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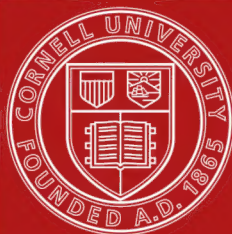
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Commentaries on the law of negligence in



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COMMENTARIES

ON THE

LAW OF NEGLIGENCE

IN ALL RELATIONS

[INCLUDING A COMPLETE REVISION OF THE AUTHOR'S
PREVIOUS WORKS ON THE SAME SUBJECT]

BY
SEYMOUR D. THOMPSON, LL. D.

IN SIX VOLUMES
VOLUME IV

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§ 3721. When the Relation of Master and Servant Exists.—This subject is considered hereafter in another relation.¹ In general it may

¹ *Post*, § 4982, *et seq.*

be said that while the right to employ and discharge the servant is an element tending to show a right of control, and therefore an evidentiary fact, yet it is not conclusive or indispensably necessary that this element should exist in order to create the relation,—the ultimate test being the *right or duty to control*.^{1a} The question has frequently arisen, where a railroad or other company chartered for the performance of public duties has leased its properties and franchises, whether the servants of the lessee corporation are the servants of the lessor corporation, in the sense which makes the lessor corporation liable for their torts. On principle it should be answered that it is not liable where the demise has taken place with the consent of the chartering State; but the trend of judicial authority is to hold it liable even in such cases.² This question has frequently arisen where one proprietor, incorporated or otherwise, has hired his machinery, appliances and servants to another, to work under the general direction of that other. In such a case, where the instrument was a steam-roller used in the improvement of a road, hired by its proprietor to the city charged with the reparation of the road,—it was held that the engineer in charge of the machine remained the servant of the proprietor whose immediate employé he was, so that it was responsible for his negligence.³ It need not be said that where one proprietor is engaged in a business where he has no public duties to perform, as a railway or navigation company has, but which is strictly of a private nature,—for example, the business of manufacturing,—and he leases his plant and facilities to another, reserving no control over the same, he thereby becomes exempt from liability for the negligence of the servants of that other in operating the machinery or plant. In such a case the test is whether the contract is a contract of lease or merely a contract to perform work and labor. If the former, the owner of the property will not ordinarily be liable for negligent torts visited upon third persons in its operation; if the latter, he will be so liable.⁴ A mine-

^{1a} *Roe v. Winston*, 86 Minn. 77; s. c. 90 N. W. Rep. 122.

² *Quested v. Newburyport &c. Horse R. Co.*, 127 Mass. 204 (leasing was authorized by the State with the provision that such lease or contract should not release or exempt the corporation from any duty or liability to which it would otherwise be subject).

³ *Stewart v. California Imp. Co.*, 131 Cal. 125; s. c. 63 Pac. Rep. 177, 724; modifying s. c. 61 Pac. Rep. 280 (injury to traveller on highway).

⁴ *Whitney v. Clifford*, 46 Wis. 138

(case of the leasing of a mill which was held to be a contract to perform labor merely, so that the owner of the mill remained liable for damages caused by sparks emitted from its smokestack). It was also reasoned that, even if the relation did not strictly exist of master and servant, yet if the injury was caused by a defect in the mill existing when the contractor took possession, and which defendant was bound by the terms of the contract to remedy, and occurred while the mill was being used in an ordinary manner, and in doing the work

owner is not relieved of liability for injuries to employes through the incompetency of the engineer, by a lease of the mine, which is shown to be nothing but a *form* adopted by the owner to carry on its business in the name of another, the owner still having full control and charge of the mine and work therein.⁵

§ 3722. **When a Question for the Jury.**—Whether the person injured was, at the time he received the injury, the servant of the defendant, or not, may sometimes be a question of fact. Thus, in a case where it appeared that the plaintiff, with others, was employed by the defendant, a railroad company, to work on a pile-driver, under the direction of a foreman selected by the defendant, whose duty it was to see that the pile-driver was kept in proper condition, and afterwards a third person was constructing a pontoon bridge across a river, for a railway-track connecting the tracks of the defendant's railway on the opposite side of the river, and designed for transferring trains across the river,—this third person being the owner of the bridge, and its construction being his individual enterprise, but he had a contract with the defendant by which it was to furnish him, at cost, the use of its pile-drivers, locomotives, etc., together with the services of its employes, for the purpose of putting down and taking up, as required, the tracks used in said transfer business. Under this contract, the defendant sent the pile-driver on which the plaintiff was employed, and the men employed thereon, to this third person, to be used by him in constructing the bridge, and the plaintiff, while so employed, received an injury. It also appeared that there was evidence tending to show that, when injured, the plaintiff was doing the work of this third person, under his direction, and that the railroad company was then exercising no control over him or his work, and did not recognize its liability to him for his wages. It was held that, upon this evidence, the question whether the plaintiff was the servant of the defendant should have been submitted to the jury.⁶

§ 3723. **General Servant of One Employer and Special Servant of Another.**—In a case in Iowa, where a railway switchman had been injured by attempting to couple cars, one of which had a defective draw-

contracted for, defendant was liable: *Whitney v. Clifford*, *supra*. See also, *post*, § 3737.

⁵ *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; s. c. 53 N. E. Rep. 733; aff'g s. c. 79 Ill. App. 456. It was shown that there was an outside verbal arrangement, carried out by the parties, under which the lessor

retained his former superintendent, had supplies shipped in his own name, prepared all bills of lading, shipped the coal, paid the freight on coal and supplies, and settled the lessee's pay-roll each month, allowing him a certain salary.

⁶ *Shultz v. Chicago & C. R. Co.*, 40 Wis. 589.

bar, the petition was demurred to on the ground that the plaintiff had not shown himself to be the defendant's servant, and that the defendant hence owed him no duty to provide a car with a draw-bar which was not defective. The court did not deem it necessary to decide whether it was essential, in order to support the action, that the relation of master and servant should exist, but, on the facts stated, ruled that the plaintiff had shown himself to be the defendant's servant. These facts were, that the plaintiff was in the general employ of another railway company, and that it became his duty, in the course of such employment, to couple and uncouple the cars of the defendant company at a station where they used a common track. His wages were paid by the company in whose immediate employ he was, but a part of them were collected by this company from the defendant company. It was held that at the time he received the injury he was to be deemed in the service of the defendant company. In the view of the court, a person may be a general servant of one, and at the same time a special servant of another, in respect of some particular service. The court also ruled that one who is injured while in the general service of two employers, has his election to sue either or both of them.⁷ In like manner, the Supreme Court of Tennessee has held, that if the cars of one railroad company, running on the road of another company, be under the exclusive control of the servants of the latter company, the latter will be liable for all damages happening to a servant of the former company through their negligence in running a train; but if the train is controlled by the servants of the two companies jointly, both companies will be liable.⁸

§ 3724. Railroad Company Hiring its Appliances and Servants to Another.—The fact that the running of a gravel-train furnished by a railroad company to a city for its use, together with a conductor, engineer, fireman, and brakeman to manage it, is entirely under the control of the conductor, does not prevent such railroad employes from being the servants of the city, so as to render it liable for injuries to a laborer employed by the city, riding on the train, caused by their negligence in running the train too rapidly over a switch and coming to a sudden stop, where the railroad company gave no directions in regard to the work and exercised no control over the train.⁹ A railroad company whose car is sent over a connecting line, and is kept

⁷ Vary v. Burlington &c. R. Co., 42 Iowa 246. Compare Laugher v. Pointer, 5 Barn. & Cress, 547.

⁸ Nashville &c. R. Co. v. Carroll, 6 Heisk. (Tenn.) 347.

⁹ Coughlan v. Cambridge, 166 Mass. 268; s. c. 44 N. E. Rep. 218 (under Employers' Liability Act).

in use by the latter carrier after it should be returned, is not liable to an employé of the latter for injuries caused by any defect therein, while so in use by the other company.¹⁰

§ 3725. Employer Lending or Hiring his Servants to Another.—

It has been held that the owner of a building in process of construction by an independent contractor, who lends to such contractor a gang of his own employés, is responsible for an injury resulting to one of them through being put into a dangerous place under the orders of his (the owner's) foreman. The contractor is also liable.¹¹ The relation of master and servant did not exist between the plaintiff and the defendant so as to render applicable the rule in regard to injuries caused by fellow servants, where the plaintiff, a driver, regularly employed and paid by a truckman, was sent by his master with a horse to furnish power for operating hoisting-appliances in the defendant's warehouse, and was injured while so engaged by the negligence of one of the defendant's servants.¹²

¹⁰ *Sawyer v. Minneapolis &c. R. Co.*, 38 Minn. 103; s. c. 8 Am. St. Rep. 648; 35 N. W. Rep. 671.

¹¹ *Rook v. New Jersey &c. Concentrating Works*, 76 Hun (N. Y.) 54; s. c. 59 N. Y. St. Rep. 610; 27 N. Y. Supp. 623; s. c. aff'd, 148 N. Y. 758 (*mem.*); 43 N. E. Rep. 989.

¹² *Murray v. Dwight*, 161 N. Y. 301; s. c. 55 N. E. Rep. 901; aff'g s. c. 15 App. Div. (N. Y.) 241; 44 N. Y. Supp. 234. After saying that there are many kinds of employment which are peculiar and special, where one person may render service to another without becoming his servant in a legal sense; and that a servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling; and that a truckman transporting goods or baggage to a railroad station is not the servant of the person who thus employs him, but is exercising an independent and quasi-public employment in the nature of a common carrier, the court continues, by O'Brien, J.: "The plaintiff beyond all doubt was in the general service of the truckman and so was his general servant. In that capacity he represented his master and, hence, was a truckman himself. In the pursuit of that calling he was directed by his master to

render special services to the defendant, not in moving goods from the store or warehouse to a place of shipment, but from the lower floor of the warehouse to an upper floor. It so happened that in this particular job it was not necessary to use the truck, but it was necessary to use the horse in order to furnish power to hoist the goods. Neither the time, nor duration of employment, nor the rate of compensation, was the subject of any express contract with the defendant, and from the very nature of the case there could not have been any well-defined agreement on the subject. The employment in its scope and character was in no respect essentially different from that which every truckman enters into with his numerous customers in the course of a day as a carrier of baggage or goods. The fact that the plaintiff detached the truck and performed the job with a horse alone did not change the character of the employment, nor the legal relation that exists between an ordinary truckman and his customers. The goods were moved, it is true, not by the truck, but by another contrivance, and the plaintiff's duty was to manage and guide the horse, which was the real power behind the pulleys and tackle, as it would

§ 3726. **Receiver of a Railroad.**—A receiver of a railroad, operating the road under orders of a court, and having exclusive control of the road, its agents and employés in the business, may be answerable in his official capacity to his employés and others, for injuries sustained through the negligent discharge of his duties by himself or agents, when the railroad company, if it were operating the road, would have been liable. The party injured, by leave of the court appointing the receiver, may bring an action against him as receiver; and it is no defense, in such an action, that the receiver was a public officer, or that he was an agent or trustee.¹³

§ 3727. **Receiver Operating Railroad as Lessee.**—A receiver operating a railroad will be responsible in damages, payable out of the trust fund, for a negligent injury to a person employed by him in such operation, the same as the railroad company if in possession of and operating the railroad property would be; and the rule applies in the case where a receiver is operating a railroad property as the lessee of the owner company, so as to make him liable for a negligent

have been when hitched to the truck. In this capacity the plaintiff represented his general master, the truckman, and was all the time his servant, and did not become in any legal sense the servant of the defendant any more than he would if employed to move the goods to a railroad-station on the truck, and if not such servant he could not, of course, have become the coservant of the defendant's regular workmen": *Murray v. Dwight, supra*. Gray, J., read a dissenting opinion; Parker, C.J., did not sit. — — — The defendant partners were engaged in the business of railroad construction-work, and had contracted to do certain grading on the line of a railroad. The railroad company furnished defendants with certain work-trains, with employés to operate them. The servants who took charge of the trains remained in the general employ of the railroad company, but were paid by defendants and were under their direct control for the time being. The plaintiff, a brakeman on such train, was injured by the alleged negligence of the engineer. It was held that the servants in control of the train were for the time being the servants of the defendant; so that, such work coming within the provisions

of the railway fellow-servant act of Minnesota, the defendants were liable: *Roe v. Winston*, 86 Minn. 77; s. c. 90 N. W. Rep. 122. Plaintiff was employed by defendants, who were ship-repairers, to assist their foreman in making such repairs to a vessel as the engineer thereof should direct. The engineer directed the repair of a band at the bottom of a ventilator made of boiler-iron. While the foreman and plaintiff were fastening the band around the ventilator the lower part of the ventilator broke off, through some defect in the riveting, and injured plaintiff. It was held that such engineer was not the *alter ego* of defendants, but represented only the owners of the ship in pointing out or directing the work to be done: *Brown v. Terry*, 67 App. Div. (N. Y.) 223; s. c. 73 N. Y. Supp. 733.

¹³ *Murphy v. Holbrook*, 20 Ohio St. 137. The Georgia statutes (Code, §§ 2083, 3036) making railroad companies liable for injuries caused to employés by the negligence of their coemployés, do not apply to the case of an injury to an employé of a receiver operating a railroad: *Central Trust Co. v. East Tennessee & C. R. Co.*, 69 Fed. Rep. 353, 357; *Baltimore Trust & C. Co. v. Atlanta Traction Co.*, 69 Fed. Rep. 358.

injury to an employé working for and paid for his services by such company.¹⁴

§ 3728. **Children Working by the Piece in a Coal Mine.**—Minor children and their father, who hires them to work in a mine under a contract that the children shall cut coal at a specified price per ton, the father to furnish the tools, powder, and other necessary materials, and the bank-boss to have control of the work, *are employés of the operator* of the mine, and not independent contractors, and an action may be maintained against the mine-operator for their negligent injury, under an Employers' Liability Act.¹⁵

§ 3729. **Servant of One Railroad Company Sent over the Track of Another Company.**—A person sent, for the purpose of seeing to the return and unloading of cars, with a train which, on permission obtained by the shipper, goes over the track of another company, is an employé of the original carrier, and as to the other company is merely a passenger, entitled only to have a reasonably safe track furnished, but not entitled to look to such company for injuries resulting from defects in the cars.¹⁶

§ 3730. **Joint Operation by Two or More Railroad Companies.**¹⁷—Railroad companies occupying the same property jointly—such as depot-grounds, switch-yards and tracks—are each bound to exercise ordinary care to prevent injuring the employés of the other; and each is liable for an injury to an employé of the other caused by its negligence, where such employé is in the discharge of his duty and is without negligence.¹⁸ So, although a switch-tender is employed and paid by another company, a company to which his services are beneficial owes him such reasonable care and diligence, as to his personal safety, as it would owe one of its own employés engaged in the same kind of service.¹⁹ Where certain depot-grounds were jointly occupied by two railroad companies, so that the servants of each had to pass over the other's track in the discharge of their ordinary duties, it was held that the servants of neither company could be trespassers as

¹⁴ Southwestern Tel. &c. Co. v. Crank (Tex. Civ. App.), 27 S. W. Rep. 38 (no off. rep.).

¹⁵ Drennen v. Smith, 115 Ala. 396; s. c. 22 South. Rep. 442.

¹⁶ Killian v. Augusta &c. R. Co., 79 Ga. 234; s. c. 4 S. E. Rep. 165.

¹⁷ See also, *post*, § 3735.

¹⁸ Omaha &c. R. Co. v. Morgan, 40 Neb. 604; s. c. 59 N. W. Rep. 81;

McMarshall v. Chicago &c. R. Co., 80 Iowa 757; s. c. 45 N. W. Rep. 1065 (negligence of employés of defendant company in running over conductor of another company, who had stepped on defendant's track to signal his own train—recovery).

¹⁹ O'Sullivan v. Chicago &c. R. Co., 23 Ill. App. 646.

to the other, but that each company would owe the same duty to the servants of the other company in the matter of observing proper care for their safety when crossing its tracks in the regular discharge of their duties, that it would owe to its own servants when crossing the same tracks; so that a servant of one company, injured by reason of the negligence of servants of the other company in failing to give warning of the approach of a locomotive while he was crossing the tracks, is entitled to recover.²⁰ So, railroad companies composing a traffic association are severally as well as jointly liable for injuries received by an employé of the association on account of its negligence in furnishing a defective track.²¹ If a railroad company acquires the permission to use the track of another company, it becomes responsible to its own servants for injuries happening to them through defects therein, in like manner as it would have been if it had been its own track.²² And so, it is liable to its own employés for the negligence of the servants of the licensing company in the discharge of the absolute duties of the master.²³ A railroad company which permits another company to use its tracks may avail itself of a violation of a rule of the latter company, as a defense to an action for injuries by an employé of such company. Thus, if the licensee company has a rule prohibiting its trainmen from standing on the top of cars, one of such trainmen, who knows or might have known by the exercise of reasonable care of the existence of an overhead bridge, but is knocked down by the same in consequence of standing up on the top of a car, cannot recover damages from the licensing company, if such company sets up and proves that the injured trainman was injured in consequence of violating a known rule of his own master.²⁴ If three railroad com-

²⁰ *Illinois &c. R. Co. v. Frelka*, 110 Ill. 498; aff'g s. c. 9 Ill. App. 605. See also, *Kunsman v. Lehigh Valley R. Co.*, 10 Pa. Super. Ct. 1; s. c. 44 W. N. C. (Pa.) 14 (employé of one railroad company, injured in a yard subject to the *joint use of several companies*, while repairing a car, by the negligence of the employé of another company in running a train against the car while a signal was up showing that it was being repaired, entitled to recover from the latter company).

²¹ *Wisconsin &c. R. Co. v. Ross*, 142 Ill. 9; s. c. 12 Rail. & Corp. L. J. 81; 31 N. E. Rep. 412; aff'g s. c. 43 Ill. App. 454.

²² *Stetler v. Chicago &c. R. Co.*, 46 Wis. 497 (liable for injuries to its own employés occasioned by the unfitness of the track).

²³ *Brady v. Chicago &c. R. Co.*, 114 Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712 (but duty of employés of depot company to tend switches not such an absolute duty).

²⁴ *Texas &c. R. Co. v. Moore*, 8 Tex. Civ. App. 289; s. c. 27 S. W. Rep. 962. If the servant of the lessee company knew of the location of a bridge on the lessor company's road, or could have known of it by the exercise of ordinary care, and he was injured while passing through such bridge by reason of standing upright on a car, in violation of a known rule of his master, he could not recover against the lessor company: *Texas &c. R. Co. v. Moore*, *supra*.

panies employ a common switchman to work in their "union yards," all will become jointly and severally liable to him for the negligence of any one of them whereby an injury is visited upon him; and the company which employed him cannot deny the relation of master and servant with respect to him, since this relation in that case arose and existed by express contract; and as to the other companies the relation arose by inference from the nature of the service and the connection of the companies.²⁵ In another case the evidence disclosed that the defendant railroad company and another company each ran its trains over the road of the other, and that the train on which the deceased was fireman at the time of his death was sent out by one who was division superintendent of both roads, and that deceased was paid by both roads in proportion to the number of miles he ran over each road. At the time of the accident he was running over the defendant's road. It was held to establish, *prima facie*, that the deceased, at the time of his death, was in the employment of the defendant.²⁶ Under a contract between two railroad companies for the running of through trains over both roads, by which one is to furnish engines and men and the other is to pay a rental for them, the former is the master, and is liable to its own servants for the condition of the engines, even while the engines are running over the portions of the road belonging to the other company, although during that time they are subject to its rules.²⁷ A railroad company which has a traffic arrangement with another company, whereby the latter is bound to transport its cars, is liable for personal injuries to servants of the latter arising from the failure of the company owning the cars to exercise due diligence to provide safe cars for such transportation, notwithstanding the other company is also liable because of its own negligence.²⁸ If two railroad companies use each other's railroad and facilities under a joint arrangement, then each becomes as to the servants of the other an implied licensor, and the position of the servants, viewed in the most unfavorable light, is that of persons coming upon premises of a proprietor by his invitation or at his request. This, as already seen,²⁹ raises a relation which puts upon him the duty of exercising reasonable care to the end that his premises shall be safe from pit-falls or other dangers which they will be likely to encounter in the discharge of the duties for which they come upon such premises. Thus, a railroad company has been held

²⁵ Gulf &c. R. Co. v. Dorsey, 66 Tex. 148. (derailment caused by defective engine).

²⁶ Goodrich v. Kansas City &c. R. Co., 152 Mo. 222; s. c. 53 S. W. Rep. 917.

²⁷ Hurlbut v. Wabash R. Co., 130 Mo. 657; s. c. 31 S. W. Rep. 1051

²⁸ Moon v. Northern Pac. R. Co., 46 Minn. 106; s. c. 48 N. W. Rep. 679.

²⁹ Vol. I, §§ 945, 968.

liable to a brakeman of another road, injured by the defective construction of its station-house, which the latter road uses together with a section of the defendant company's track, under a contract.³⁰ Where an engineer of one of two connecting roads, in charge of an engine pulling out from a packing-house on the western line of a switch-track, was injured by a collision with a car which was being backed upon the eastern switch-line, and which, by reason of an insecure crossing, broke from that line and ran on to the track on which the plaintiff was,—the companies owning such switch-tracks and the line crossing them were jointly liable.³¹ A railway company, running its trains over another road by permission, is not liable to its servants for the negligence of the employes of the licensing company in the discharge of their duties as servants,—as, the negligent failure of employes of a depot company to attend to switches.³²

§ 3731. Joint Operation by Other Employers.—In an action to recover for personal injuries, it appeared that both defendants were corporations furnishing electric light and power; that they occupied the same premises, employed the same servants, and were more or less jointly associated, though separate corporations, and though distinct accounts were kept. Plaintiff was in the employ of both defendants, and paid by each for the time employed by each separately. He was injured while removing an appliance connected with the electric-light plant, by reason of the defective condition of a trapdoor opening into the basement, while under the superintendence of a foreman employed by both defendants. It was held that he was in the employ of both defendants in the performance of his duties, rendering both liable for any negligence causing the injury.³³

§ 3732. Members of a Partnership Firm.—Where a servant is employed by a partnership firm, and is injured by the personal negligence of one member of the firm, if the work in which such member is engaged when he does the injury is within the scope of the common undertaking of the partnership, his copartners will be liable with him to the servant.³⁴ The governing principle here is, that one part-

³⁰ *Nugent v. Boston &c. R. Co.*, 80 Me. 62; s. c. 5 N. Eng. Rep. 865; 12 Atl. Rep. 797 (injury from projecting awning while climbing side-ladder on box-car). Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712.

³¹ *Indiana &c. R. Co. v. Barnhart*, 115 Ind. 399; s. c. 13 West. Rep. 425; 16 N. E. Rep. 121. ³² *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474; s. c. 91 N. W. Rep. 15.

³³ *Ashworth v. Stanwix*, 3 El. & L. 701; s. c. 7 Jur. (N. S.) 467; 30 L. J. (Q. B.) 183; 4 L. T. (N. S.) 85.

ner is liable for the negligence of his copartner while engaged in the partnership business.³⁶ But the mere fact that the master had agreed to give his superintendent one-half the profits of the job for superintending it, does not make him a partner and joint principal with the master.³⁶

§ 3733. Status of Employé of a Partnership which is Reorganized into a Corporation.—It has been held that the fact that partners organized a corporation to engage in the same business in which the partnership had been engaged, is not evidence of a dissolution of the partnership and of the assumption of its business by the corporation; and therefore a servant of the partnership who continued, after the corporation was organized, to work as before, without being discharged or re-employed, or notified of the incorporation, continued to be a servant of the partnership, and might look to the partners for damages for injuries thereafter received by him through the gross negligence of the foreman.³⁷

§ 3734. Status of Employé who is a Stockholder in the Employing Corporation.—It is conceived that a stockholder, even a large one, may sustain the relation of servant to a corporation, they being different persons in theory of law. It has been held that the fact that a coal miner engaged by a mining corporation in sinking a coal shaft is a *small stockholder* of the corporation will not prevent him from recovering damages for a personal injury caused by the negligence of the corporation, as he has no personal control or management of the corporation or its property.³⁸

§ 3735. Servant of One Company Injured in Consequence of Defective Track of Another Company.³⁹—Where a fireman on a locomotive was injured by reason of a defective track over which he was running his engine in the course of his employment, the fact that the track was owned by another company, whose duty it was to keep it in

³⁶ This principle is illustrated by many cases where several persons are engaged in the common undertaking of carrying passengers by stage-coach, one partner operating one part of the line, another another part, and so on. In these cases, if a passenger is injured by one of the partners on his part of the line, or while performing his part of the partnership duty, he may recover damages of any of the

others: *Moreton v. Hardern*, 4 Barn. & Cress. 223; *Story on Part.*, §§ 166, 168. Compare *Connolly v. Davidson*, 15 Minn. 519.

³⁷ *Zeigler v. Day*, 123 Mass. 152, 154.

³⁸ *Goodwin v. Smith*, 23 Ky. L. Rep. 1810; s. c. 66 S. W. Rep. 179 (no off. rep.).

³⁹ *Morbach v. Home Min. Co.*, 53 Kan. 731; s. c. 37 Pac. Rep. 122.

⁴⁰ See also, *ante*, § 3730.

repair, and that the fireman knew of such fact, or that he had an action against such company, did not deprive him of his right of action against his employer, since such fact did not relieve his employer from the duty of furnishing a safe place to work. Nor was it material that the exclusive control of the track was vested in the other company, or that the defendant company had no right under its contract to enter on such tracks for the purpose of making repairs; since neither company could relieve itself, as to third persons, of a duty imposed by law; but the company whose duty it was to repair, under the contract, was the *agent of the other* for that purpose.⁴⁰

§ 3736. **When Employer Liable for Injuries to Servants of Independent Contractor.**—The owner of real property does not owe to a person employed on his premises in the *service of an independent contractor* the duty to furnish a safe place to work, and for omission to do so he is not liable in damages. He merely owes the duty to commit no act of *affirmative* negligence.⁴¹ A corporation erecting a building for the owner, under a percentage contract by which it is to furnish materials and labor and be paid its cost with a percentage added, is an independent contractor, and is liable for an injury to one of the laborers so employed and paid by such corporation, caused by the negligence of the foreman of such corporation.⁴² A proprietor who personally interferes in the work is responsible for any injury to a *servant of the contractor* occasioned by such interference, whether such contractor is independent or not.⁴³ Where a mining company, contract-

⁴⁰Story v. Concord &c. R. Co., 70 N. H. 364; s. c. 48 Atl. Rep. 288.

⁴¹Callan v. Pugh, 54 App. Div. (N. Y.) 545; s. c. 66 N. Y. Supp. 1118.

⁴²Whitney &c. Co. v. O'Rourke, 172 Ill. 177; s. c. 50 N. E. Rep. 242; aff'g s. c. 68 Ill. App. 487. B. and S., agents of a religious society, contracted with N., in whose employ the plaintiff was, to paint the inside of a church, for a gross sum, and not subject to the society's control. The society undertook to erect and remove a staging to be used by N., and, through B. and S., selected and employed C., a carpenter, for a gross sum, and not subject to the society's control, to erect and remove the scaffold and to furnish the material and labor therefor. N. did not and could not know from the appearance or from examining the staging whether it

was or was not strong enough for his workmen to go upon. The staging, being defective, fell, injuring the plaintiff. There was no evidence that the defendants took any part in erecting the staging, or in directing its erection, beyond making the contract with C.; or that they ever inspected the staging; or that they were guilty of any negligence in employing C. to erect it. It was held: 1. That the society was liable to the plaintiff for the injury, by reason of having *accepted* the staging and induced N.'s workmen to come thereon; 2. That the plaintiff could not maintain an action jointly against the society and B. and S. for the injury: Mulchey v. Methodist Religious Soc., 125 Mass. 487.

⁴³Faren v. Sellers, 39 La. An. 1011; s. c. 3 South. Rep. 363.

ing for the removal of ore, reserves to itself such arrangements as are necessary for the protection of workmen, it is liable for such injuries as happen to *employés of the contractors* without the fault of the *employés*.⁴⁴

§ 3737. **Injuries to One's Servants by Contractors or their Servants.**—An employé of a contractor employed by the owner of a saw-mill to do the manual work required to manufacture blocks into shingles, while the owner furnishes and operates the machinery for the purpose, may recover of the owner for injuries caused by a failure to furnish reasonably safe machinery, since the relation of master and servant exists between such employé and the owner.⁴⁵ It has been held, under a statute, that the presumption of negligence imposed upon railroad companies in *all cases* where injury ensues by reason of the running of the cars, etc., arises in favor of an *employé* whenever it is affirmatively shown that he has been injured "by the running of the locomotives or cars or other machinery" of the company, and that he himself was without fault. This general rule applies though at the time of an injury to a fireman neither the engine nor the fireman is engaged in the usual or ordinary business of the company as a common carrier, they having been lent by the railway company to a contractor, under whose directions they are engaged in constructing an extension of the road; so that, where the engine is derailed by reason of its defective condition, injuring the fireman, the presumption is that such defective condition was due to the negligence of the railroad company.⁴⁶ As will be seen hereafter,⁴⁷ the duty of a master to provide his servant with a safe place in which to work, is a primary and absolute duty, such as cannot be delegated or assigned so as to exonerate

⁴⁴ *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492. Compare *Callan v. Pugh*, 54 App. Div. (N. Y.) 545; s. c. 66 N. Y. Supp. 1118.

⁴⁵ *Neimeyer v. Weyerhaeuser*, 95 Iowa. 497; s. c. 64 N. W. Rep. 416. See to the contrary, *Reier v. Detroit Steel & C. Works*, 109 Mich. 244; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 459; 67 N. W. Rep. 120; 3 Det. Leg. N. 95. But it has been held that where a rolling-mill company employs a "boss roller" under the rules and regulations of the Amalgamated Association, the boss roller to employ his own assistant roller, roughers, and heaters; the compensation to be an agreed price per ton for labor performed, divided among the boss roller and his assistants, a cer-

tain percentage to each as provided by the rules of such association, paid at the office of the company; the work to be continuous, and the output of the mill to be under the direction of the general superintendent and to his satisfaction,—the relation between the company and the boss roller is that of master and servant; and if a rougher is injured through the negligence of the assistant roller, who is the superior of the rougher, and without the latter's fault, the company will be liable: *Andrews Bros. Co. v. Burns*, 22 Ohio C. C. 437; s. c. 12 Ohio C. D. 305.

⁴⁶ *Savannah & C. R. Co. v. Phillips*, 90 Ga. 829; s. c. 17 S. E. Rep. 82.

⁴⁷ *Post*, § 3874.

the master from exercising care to see that it is properly performed. It cannot, therefore, be assigned to an independent contractor. When, therefore, a railroad company fails to exercise reasonable diligence in furnishing its employ  s a safe place in which to work, though the defects which make the place unsafe exist in the appliances of an independent contractor, and an employ   of the railroad company is injured by reason thereof, the railroad company is liable.⁴⁸ At seeming variance with this rule, it has been held that where it is the custom of railroad companies to have certain work, not essentially hazardous, done by independent contractors, and ordinary care is used in the selection of such contractors, the railroad company cannot be held responsible for injuries resulting to its employ  s through the negligence of such independent contractors, since the railroad company is not an insurer of the safety of its employ  s, but is bound only to exercise ordinary care for their safety.⁴⁹ In line with the better doctrine, it has been held that where the rails of a street-railway company are being relaid under its charter and a permit granted to it by the city, negligence therein is the negligence of the company, so as to make it liable to its employ   injured thereby, though the work is being done for it by a *contractor*; since such contractor "will be regarded as the servant or agent of the corporation for whom he is doing the work if he is exercising some chartered privilege or power of such corporation, with its assent, which he could not have exercised independently of the charter of such corporation. 'In other words, a company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it

⁴⁸ *Gulf &c. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; s. c. 55 S. W. Rep. 538 (contractor ballasting track by means of derricks on each side of track, insecurely anchored, allowing wire cable across the track to sag and injure employ  ; but liability placed on ground that, under contract, giving chief engineer of company control of work, the contractor was not an independent contractor).

⁴⁹ *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631; s. c. 34 S. E. Rep. 525; 46 L. R. A. 367. The case was that of putting in a new railway-bridge in the place of an old one without interrupting traffic. The bridge company negligently removed the false-work from the uncompleted portion before enough rivets had been put in, and consequently the bridge gave way, killing a railway fireman.

As the rule that a master is bound to furnish his servant with a safe place wherein to work, applies to railway companies, so as to make them liable to their trainmen for negligent defects in their tracks, whereby such trainmen are injured (*post*, § 4253), it seems to follow that this decision is contrary to sound principle and not worthy to be cited. As between itself and its trainman, required in the discharge of his duty to cross the bridge, the railroad company was clearly under the duty of exercising reasonable care to keep the bridge in a safe condition for the passage of trains, and could not unload this duty upon an independent contractor, so as to escape liability to its own servant, although the contractor might also be liable to him.

has permitted their exercise.'"⁵⁰ In like manner, where a contract for ballasting a railroad-track provided that "the contractor will carry on and prosecute the work in such a manner" as the engineer of the railroad company shall direct, and that such engineer had a right to have discharged any workman not doing his work properly, the company is liable for the death of one of its employes, caused by a defect in the attachments of a derrick used by the contractor in performing such work, allowing a wire cable to sag down over the track.⁵¹

§ 3738. When Employer Liable for Injuries to his Servant by Negligence of Independent Contractor.—Recurring to principles already considered,⁵² we find that a master may be liable for injury to a servant caused by an obstruction placed by an independent contractor in a walk which the servant was required to use, if the master, or any servant whose duty it was to look after the safety of the way, had

⁵⁰ North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477; s. c. 56 N. E. Rep. 796 (paving-stones piled along the street by the contractor close to the track, injuring a conductor).

⁵¹ Gulf & C. R. Co. v. Delaney, 22 Tex. Civ. App. 427; s. c. 55 S. W. Rep. 538. A corporation with which a person contracts to bale hulls of cotton-seed at a specified price per bale, using the machinery and power of the corporation, the contractor employing and paying the hands, is liable as employer for an injury to one of the hands so employed, where it exercises control over the hands or the manner in which the work is done or the means by which it is done; and whether it does so exercise control is properly submitted to a jury where there is evidence tending to prove such a state of facts: Wallace v. Southern Cotton Oil Co., 91 Tex. 18; s. c. 40 S. W. Rep. 399; aff'd in part and rev'd in part (Tex. Civ. App.), 38 S. W. Rep. 1137 (no off rep.). A motorman employed by a street-railway company, while running his car at night, collided with cars loaded with stone ballast, which resulted in his being injured. The stone-cars belonged to contractors who had contracted with the railroad company to ballast a portion of the road, and at the time of the accident were in charge and under the control of the con-

tractor's employes, and the accident was due to the negligence of the contractor's employes in failing to properly manipulate a block system of electric signals. It was held that the railroad company was liable for the negligence of the contractor's employes. It could not shift its charter responsibilities on to the shoulders of agents, but was responsible for whatever was done under its charter rights. The motorman had a right to assume that the road, signals, etc., were being used by the contractors under the supervision and control of the defendant company, and in such a manner and under such rules and regulations as to secure the safety of both: Ortlip v. Philadelphia & C. Traction Co., 9 Pa. Dist. Rep. 291. Where a city was constructing a water-pipe trench, and a laborer employed under the direction of the city's inspector and superintendent was assigned to the excavation of a twelve-foot section of the trench, but he had no authority or discretion as to his work, he was *not an independent contractor*, and the city was bound to exercise reasonable care to provide for his safety against caving of the banks while performing the work: Fort Wayne v. Christie, 156 Ind. 172; s. c. 59 N. E. Rep. 385.

⁵² Vol. I, § 646.

notice of it, or if it had been there so long that reasonable care in the inspection of the way would have disclosed it.⁵³

§ 3739. **Servants of Different Masters Not Fellow Servants.**—A car-repairer of one railroad company, while in the exercise of due care, was injured by the negligence of the employes of another company. It was held that such employes were not fellow servants, and that he had a right of action against the latter company, the fellow-servant rule not applying.⁵⁴

§ 3740. **Janitress of Building and Its Owner.**—The relation which exists between a janitress, receiving the use of certain rooms in a building as part payment for her services, and the owner of the building, is that of master and servant, and not that of landlord and tenant; and, therefore, where she is injured by the fall of plaster from a ceiling of one of her rooms which was cracked when she began to occupy, and after the owner has promised, but failed, to repair, she is entitled to recover damages from him for her injuries.⁵⁵

§ 3741. **Employé and Officers of Employing Corporation.**—In one case the plaintiff sued four individuals whom she charged to be partners trading as the Beaver Brook Coal Co., to recover damages for causing the death of her husband, their servant, by using defective machinery. It appeared on the trial that the company was a *corporation*, and employed the plaintiff's husband, and that the defendants were officers therein. It was held that the relation of master and servant was not shown to have existed between the *defendants* and the plaintiff's husband, and that therefore no recovery could be had.⁵⁶

§ 3742. **Railroad Company and Baggage-man or Express-Messenger.**—An express contract is not necessary to create the relation of master and servant. The relation exists if the plaintiff, with the knowledge, consent, and approval of the defendant, acts as baggage-man, and in that capacity performs duties which the defendant owes

⁵³ Burnes v. Kansas City &c. R. Co., 129 Mo. 41; 31 S. W. Rep. 347.

⁵⁴ Murphy v. New York &c. R. Co., 44 Hun (N. Y.) 242; s. c. 10 N. Y. St. Rep. 156; 26 Wkly. Dig. (N. Y.) 494; s. c. aff'd, 118 N. Y. 527; 29 N. Y. St. Rep. 941; 23 N. E. Rep. 812. See *post*, § 4996, *et seq.*

⁵⁵ Anderson v. Steinreich, 32 Misc. (N. Y.) 680; s. c. 66 N. Y. Supp. 498; 100 N. Y. St. Rep. 498; rev'g

s. c. 32 Misc. (N. Y.) 237; 65 N. Y. Supp. 799; 99 N. Y. St. Rep. 799 [citing Kerrains v. People, 60 N. Y. 221 (where it was held that, the relation under similar circumstances being that of master and servant, the servant had no right to resist eviction)].

⁵⁶ Bullock v. Gaffigan, 100 Pa. St. 276.

to the public.⁵⁷ But, in the absence of a contract, expressed or fairly implied from circumstances varying his duties and charging him with duties on behalf of the carrier, an express-messenger is ordinarily the servant of his own master, and not the servant of the carrier on whose vehicle he rides; so that, in case of his injury, the liability of the carrier is to be tested by the principles which apply in case of an ordinary passenger; and this statement will apply to bar-tenders and other persons admitted to the vehicle of the carrier for the purpose of plying their own or their master's business.⁵⁸

§ 3743. **Who is an Employé within the Meaning of a Statute.**—The word "employé," within the meaning of the Ohio statute making a railroad company liable to employés for injuries caused by its failure to fill or block guard-rails, frogs, etc., means all those who, by rightful authority of the company, are engaged in the business of walking over these frogs and guard-rails, although employed and paid by another company. Thus, where the defendant company and another company

⁵⁷ *Missouri &c. R. Co. v. Reasor*, 28 Tex. Civ. App. 302; s. c. 68 S. W. Rep. 332. This was an action against a railroad company for injuries received by plaintiff while working on one of defendant's trains as an express-messenger, and also as baggageman for defendant. The petition alleged that plaintiff was an employé of the express company and of defendant, jointly and severally, or was employed by the express company, and required to handle baggage with the knowledge and procurement of the railroad company. It was held that the petition was sufficient to justify a charge that, even though plaintiff was on the train as express-messenger, if he, during the time he acted as messenger, also served the defendant as baggageman on such train, and if he did so with the knowledge and approval of the defendant, it owed to him the duty to use ordinary care to avoid injuring him: *Missouri &c. R. Co. v. Reasor, supra*. In the same case, it being in issue whether plaintiff was employed by the railroad company, it was proper to admit evidence that the express company deducted from the wages of the plaintiff and of all other employés who acted *both as messengers and baggagemen*, the sum of fifty cents per

month as hospital-fees for defendant's hospital; the fees not being deducted where the employé acted *only as messenger*: *Missouri &c. R. Co. v. Reasor, supra*.

⁵⁸ Thus, it has been held that if an express company hires its freight transported on the steamer or railroad of a company engaged in transporting freight and passengers for hire as common carriers, and hires an agent to take charge of such freight, whose passage is paid for in the contract, such agent occupies the position of an ordinary passenger, as to the liability of the common carrier for the injuries he may sustain, caused by the negligence of its employé. And in the same case it is held, that if a navigation or railroad company, engaged in transporting freight and passengers for hire as common carriers, rents a room to a person for selling liquors and cigars, at a stipulated rent, and is to carry and board him as a part of the contract, he is not an employé, nor is he a member of the establishment, and the company is not released from liability for injuries he may sustain from the negligence of other employés of the company, but must stand by the rule applicable to passengers: *Yeomans v. Steam Nav. Co.*, 44 Cal. 71.

receive cars from each other over a delivery-track at a certain point, a person employed by such other company to take the numbers of its cars, and inspect their seals, as trains are being made up at such place by such other company, is an employé of the *defendant company*, within the meaning of the statute,—such employé being engaged in a duty that is mutual, joint, and necessary to both companies.⁵⁹

§ 3744. **Manufacturer and Hired Prisoners.**—A manufacturer contracted with prison directors for the labor of convicts on a building in course of erection, who were to remain in custody of the guards while engaged in the work. The plaintiff, a convict, was assigned to operate an elevator, and, while engaged at his duty, was injured. It was held that the relation of master and servant so far existed between such manufacturer and the plaintiff that the manufacturer was liable for any injury resulting from his failure to exercise reasonable care in providing safe machinery.⁶⁰

ARTICLE II. SERVANTS ACTING OUTSIDE THE SCOPE OF THEIR DUTIES—VOLUNTEERS—INTERMEDDLERS.

SECTION

- 3748. Master not liable for injury to servant when acting outside the scope of his employment.
- 3749. Further of injuries to servants acting outside the line of their duty.
- 3750. Injuries to servants before commencing or after quitting work, outside of working-hours.
- 3751. Injuries to servants going to their place of employment and returning therefrom.
- 3752. Injuries to servants during temporary cessations of their employment.

SECTION

- 3753. Instances of such injuries where the master was held liable.
- 3754. Master voluntarily assuming duties of servant, liable for negligently performing such duty.
- 3755. Failure of employer to restrain volunteers and intermeddlers.
- 3756. Injuries to mere volunteers and intermeddlers.
- 3757. When master not chargeable with acts of strangers or intermeddlers.

§ 3748. **Master Not Liable for Injury to Servant when Acting Outside the Scope of his Employment.**—As a general statement of doctrine, it may be said that, to render a master liable as such for an injury resulting from a breach of his duties to his servant, it must

⁵⁹ *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193; s. c. 23 Ohio L. J. 151. *Jamar*, 93 Md. 404; s. c. 49 Atl. Rep. 847.

⁶⁰ *Baltimore Boot &c. Man. Co. v.*

appear that the injured servant was at the time of the injury acting within the scope of his employment.¹ A larger statement of the same principle is to say that, in order to hold a master liable for personal injuries to a servant, it must appear that the servant was, at the time of the injury, engaged in the service of the master, or going to or from such service, and not acting for some purpose of his own, or going into some place where it was not proper or necessary that he should have been.² In applying this doctrine it must be kept in view that there are implied duties resting upon servants, the performance of which will prevent them from being imputed with the fault of attempting duties outside the scope of their employment. For example, a servant is employed to act as night-watchman on a steamship to prevent pilfering by river thieves. He is injured while attempting to close one of the large doors of the pier left open during the day. Owing to the defective condition of the door, of which the foreman of the defendant has been notified two days before, the night-watchman falls into the water, in consequence of which he contracts pneumonia and dies. His master is liable in damages to his personal representative.³ An employé of a railroad company undertook to turn the wheels of an engine which was being repaired. The foreman of the repair-shop attempted to assist him and did it negligently, in consequence of which the servant was injured. An indefensible refinement led to the conclusion that the superintendent, in so acting, did not represent the company, but acted as a volunteer and outside the line of his duty as foreman, and was merely a fellow servant of the injured servant, whereby there could be no recovery.⁴

¹ *Southern R. Co. v. Guyton*, 122 Ala. 231; s. c. 25 South. Rep. 34 (servant who was working with another gang by direction of the foreman of his own gang, who had authority so to direct him, was within the scope of his employment).

² *Lenk v. Kansas & C. Coal Co.*, 80 Mo. App. 374; s. c. 2 Mo. App. Repr. 589 (plaintiff, being overcome by foul air in a mine, and after coming to a safe place where he could get fresh air, went into a cross-cut designed only as an air-shaft, and not as a passageway, and which the master was under no duty to keep safe for miners to pass through, and was struck by a falling rock—master not liable).

³ *Upton v. Bartlett*, 59 Hun (N. Y.) 619 (*mem.*); s. c. 13 N. Y. Supp. 451; 37 N. Y. St. Rep. 193.

⁴ *Hartford v. Northern Pac. R.*

Co., 91 Wis. 374; s. c. 64 N. W. Rep. 1033. A working-man in the employment of a railroad company as a platelayer was occasionally engaged in the duty of collecting tickets, and on one occasion, after having completed the collection of tickets, got on to the footboard of a carriage to speak to a passenger. It was found as a fact that he got on to the footboard, not for any object of his employment, but only for his own pleasure. In getting off the train after it had started he fell between the platform and the train, and was killed. Here it was held that the accident was not one arising "out of" his employment within the meaning of subsection 1 of section 1 of the Workmen's Compensation Act, 1897; that, to render an employer liable to pay compensation, the accident must arise, not

§ 3749. **Further of Injuries to Servants Acting Outside the Line of their Duty.**—If a servant voluntarily, and without any necessity growing out of his work, abandons the employment for which he is engaged and steps entirely outside the line of his duty, he thereby suspends the relation of master and servant as between his master and himself, and voluntarily puts himself in the attitude of a stranger,—in which case the question of the liability of the master to him for a negligent injury will be tested by the principles which would govern

only "out of," but also "in the course of," the employment, and consequently that the railroad company was not liable: *Smith v. Lancashire & c. R. Co.*, [1899] 1 Q. B. 141; s. c. 79 L. T. (N. S.) 633; 47 Wkly. Rep. 146; 68 L. J. Q. B. 51. Where the servant of a contractor with the defendant company had stepped aside on an occasion of nature, and in so doing a gate fell upon him, injuring him, it was held, but with doubtful propriety, that, the company owning the premises being under no obligation to furnish a water-closet for the use of the servants of the contractor, its failure to do so was no invitation to the plaintiff to use any portion of the premises that he saw fit for that purpose: *Flanagan v. Atlantic Alcatraz Asphalt Co.*, 37 App. Div. (N. Y.) 476; s. c. 5 Am. Neg. Rep. 694; 56 N. Y. Supp. 18. In an action by a servant for personal injuries due to defective machinery, it was error to charge the jury that a verdict for plaintiff would be authorized if he were not a servant, but a mere volunteer, at the time of the injury, where the plaintiff based his right to recover on the allegation that he was in the *employment* of the defendant, and was injured through his failure to furnish him reasonably safe machinery: *Manchester Man. Co. v. Polk*, 115 Ga. 542; s. c. 41 S. E. Rep. 1015. A master is not responsible to a servant for injuries resulting from obedience to the orders of another servant employed for a wholly different service from that in which he assumed to give orders, and who had no authority to give them. For example, one employed to look after stock which is killed, and to look after any litigation against a railroad company, has no authority by virtue of such

employment to command other employes of the company. He has no authority to order employes out of a train to break up a rock which has fallen and obstructed a tunnel; so that an employé injured by the fall of another rock from the roof while working under such order cannot recover: *Nashville & c. R. Co. v. McDaniel*, 12 Lea (Tenn.) 386. A railroad company is not liable for the death of an employé, caused by an accident while the latter was rendering a service, out of his *usual* employment, for the relief of passengers on a wrecked train, where it was his duty, according to the company's rules, to render such service. The deceased, a yardmaster, was ordered to go on a relief-train to the scene of the wreck, which had been occasioned by a severe storm, and the relief-train ran into a culvert which had been washed out, through no negligence on the part of the company. Besides, the service being within the scope of the deceased's employment, he had as good, if not a better opportunity to acquaint himself with the dangers, as had the assistant superintendent who sent him out. The court cite *Pierce on Railroads* to the effect that it is not negligence to detail a servant for a dangerous duty outside of his employment, or a more than usually dangerous service, when required for a good reason, as for the safety of passengers. But the case is not decided on this ground, because, not only was the service shown to have been within the scope of the deceased's employment, but the storm was raging at the place where deceased was employed, and the accident happened only two miles away from that place: *Houston & c. R. Co. v. Fowler*, 56 Tex. 452.

as between the master and a stranger.⁵ But here the line ought not to be drawn too tightly against the servant; if he is acting in good faith and in the general scope of his employment, he will not be put in the category of a stranger or volunteer. It was so held where a servant, who was directed to assist a wrecking-crew in clearing the track, after having completed the piece of work to which he was assigned, went to the place where he was injured to see if there was anything for him to do there. Here the fact that at the time of the injury he was not actually engaged in work did not deprive him of the right to recover damages on the ground that he was a mere bystander or intermeddler and was guilty of contributory negligence, and was thrusting himself into danger where he had no right to be.⁶ So, where a superintendent of work orders a servant to do a job for the superintendent's personal benefit, which service is in the apparent line of the duty of the servant, he not knowing that the services are for the personal benefit of the superintendent,—he is not debarred from recovering damages from the master for an injury sustained while so engaged, on the ground of being out of the line of his employment.⁷ So, it has been held that the fact that the crew of an engine which inflicted personal injuries on a person on the track were *going to their dinner* at the time of the accident does not release the company from liability, where it is not shown that the engine was not so employed in order that they might sooner return to their work.⁸

⁵ *Post*, §§ 3756, 4677, *et seq.*

⁶ *Reed v. Missouri & C. R. Co.*, 94 Mo. App. 371; s. c. 68 S. W. Rep. 364.

⁷ *Sims v. Omaha & C. R. Co.*, 89 Mo. App. 197 (plaintiff was injured by reason of defective tracks while returning on hand-car from place to which he had taken the superintendent, who frequently went to such place, and, the evidence tended to show, ordered material from there; though on this occasion he had gone there to get his dinner, but plaintiff was not shown to have known it). There is a holding to the effect that, to support a judgment against a railroad company for negligently causing the death of one of its section-hands, by the explosion of a boiler in one of its pump-houses while eating his dinner there during the thirty minutes allowed for that purpose, the special findings of the jury must show that, notwithstanding the time allowed was too short to allow him to leave the company's premises,

he was at the time of the accident in the *particular pump-house* by express or implied invitation of the company, and in the line of his duty,—it not being necessarily incident to his employment as a section-hand that he should eat his dinner in the *pump-house* in the vicinity of his work: *Cleveland & C. R. Co. v. Martin*, 13 Ind. App. 485; s. c. 41 N. E. Rep. 1051. A servant who *works during the dinner hour* does not for that reason alone become a volunteer, so as to relieve the master of liability for an injury to him resulting from a defect in the premises. The fact of his being engaged about his master's business will make the time of doing the work immaterial: *Mitchell-Tranter Co. v. Ehmett*, 23 Ky. L. Rep. 1788; s. c. 65 S. W. Rep. 835; 55 L. R. A. 710 (no off. rep.).

⁸ *East St. Louis & C. R. Co. v. Reames*, 75 Ill. App. 28; s. c. *aff'd*, 173 Ill. 582; 51 N. E. Rep. 68. *Instances where the Servant was held to be a Volunteer*:— An employé,

§ 3750. **Injuries to Servants Before Commencing or After Quitting Work, Outside of Working-Hours.**—It has been held that a railroad employé working by the day in a bridge-gang, and living in a car provided by the company, cannot recover for an injury which he sustained in a collision after his day's work was performed and while he was in his car engaged with his own affairs, due to the negligence of an employé in charge of a switch-engine, as in such case his em-

injured in loading rails on a moving car, cannot recover where the injury was caused by attempting, without orders, to straighten a rail after it was put on the car, which was a duty not required of him by his employer, there being men on the car for that purpose: *Cleveland &c. R. Co. v. Carr*, 95 Ill. App. 576. It has been held that although a servant's regular duties required him to go upon the roof of a mill in which he worked, yet if, at the time he was injured by the falling of the roof, he was on the roof not in the discharge of a duty within the scope of his employment, the master is not liable, though he was negligent in permitting the roof to be defective: *Mitchell-Tranter Co. v. Ehmet*, 23 Ky. L. Rep. 1788; s. c. 65 S. W. Rep. 835; 55 L. R. A. 710 (no off. rep.). Where a bricklayer whom the plaintiff was employed to assist in repairing the furnaces and stacks of the defendant's mill directed the plaintiff, as he was leaving the mill, to do in his absence anything which any puddler or heater might ask him to do, it was held that the order must be regarded as including only such things as were in the line of the plaintiff's duty, and did not include the removal of a dangerous beam from the roof, which it was the duty of the carpenter to remove; and therefore, in the performance of that work, the plaintiff was a volunteer, especially as he was acting for the benefit of the puddler, who requested its removal in order that he might not lose from his piecework the short time which he would otherwise have been required to lose in awaiting the return of the carpenter: *Mitchell-Tranter Co. v. Ehmet*, *supra*. Where the plaintiff, employed as a carpenter in a mill at the defendant's stone quarry, was standing in

front of a truck for the purpose of determining whether stone with which the truck was loaded was properly sawed, when the truck, without notice to him, was moved, causing injury to his foot,—it was held that the plaintiff was a mere volunteer, unless he was performing a regular duty, or was acting under a special order of the foreman; and unless such was the case the company owed him no duty to keep a lookout; and it was therefore error to *instruct the jury* that, if he was acting without an order from the foreman, they should find for the defendant unless they believed that the servant in charge of the truck knew, "or by the exercise of ordinary care might have known," of the plaintiff's peril, as the words quoted should have been omitted: *Bowling Green Stone Co. v. Capshaw*, 23 Ky. L. Rep. 945; s. c. 64 S. W. Rep. 507 (no off. rep.). Where plaintiff, a boy about sixteen years old, employed as off-bearer from a planing-machine, volunteered without suggestion or leave from any one, to oil the machine after he had been warned that it was dangerous to do so, the master was not liable to him for an injury received while thus engaged: *Floyd v. Kentucky Lumber Co.*, 23 Ky. L. Rep. 1914; s. c. 66 S. W. Rep. 501 (no off. rep.). But where it was conceded, on the trial of an action for injuries received from a circular saw, that the plaintiff was acting as a servant of the defendant in using the saw, and not as a volunteer, the defendant owed him the same care while he was working with its machinery with its knowledge and permission as if he had been *ordered* to do the work: *Virginia &c. Wheel Co. v. Chalkley*, 98 Va. 62; s. c. 34 S. E. Rep. 976.

ployment did not end with his day's labor, and he was a fellow servant with the negligent employé.⁹ A Federal court has held that a coal miner who, during the noon hour, while not engaged in work, goes to a different part of the mine, for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty, so as to impose upon the employer the duty of a master to see that the entry through which he passes from and to the part of the mine where he is employed is kept in a safe condition for his passage; so that there can be no recovery on that ground for the death of a miner under such circumstances, caused by coming in contact with an uninsulated electric wire in such passageway.¹⁰

§ 3751. Injuries to Servants Going to their Place of Employment and Returning therefrom.—The question whether the relation of master and servant has or has not commenced in the case of a servant injured while going to his work, or has been suspended in the case of a servant injured after quitting his work and while returning to his home, is often an important one, because upon its solution depends whether the principles applied shall be those applicable where the injury is done to a stranger, or those applicable where the injury is done to a servant of the party guilty of negligence. Where a workman had finished his day's work and was *changing his clothes* preparatory to going home, and while so engaged was injured through the negligence of his employer, it was held that the relation of master and servant still existed between them.¹¹ Where laborers are returned by an employer to their homes by means of a hand-car a number of miles from work, after working-hours, the employer is liable for an accident to an employé while returning home, due to the negligence of the foreman in charge of the men, the relation of master and servant existing though their day's work is over.¹² But it has been held that where a fireman in the employ of a railway company is excused from his duties by his superior officer, and, while attempting to cross the track at a public

⁹ International &c. R. Co. v. Ryan, 82 Tex. 565; s. c. 18 S. W. Rep. 219.

¹⁰ Ellsworth v. Metheney, 104 Fed. Rep. 119; s. c. 51 L. R. A. 389; 44 C. C. A. 484. Compare *post*, §§ 3752, 3753. A decision which is obviously unsound is to the effect that an employer is not liable for an injury to an employé, suffered while he was passing up a ladder to an upper floor of the unfinished building in which he was at work, *on an errand*, on the ground that a *safe place of work* had not been furnished the employé, as the lad-

der was merely a *means of getting* to his place of work: Evans v. Vogt &c. Man. Co., 5 Misc. (N. Y.) 330; s. c. 55 N. Y. St. Rep. 212; 25 N. Y. Supp. 509 (injured while returning an oil-can to an upper floor, by some object falling down the ladder and knocking him off).

¹¹ Helmke v. Thilmany, 107 Wis. 216; s. c. 83 N. W. Rep. 360.

¹² Wilson v. Banner Lumber Co., 108 La. 590; s. c. 32 South. Rep. 460. To a similar effect, see Bowles v. Indiana R. Co., 27 Ind. App. 672; s. c. 62 N. E. Rep. 94.

crossing, is injured, he occupies the relation of one of the public, and persons in control of his train owe him the same duty as that owing to the public.¹³

§ 3752. Injuries to Servants During Temporary Cessations of their Employment.—It has been held that where an employer provides a place for his employes to eat, or directs or permits them to go to a place for that purpose, he owes to them the same duty of protection from danger there that he does at the place where such employes work.¹⁴ Where a servant who was employed by the day, at so much an hour, was injured through the negligence of the master while eating his lunch at the noon hour, a contention that he was not at the time engaged in the work or business of the master was held to be without merit.¹⁵ Where a hostler took charge of an engine to take it to the roundhouse, but before doing so ran out some distance on the main track to take the yardmaster to his dinner, he was not, after his return, and while proceeding on the roundhouse track to the roundhouse, deemed to be outside the scope of his employment; so that the railway company was liable for injuries inflicted by his negligence on a fellow servant while engaged in taking the engine to the roundhouse.¹⁶

§ 3753. Instances of such Injuries where the Master was held Liable.—A miner who is permitted by his employer, either expressly or impliedly, to go to a certain place in the mine to work, and there receives injuries from causes of which he had no previous knowledge, but which were known to the employer, and should, in compliance with his duty to provide a reasonably safe place for his employes, have been

¹³ *Davis v. Atlanta &c. R. Co.*, 63 S. C. 370; s. c. 41 S. E. Rep. 468; *Davis v. Atlanta &c. R. Co.*, 63 S. C. 577; s. c. 41 S. E. Rep. 892.

¹⁴ *Heldmaier v. Cobbs*, 96 Ill. App. 315; s. c. aff'd, 195 Ill. 172; 62 N. E. Rep. 853.

¹⁵ *Heldmaier v. Cobbs*, *supra*. See also, *East St. Louis &c. R. Co. v. Reames*, 75 Ill. App. 28; s. c. aff'd, 173 Ill. 582; 51 N. E. Rep. 68. Where a servant employed on excavating work was told to leave his dinner-bucket in a boiler-house maintained by the master, and while there eating his lunch was injured by an explosion of dynamite caps negligently left in the boiler-house by the master, a contention, in an action for the injuries, that the servant was a *mere licensee*

while in the house, so as to preclude recovery, was held to be without merit: *Heldmaier v. Cobbs*, *supra*.

¹⁶ *Jenson v. Omaha &c. R. Co.*, 115 Iowa 404; s. c. 88 N. W. Rep. 952 (action under Railway Fellow-Servant Act). But where a train-despatcher, though having the right to cross the tracks of a railroad company by which he was employed to reach a water-closet provided by the company for its employes, went between the cars at another place to urinate, the company owed him no duty, except to avoid injuring him after discovering his peril: *Louisville &c. R. Co. v. Hocker*, 111 Ky. 707; s. c. 23 Ky. L. Rep. 982, 1274; 64 S. W. Rep. 638; 65 S. W. Rep. 119.

obviated, may recover from the master for such injuries.¹⁷ Where the miners in a coal mine, with the knowledge and implied consent of the owner, are accustomed to use the passages or entries in the mine as a place for congregating or passing to and fro during hours of recreation, it is negligence in the owner to introduce and extend along such an entry an electric wire which is dangerous to the life of those who come in contact with it, without properly insulating or enclosing it, or giving notice of the danger to those who he should reasonably apprehend are likely to be brought in contact with it; and such negligence will render him liable for the death of a miner who, in the accustomed use of the premises, and without knowledge of the danger, or negligence on his own part, is killed by coming in contact with such wire.¹⁸ That a workman comes before the usual hour of employment, and either waits until the proper hour or goes to work before he is actually required to, will not prevent recovery for his death by the negligence of the employer on the ground that he is not engaged in the performance of his duty, provided that he does not come an *unreasonable length of time* before the hour for beginning work, the determination of which point was properly left to the jury in the particular case. He is entitled to a reasonable margin in arriving, so as not to be late.¹⁹ An employé is reasonably within the scope of his employment, so as to allow recovery for his death, caused by the explosion of a defective boiler due to the negligence of his employer, in going to an engine-house in which he is not employed, for the purpose of sharpening the knife with which he works, as a preliminary to the occupation of the day, where the oil and whetstone used for such purpose are kept in such engine-house.²⁰ In like manner, a master is not relieved from liability for injuries to a servant in the course of his employment, by the fact that he had directed such servant to quit work at a time before the accident happened.²¹

¹⁷ Harder &c. Coal Min. Co. v. Schmidt, 104 Fed. Rep. 282; s. c. 43 C. C. A. 532 (unsafe roof in passageway).

¹⁸ Ellsworth v. Metheney, 104 Fed. Rep. 119; s. c. 44 C. C. A. 484; 51 L. R. A. 389 (so laid down in remanding case for new trial, on which trial facts creating such liability might be brought out). But see *ante*, § 3750.

¹⁹ Walbert v. Trexler, 156 Pa. St. 112; s. c. 32 W. N. C. (Pa.) 489; 27 Atl. Rep. 65.

²⁰ Walbert v. Trexler, 156 Pa. St. 112; s. c. 32 W. N. C. (Pa.) 489; 27 Atl. Rep. 65.

²¹ The deceased, a factory-hand, was temporarily engaged on difficult and dangerous work—taking a heavy wheel apart and removing it from a pit—under the direction of the master mechanic of the factory. The superintendent of the factory told deceased not to work later than ten o'clock that night, as he would be needed the next day. The master mechanic told him not to work any later than twelve o'clock for the same reason. The accident happened after twelve o'clock, and was directly due to the failure of the master mechanic to stay and superintend the work of the men, who

§ 3754. **Master Voluntarily Assuming Duties of Servant, Liable for Negligently Performing such Duty.**—In considering this subject, we must keep in mind the fact that the duty of a servant is in a sense the duty of the master himself; so that if the master voluntarily assumes the performance of a duty, and in performing it injures one of his servants through negligence, he must pay damages to that servant, although he was under no obligation to the servant with respect to the performance of the duty in the first instance,—this being merely an illustration of the doctrine elsewhere considered,²² that the master is always liable in damages for his own personal negligence whereby his servant is injured. It follows that, though the rules of a mine-owner impose on the *miners* the duty of seeing that the mine is safe, still, where the “*timberman*,” being the representative of the master, undertakes to prop up the roof of the mine, but does it so carelessly that it falls and injures a driver in the mine, the mine-owner is liable.²³

§ 3755. **Failure of Employer to Restrain Volunteers and Intermeddlers.**—The obligation of a master to furnish a safe place for his servant to work necessarily extends to maintaining such an inspection and supervision as will not render any portion of his premises unsafe through the intervention of trespassers and intermeddlers. Thus, a railroad company is liable for the death of an engineer caused by the misplacement of a switch, due to the removal of a bolt therefrom by some unauthorized person, if it was guilty of negligence in failing to discover the condition of the switch before the accident.²⁴

were unskilled in mechanical work of that kind: *McElligott v. Randolph*, 61 Conn. 157; s. c. 22 Atl. Rep. 1094. The mere fact that a railroad employé, under a mistake for which he is not responsible, leaves his place of work before the arrival of the last train of gravel-cars which it is his duty to unload, does not relieve the company from responsibility for his death while returning at the request of the conductor of a train which he is to unload, on the ground that he was not in the employ of the company: *Rombough v. Balch*, 27 Ont. App. 32 (train on which he was returning was derailed at an open switch, which was not provided with a lock).

²² *Post*, § 3764.

²³ *Consolidated Coal Co. v. Scheiber*, 167 Ill. 539; s. c. 47 N. E. Rep. 1052; aff'g s. c. 65 Ill. App. 304.

²⁴ *Houston &c. R. Co. v. Gaiter* (Tex. Civ. App.), 43 S. W. Rep. 266 (no off. rep.). Where a railroad company discontinued the use of a certain switch and removed the lights from it, and notified its engineers to use the track as though no switch were there; but afterward reopened such switch, without notice to engineers, and without knowledge on their part, and failed to replace the lights; and either a stranger or a fellow servant with the engineer misplaced the switch at night, by reason of which the engineer was injured,—it was held that, if the lights would have prevented the accident, the opening of the switch for use without replacing the lights was as much a proximate cause of the accident as the unlocking and turning of the switch-rails, and if they were not concurrent causes, the railroad com-

§ 3756. **Injuries to Mere Volunteers and Intermeddlers.**—One who renders temporary service in assisting a servant in his work, at the latter's request, without expectation of pay, and where the master has no knowledge of the performance of the services, and the servant has no authority to employ help, does not thereby become a servant of the master so as to charge the latter with the active duty of providing him with a safe place in which to work.²⁵

§ 3757. **When Master Not Chargeable with Acts of Strangers or Intermeddlers.**—Assuming that the master has exercised reasonable care in protecting his premises from strangers and intermeddlers, he is not chargeable with their acts in favor of his servants who are thereby injured. For example, a railroad company is not chargeable with the act of a stranger in *opening a switch*, from which an injury results to an employé of the company.²⁶

pany would be liable, and it was error to direct a verdict for the defendant: *Town v. Michigan & C. R. Co.*, 84 Mich. 214. It has been held that the failure of an employer to station a watchman to prevent volunteers from helping to push street-cars over a trench excavated under the track, in which a servant is at work helping to lay a drain-pipe, is not such negligence as renders him liable for injuries to the servant from the fall upon him of a boy who was so volunteering. The court said: "It seems to us, however, that the injury to the plaintiff must be deemed to have resulted from a pure accident, and that the omission to guard against it was not negligence on the part of the defendant": *Craven v. Mayers*, 165 Mass. 271; s. c. 42 N. E. Rep. 1131.

²⁵ *Langan v. Tyler*, 114 Fed. Rep. 716; s. c. 51 C. C. A. 503. In this case the plaintiff's intestate, at the request of defendant's servant, employed to run an elevator in defendant's building, assisted the latter in taking apart an electric machine used to furnish power for the elevator, which the servant thought did not work properly. The servant had no authority to have the work done, his instructions being to report any defects or needed repairs in all cases to defendant's agent in charge of the building. Neither defendant nor his agent had any

knowledge of the service, which was rendered without expectation of pay. After the machine had been put together again and started, plaintiff's intestate was killed by the *giving way of a hanger* in the machinery-room. It was held that the deceased was not a servant of defendant to whom the latter owed the duty of care in providing a safe place to work, and that defendant was not liable for his death even though defendant may have been chargeable with notice of the defective condition of the hanger: *Langan v. Tyler*, *supra*.

²⁶ *Bennett v. Long Island R. Co.*, 21 App. Div. (N. Y.) 25; s. c. 47 N. Y. Supp. 258; s. c. rev'd on other grounds, 163 N. Y. 1; 57 N. E. Rep. 79. Thus, a stranger, without authority, assumed control of the hoisting machinery of A, which A had left in the charge of a servant. The servant in charge of the machinery left it with no one to watch it, though for a few moments only. It was not shown that the stranger assumed charge of the machinery with the servant's knowledge or assent. While the machinery was in charge of the stranger a person was injured by it, whether a servant or stranger does not clearly appear, though it was seemingly a stranger. It was held that the owner of the machine was not liable: *Edwards v. Jones*, 12 Daly (N. Y.) 415.

CHAPTER CVII.

GENERAL PRINCIPLES RELATING TO THE DUTIES AND LIABILITIES OF
THE EMPLOYER.

- ART. I. General Doctrines and Illustrations, §§ 3758-3765.
 ART. II. Degree of Care Required of the Employer, §§ 3767-3778.
 ART. III. Duty of Inspecting and Finding Out, §§ 3781-3803c.
 ART. IV. Injuries to Servants through Faults of Operation,
 §§ 3804-3812.
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 Servants, §§ 3836-3845.
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 Injuries to Servants, §§ 3856-3862.
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ARTICLE I. GENERAL DOCTRINES AND ILLUSTRATIONS.

SECTION	SECTION
3758. A comprehensive statement of the duties of the master.	3762. Cases denying or failing to apply this principle.
3759. General statement of master's liability.	3763. What instructions on this subject are proper and what improper.
3760. Suitable place, machinery, appliances, servants, furnished by master, and details of the work and selection and use of materials committed to servant.	3764. Personal negligence of the master.
3761. Some applications of the foregoing principle.	3765. When servant may rightfully assume that master has done his duty in this respect.

§ 3758. **A Comprehensive Statement of the Duties of the Master.**—It would, perhaps, be a comprehensive statement of the duties of an

employer to say that the law requires of him the exercise of ordinary or reasonable care, to the end of seeing that the place in which he requires his servant to work is reasonably safe for the purposes intended;¹ that the machinery, tools, materials, and appliances with which he requires him to work are likewise reasonably safe, having regard to the nature of the work;² that the fellow servants with whom he is required to work are reasonably fit, competent, and sober;³ that the help which he provides for the performance of a given task is adequate for its safe performance;⁴ that he establishes and enforces adequate rules and regulations for the safe conduct of his business, to the end of protecting his employes;⁵ that where his business is complicated, so as to require such a precaution, he establishes and maintains a system of work to the same end, on the carrying-out of which his employes may rely;⁶ and that he gives reasonably suitable and sufficient warnings and instructions to his servants concerning dangers of which he is aware, or ought to be aware, and of which they are excusably ignorant.⁷ Other incidental duties which the law imposes upon him, will be spoken of as the subjects occur.

§ 3759. General Statement of Master's Liability.—Subject to qualifications hereafter stated, a master is bound to take ordinary and reasonable care not to subject his servant to unreasonable or extraordinary dangers by sending him to work in dangerous buildings, on dangerous premises, or with dangerous tools, machinery, or appliances. If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured, without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he may recover damages of the master.⁸

¹ *Post*, § 3873, *et seq.*

² *Post*, § 3986, *et seq.*

³ *Post*, § 4048, *et seq.*

⁴ *Post*, §§ 3807, 4175, 4768, 4829, 4865, 4868.

⁵ *Post*, § 4135, *et seq.*

⁶ *Post*, § 4175, *et seq.*

⁷ *Post*, § 4055, *et seq.*

⁸ *United States Rolling-Stock Co. v. Weir*, 96 Ala. 396; s. c. 11 South. Rep. 436; *Halloway v. Henley*, 6 Cal. 209; *Hayden v. Smithville Man. Co.*, 29 Conn. 549; *Chicago & C. R. Co. v. Swett*, 45 Ill. 197; *Illinois & C. R. Co. v. Welch*, 52 Ill. 183; *Schooner Norway v. Jensen*, 52 Ill. 373; *Chicago & C. R. Co. v. Jackson*, 55 Ill. 492; *Toledo & C. R. Co. v. Conroy*, 68 Ill.

560; s. c. 61 Ill. 162; *Chicago & C. R. Co. v. Taylor*, 69 Ill. 461; *Perry v. Ricketts*, 55 Ill. 234; *Illinois & C. R. Co. v. Patterson*, 69 Ill. 650; *Toledo & C. R. Co. v. Fredericks*, 71 Ill. 294; *Fairbank v. Haentzsche*, 73 Ill. 236; *Indianapolis & C. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo & C. R. Co. v. Asbury*, 84 Ill. 429; s. c. 17 Alb. L. J. 91; *East St. Louis Packing & C. Co. v. McElroy*, 29 Ill. App. 504; *Chicago v. Edson*, 43 Ill. App. 417; *Ross v. Shanley*, 86 Ill. App. 144; s. c. *aff'd*, 185 Ill. 390; 56 N. E. Rep. 1105; *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554; *Thayer v. St. Louis & C. R. Co.*, 22 Ind. 26; *Columbus & C. R. Co. v.*

§ 3760. Suitable Place, Machinery, Appliances, Servants, Furnished by Master, and Details of the Work and Selection and Use of

Arnold, 31 Ind. 174; St. Louis &c. R. Co. v. Valirius, 56 Ind. 512; Nordyke &c. Co. v. Van Sant, 99 Ind. 188; Krueger v. Louisville &c. R. Co., 111 Ind. 51; s. c. 9 West. Rep. 249; 11 N. E. Rep. 957; Hammond v. Schweitzer, 112 Ind. 246; s. c. 11 West. Rep. 661; 13 N. E. Rep. 869; Pennsylvania Co. v. Witte, 15 Ind. App. 583; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 629; 43 N. E. Rep. 319; 44 N. E. Rep. 377; Greenleaf v. Illinois &c. R. Co., 29 Iowa 14; Muldowney v. Illinois Cent. R. Co., 39 Iowa 615; Union &c. R. Co. v. Fray, 43 Kan. 750; s. c. 23 Pac. Rep. 1039; Sullivan v. Louisville Bridge Co., 9 Bush (Ky.) 81; Quaid v. Cornwall, 13 Bush (Ky.) 601; s. c. 5 Rep. 693; Bomar v. Louisiana &c. R. Co., 42 La. An. 983, 1206; s. c. 8 South. Rep. 478; 9 South. Rep. 244; Buzzell v. Laconia Man. Co., 48 Me. 113; Lawler v. Androscoggin &c. R. Co., 62 Me. 463; Shanny v. Androscoggin Mills, 66 Me. 420; Frye v. Bath Gas &c. Co., 94 Me. 17; s. c. 46 Atl. Rep. 804; Cumberland &c. R. Co. v. State, 44 Md. 283; Cumberland &c. R. Co. v. State, 45 Md. 229; Cayzer v. Taylor, 10 Gray (Mass.) 274; Snow v. Housatonic R. Co., 8 Allen (Mass.) 441; Hackett v. Middlesex Man. Co., 101 Mass. 101; Huddleston v. Lowell Mach. Co., 106 Mass. 282; Walsh v. Peet Valve Co., 110 Mass. 23; Summersell v. Fish, 117 Mass. 312; Arkerson v. Denison, 117 Mass. 407; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 134; Botsford v. Michigan &c. R. Co., 33 Mich. 256; Le Claire v. First Division &c. R. Co., 20 Minn. 9; Krogstad v. Northern &c. R. Co., 46 Minn. 18; s. c. 48 N. W. Rep. 409; Gibson v. Pacific R. Co., 46 Mo. 163; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 944; Devitt v. Pacific R. Co., 50 Mo. 302; Lewis v. St. Louis &c. R. Co., 59 Mo. 495; Porter v. Hannibal &c. R. Co., 60 Mo. 160; Conroy v. Vulcan Iron Works, 62 Mo. 35; Keegan v. Kavanagh, 62 Mo. 230; Dale v. St. Louis &c. R. Co., 63 Mo. 455; Nolan v. Shickle, 3 Mo. App. 300; Stoddard v. St. Louis &c. R. Co., 65 Mo. 514; s. c. 5 Reporter 177; Tabler v. Hannibal &c. R. Co., 93 Mo. 79; s. c. 11 West. Rep. 462; 5 S. W. Rep. 810; Creig v. Chicago &c. R. Co., 54 Mo. App. 523; Dutzi v. Geisel, 23 Mo. App. 676; Joseph Garneau Cracker Co. v. Palmer, 28 Neb. 307; s. c. 44 N. W. Rep. 463; Union &c. R. Co. v. Broderick, 30 Neb. 735; s. c. 1 Neb. L. J. 366; 46 N. W. Rep. 1121; Fifield v. Northern R. Co., 42 N. H. 225; Paulmier v. Erie R. Co., 34 N. J. L. 151; Plank v. New York &c. R. Co., 1 Thomp. & C. (N. Y.) 319; s. c. aff'd, 60 N. Y. 607; Keegan v. Western R. Co., 8 N. Y. 175; Ryan v. Fowler, 24 N. Y. 410; Wright v. New York &c. R. Co., 25 N. Y. 46; Laning v. New York &c. R. Co., 49 N. Y. 521; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 932; Booth v. Boston &c. R. Co., 67 N. Y. 593; McMillan v. Saratoga &c. R. Co., 20 Barb. (N. Y.) 449; Connolly v. Poillon, 41 Barb. (N. Y.) 366; s. c. aff'd, 41 N. Y. 619; Spelman v. Fisher Iron Co., 56 Barb. (N. Y.) 151; Courtney v. Cornell, 49 N. Y. Super. 286 (defective rigging of a derrick); Hardy v. Carolina &c. R. Co., 76 N. C. 5; Cowles v. Richmond &c. R. Co., 84 N. C. 309; s. c. 37 Am. Rep. 620; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; Columbus &c. R. Co. v. Webb, 12 Ohio St. 475; McGatrick v. Wason, 4 Ohio St. 566; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239; Johnson v. Bruner, 61 Pa. St. 58; rev'g s. c. 6 Phila. (Pa.) 554; Patterson v. Pittsburgh &c. R. Co., 76 Pa. St. 389; Mullan v. Philadelphia &c. R. Co., 78 Pa. St. 25; Strange v. McCormick, 1 Phila. (Pa.) 156; Bier v. Standard Man. Co., 130 Pa. St. 446; s. c. 18 Atl. Rep. 637; Brickman v. South Carolina R. Co., 8 S. C. 173; Donahue v. Enterprise R. Co., 32 S. C. 299; s. c. 11 S. E. Rep. 95; Nashville &c. R. Co. v. Elliott, 1 Coldw. (Tenn.) 611; Nashville &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; Houston &c. R. Co. v. Dunham, 49 Tex. 181; International R. Co. v. Doyle, 49 Tex. 190; s. c. 5 Rep. 631; Houston &c. R. Co. v. Oram, 49 Tex. 341; Noyes v. Smith, 29 Vt. 59; Southwest Virginia Imp. Co. v. Andrew, 86 Va. 270; s. c. 9 S. E. Rep. 1015; 13 Va. L. J. 634; 17 Wash. L.

Materials Committed to Servant.^{8a}—There is an extensive principle, applied chiefly in those courts which pursue the policy of casting, as far as possible, the responsibility for injuries upon the servant while exonerating the master. That principle is that where the master furnishes a reasonably safe and suitable place at which his servants are to work, and reasonably safe and suitable machinery and appliances for accomplishing the work intended to be done, and reasonably safe, fit, and sober servants with whom other servants are to work, and establishes a reasonably safe and suitable system for the conduct of the work where it is complicated or dangerous, and establishes and enforces reasonable rules to the end of promoting the safety of his servants, and warns and instructs those who need warning and instruction under principles elsewhere considered, and fulfills other conditions incumbent upon him under principles elsewhere explained in this chapter; and then commits to them the selection and use of materials which he has furnished, and the details of the work which he has given them to do; and one of them is injured in consequence of the mode of using such materials or the manner of performing the work, —his injury will be ascribed either to his own fault, or to the fault of his fellow servants, in neither of which cases will the master be liable to him. This doctrine, variously expressed and applied (or misapplied), may be gathered from the cases cited in the margin.⁹

Rep. 599; 6 Rail. & Corp. L. J. 252; Baltimore & C. R. Co. v. McKenzie, 81 Va. 71; Hoffman v. Dickinson, 31 W. Va. 142; s. c. 6 S. E. Rep. 53; Humphrey v. Newport News & C. Co., 33 W. Va. 135; s. c. 10 S. E. Rep. 39; 39 Am. & Eng. R. Cas. 363; Wedgewood v. Chicago & C. R. Co., 41 Wis. 478; s. c. 44 Wis. 44; 18 Alb. L. J. 137; Dorsey v. Phillips & C. Co., 42 Wis. 583; Jones v. Yeager, 2 Dill. (U. S.) 64; s. c. 5 Chic. Leg. N. 25; Dillon v. Union Pacific R. Co., 3 Dill. (U. S.) 319; Washington & C. R. Co. v. McDade, 135 U. S. 554; s. c. 34 L. ed. 235; 18 Wash. L. Rep. 526; 42 Alb. L. J. 175; 10 Sup. Ct. Rep. 1044. The following cases, as well as those previously cited, sustain the text: Paterson v. Wallace, 1 Macq. H. L. Cas. 748; s. c. 1 Pat. Sc. App. 389; Griffiths v. Gidlow, 3 Hurl. & N. 648. Compare Fowler v. Locke, 41 L. J. (C. P.) 99; Holmes v. Clark, 6 Hurl. & N. 349; s. c. aff'd in Exchequer Chamber, *sub nom.* Clark v. Holmes, 7 Hurl. & N. 937; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 953; Marshall v. Stewart, 2 Macq. H. L.

Cas. 30; s. c. 1 Pat. Sc. App. 447; 33 Eng. L. & Eq. 1. The statement of an employé, at the time of the contract of employment, that he is accustomed to the work, excuses the employer from explaining to him peculiar dangers ordinarily incident to such work; but it does not qualify the obligation of the master to furnish reasonably safe appliances, or excuse him from liability for any neglect so to do; Steen v. St. Paul & C. R. Co., 37 Minn. 310; s. c. 34 N. W. Rep. 113.

^{8a} See *post*, §§ 3876, 3877, 3953, 3954, 3999, *et seq.*

⁹ *Terre Haute & C. R. Co. v. Leeper*, 60 Ill. App. 194 (third section of train ran at too great a speed in entering switch on which first and second sections were standing); *American Glucose Co. v. Lavin*, 81 Ill. App. 482 (injury ascribed to the negligence of the plaintiff in not holding the rope tightly, and not to the absence of a clutch on a machine); *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338; s. c. 1 Repr. (Ind.) 492; 52 N. E. Rep. 462 (carpenters removing the sup-

§ 3761. **Some Applications of the Foregoing Principle.**—Applying the foregoing principle, it has been held a master performs his duty

ports of a scaffold and substituting new ones); *Rounds v. Carter*, 94 Me. 535; s. c. 48 Atl. Rep. 175 (selection of stakes and placing them in position to hold in place the sleepers loaded on a car, held to be an incidental duty of the servant, for negligence in doing which the master was not liable); *McGuerty v. Hale*, 161 Mass. 51; s. c. 35 N. E. Rep. 682 (employer not liable for negligent failure of his foreman to obey his orders to keep the room ventilated while a certain machine was being operated); *Kennedy v. Spring*, 160 Mass. 203; s. c. 35 N. E. Rep. 779 (master not liable to a mason's "tender" for the fall of a scaffold built by the mason, who selected improper materials for its construction); *Cogan v. Burnham*, 175 Mass. 391; s. c. 56 N. E. Rep. 585 (master not liable for injuries resulting from lack of appliances necessary on account of a temporary condition during the progress of the servant's work, caused by the negligence of fellow workmen in their method adopted to do the work); *Harnois v. Cutting*, 174 Mass. 398; s. c. 54 N. E. Rep. 842 (injury from a defective hook selected by a fellow servant from a collection of hooks furnished by the master which contained good ones); *Smith v. Lowell Man. Co.*, 124 Mass. 114 (injury from neglect of a fellow servant to tighten a screw on a carding-machine); *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485; s. c. 59 N. E. Rep. 1113 (where a number of safe appliances adapted for the work are within reach of an experienced servant, the selection of the particular appliance to be used is no part of the master's duty; but defendant was shown not to have brought himself within this rule, having failed to make safe a chain which was a permanent appliance); *McGinty v. Athol Reservoir Co.*, 155 Mass. 183; s. c. 29 N. E. Rep. 510 (negligence in adjusting and securing a derrick intended to be moved from place to place, is the negligence of the workmen or of the superintendent, who is a fellow servant of them, although the work is

done under his direction); *Burns v. Washburn*, 160 Mass. 457; s. c. 36 N. E. Rep. 199 (failure of the general superintendent of the erection of a building to direct the masons, accustomed to build their own staging, as to the way in which it shall be done, is not negligence, and does not render the employer liable for an accident to a mason's tender injured by the fall of the staging, under the statute making the employer liable for the negligence of one intrusted with and exercising superintendence); *O'Connor v. Rich*, 164 Mass. 560; s. c. 42 N. E. Rep. 111; 49 Am. St. Rep. 483 (employer not liable to employé for injury from defective temporary staging erected by other employés prior to the employment of the injured servant, where the master had furnished suitable materials,—the risk being assumed by him); *McKay v. Hand*, 168 Mass. 270; s. c. 47 N. E. Rep. 104 (employer furnished a supply of good ladders from which the ladder which broke was selected by his employés, and improperly used by them); *Adasken v. Gilbert*, 165 Mass. 443; s. c. 43 N. E. Rep. 199 (defect in a rope selected from a sufficient supply of proper ropes, and used to steady a swinging scaffold which master did not undertake to furnish as a completed structure, but intrusted the making of it to the servant who was killed); *Thyng v. Fitchburg R. Co.*, 156 Mass. 13; s. c. 30 N. E. Rep. 169; 32 Am. St. Rep. 425 (brakeman killed by negligence of employés in selecting and using a coupling-pin which was too short); *Wosbigian v. Washburn & Co. Man. Co.*, 167 Mass. 20; s. c. 44 N. E. Rep. 1058 (negligence of a servant intrusted with the changing of the rolls used in a machine, in not replacing the guard over the gearing after changing the rolls and oiling the gearing, not chargeable to master); *Rawley v. Colliau*, 90 Mich. 31; s. c. 51 N. W. Rep. 350 (defective hammer selected and used by a fellow servant, where other good hammers were furnished which might have been used); *Ke-hoe v. Allen*, 92 Mich. 464; s. c. 52

with respect to changes and adjustment of machinery necessarily involved in the operation of it, but which require skill beyond that which

N. W. Rep. 740; 31 Am. St. Rep. 608 (molder in a foundry selected and used an imperfect flask, in consequence of which molten metal escaped, injuring a foundry-man, numerous good flasks having been provided); *Ling v. St. Paul & C. R. Co.*, 50 Minn. 160; s. c. 52 N. W. Rep. 378 (servant or foreman negligently selected a broken and unfit pulley-hook—fellow servant injured through its breaking—no recovery, the selection of the hook being a mere detail of work committed to the workmen); *Bell v. Lang*, 83 Minn. 228; s. c. 86 N. W. Rep. 95 (foreman selected a tree to be used as a tackle-post in loading the hammer of a pile-driver on a wagon; the tree broke under the strain, injuring one of the workmen; he was denied a recovery of damages on the ground that the tree was not an appliance furnished by the master, but was a mere temporary instrumentality provided by the servants themselves during the progress of the work); *Oelschlegel v. Chicago & C. R. Co.*, 73 Minn. 327; s. c. 76 N. W. Rep. 56, 409 (injury from the breaking of a plank selected from a sufficient quantity of proper materials for use in the erection of a temporary scaffolding); *Collins v. St. Paul & C. R. Co.*, 30 Minn. 31; s. c. 14 N. W. Rep. 60 (proper locomotive-headlight furnished by the company, but left unlighted by employé; track-repairer run over; company not liable); *Marsh v. Herman*, 47 Minn. 537; s. c. 50 N. W. Rep. 611 (persons engaged in the same general work are fellow servants in respect to the negligence of one of them in constructing appliances with which they are to work, where their work includes the construction of such appliances); *Ryan v. McCully*, 123 Mo. 636; s. c. 27 S. W. Rep. 533 (employer's order to lower a beam during the construction of a bridge does not render him liable for the act of an employé charged with the execution of the order, in lowering the beam so carelessly as to inflict an injury on a fellow servant); *Lebarge v. Berlin Mills Co.*, 68 N. H. 373; s. c. 44 Atl. Rep. 533 (staging,

properly constructed and adequate, fell by reason of the negligence of a fellow servant in taking it down); *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. L. 354; s. c. 5 Am. Neg. Rep. 388; 41 Atl. Rep. 844; 42 Atl. Rep. 145 (employer not liable for injuries sustained by an employé from using a ladder not provided by master, but made by a fellow workman, where suitable ladders were furnished by the employer, although the employé had reason to believe that the ladder used was one of those provided by his employer); *Campbell v. New Jersey Dry-Dock & C. Co.*, 61 N. J. L. 382; s. c. 4 Am. Neg. Rep. 191; 11 Am. & Eng. R. Cas. (N. S.) 12; 39 Atl. Rep. 658 (employer who furnishes safe and suitable appliances to the employé with which to do the work on which he is engaged is not responsible for injuries from defects in appliances substituted by a fellow servant for those furnished by the employer); *Sofield v. Guggenheim Smelting Co.*, 64 N. J. L. 605; s. c. 50 L. R. A. 417; s. c. *sub nom.* *Guggenheim Smelting Co. v. Sofield*, 46 Atl. Rep. 711 ("helper" in a copper-smelting establishment fell into a pit of scalding water in consequence of the temporary omission of other workmen to replace the cover over the pit); *Mayer v. Thropp*, 59 N. J. L. 186; s. c. 35 Atl. Rep. 1057 (employer who supplies safe and proper tools not liable for an injury to an employé who uses, under the direction of the foreman over him, a tool not furnished for or safely adapted to the work); *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. L. 400; s. c. 51 Am. St. Rep. 604; s. c. *sub nom.* *Ingebregtsen v. Nord Deutscher Lloyd S. S. Co.*, 31 Atl. Rep. 619 (master not liable for negligence of one servant in performing the incidental duty of inspecting and repairing an apparatus used in common by him and his fellow servants; but as storekeeper who furnished appliance, and who was charged with inspection and repair of it, was not himself to be engaged in using it, his negligence was held to be that of the defendant

the person tending the machinery could reasonably be expected to have, where he employs competent men for the purpose and exercises

—judgment for plaintiff aff'd); *Stourbridge v. Brooklyn City R. Co.*, 9 App. Div. (N. Y.) 129; s. c. 41 N. Y. Supp. 128; 75 N. Y. St. Rep. 586 (selection of sound beams out of a sufficient quantity of proper and suitable material furnished by the employer, is the duty of the servant and not of the master); *Kimmer v. Weber*, 151 N. Y. 417; s. c. 56 Am. St. Rep. 630; 45 N. E. Rep. 860; rev'g s. c. 81 Hun (N. Y.) 599; 30 N. Y. Supp. 1103; 63 N. Y. St. Rep. 291 (master not responsible for the negligent performance of detail of work by servant of whatever grade; error of judgment of foreman with respect to the sufficiency of a platform constructed by workmen is a detail of their work, not chargeable to the master; master not chargeable for an injury to servant arising from the adoption of an unsafe scaffolding, found upon the premises, as a part of the scaffolding erected by them, he having furnished suitable materials for the construction of the scaffolding); *Ludlow v. Groton Bridge & Co.*, 11 App. Div. (N. Y.) 452; s. c. 42 N. Y. Supp. 343; 76 N. Y. St. Rep. 343 (negligence of foreman of a bridge company in failing to use suitable appliances furnished him for the purpose, not attributable to the company but to its servants); *Divver v. Hall*, 21 Misc. (N. Y.) 452; s. c. 47 N. Y. Supp. 630; 81 N. Y. St. Rep. 630; rev'g s. c. 20 Misc. (N. Y.) 677; 46 N. Y. Supp. 533; 80 N. Y. St. Rep. 533 (employer who furnishes sufficient rope to fasten a deck bridge to a vessel while unloading, not liable for an injury to an employé caused by the falling of the bridge due to the failure of a fellow servant to fasten it); *Harley v. Buffalo Car Man. Co.*, 142 N. Y. 31; s. c. 58 N. Y. St. Rep. 437; 36 N. E. Rep. 813; rev'g s. c. 20 N. Y. Supp. 347; 48 N. Y. St. Rep. 58 (employer not liable for an injury to a servant caused by the giving way of a belt-fastener, due to the use of an insufficient number of fasteners in splicing the belt, where it keeps on hand a large quantity of such fasteners, and the failure to use a sufficient number is

due to the negligence of its employés); *Clark v. Riter-Conley Co.*, 39 App. Div. (N. Y.) 598; s. c. 57 N. Y. Supp. 755; 91 N. Y. St. Rep. 755 (employer not liable for an injury caused by the breaking of a derrick-boom from the lack of guy-ropes to prevent swinging and catching of the article hoisted, where there was rope on the premises which might have been used as guy-ropes, but which the fellow servants of the injured employé neglected to use); *Mahoney v. Vacuum Oil Co.*, 76 Hun (N. Y.) 579; s. c. 58 N. Y. St. Rep. 279; 28 N. Y. Supp. 196 (employer not liable for an injury to an employé caused by the breaking of a plank while putting a tank in position, where such plank was selected by an employé and his foreman while employed in the same service with him, and there were other planks which might have been used to strengthen the support); *Headifen v. Cooper*, 6 Misc. (N. Y.) 263; s. c. 26 N. Y. Supp. 763; 58 N. Y. St. Rep. 130 (employer not liable for the death of an employé, caused by the breaking of a belt on a machine in charge of a fellow servant to whom the employer has delegated the duty of inspection, and to whom other belts are supplied); *Jenkinson v. Carlin*, 10 Misc. (N. Y.) 22; s. c. 62 N. Y. St. Rep. 643; 30 N. Y. Supp. 530 (fall of a derrick caused by the absence of a check-rope which workman had forgotten to attach thereto); *Di Vito v. Crago*, 165 N. Y. 378; s. c. 59 N. E. Rep. 141; rev'g s. c. 35 App. Div. (N. Y.) 155; 55 N. Y. Supp. 64; 89 N. Y. St. Rep. 64 (removal of a rock thrown by a blast upon the edge of a cliff was a detail of work properly confided to the foreman, who was a fellow servant of the workman injured by his failure to remove it); *Capasso v. Woolfolk*, 163 N. Y. 472; s. c. 57 N. E. Rep. 760; rev'g s. c. 25 App. Div. (N. Y.) 234; 49 N. Y. Supp. 409; 83 N. Y. St. Rep. 409 (master not liable for injury to servant by a fall of rock thrown out by blasting, where servants had been sent at night to clear up the debris caused by blasting in the daytime, it being merely

a proper supervision; and he is not liable to an employé tending the machine, merely because of the negligence of such workmen in per-

a detail of work); *McC Campbell v. Cunard S. S. Co.*, 144 N. Y. 552; s. c. 64 N. Y. St. Rep. 246; 39 N. E. Rep. 637; rev'g s. c. 76 Hun (N. Y.) 609; 27 N. Y. Supp. 1112; 58 N. Y. St. Rep. 870 (suitable appliances furnished for a simple construction; failure of coemployés properly to arrange them); *Vincent v. Mauterstock*, 30 App. Div. (N. Y.) 308; s. c. 51 N. Y. Supp. 494; 85 N. Y. St. Rep. 494 (scaffolding fell owing to negligence of fellow workman in using a cross-grained stick of timber for one of the brackets supporting it, where plenty of good timber was supplied); *Bell v. Consolidated Gas & Co.*, 60 App. Div. (N. Y.) 615; 69 N. Y. Supp. 921; 103 N. Y. St. Rep. 921; s. c. on prior appeal, 36 App. Div. (N. Y.) 242; 56 N. Y. Supp. 780; 90 N. Y. St. Rep. 780 (master not liable to a servant for the negligence of his engineer in failing to make a proper examination after removing the caps connected with the boiler-tubes in cleaning the boiler); *Page v. Naughton*, 63 App. Div. (N. Y.) 377; s. c. 71 N. Y. Supp. 503; 105 N. Y. St. Rep. 503 (injury from the falling of piles of bags of cement in the defendants' warehouse—storing of cement a mere detail of work of constructing railroad—negligence held to be that of fellow servants); *Quigley v. Levering*, 167 N. Y. 58; s. c. 60 N. E. Rep. 276; 54 L. R. A. 62; aff'g s. c. 50 App. Div. (N. Y.) 354; 63 N. Y. Supp. 1059; 97 N. Y. St. Rep. 1059 (master not liable for injury to employé caused by the failure of a fellow servant to properly oil and clean an automatic drop-bar to prevent a "trolley" running off the traveller when a section of the traveller was shifted, though there was a standard article in use which would have prevented the accident, if the master had procured and used it; nor, machinery not being defective, was master liable for the negligence of a fellow servant who set it in motion without first seeing that everything was all right, and failed to see that the continuity of the track was broken); *Hale v. Wayside Knitting Co.*, 59 App. Div. (N. Y.) 395; s. c. 69 N. Y. Supp. 404; 103 N. Y. St. Rep. 404 (bundles or unfinished clothes fell on operator of sewing-machine—accident ascribed to negligence of co-servant in piling material); *Golden v. Sieghardt*, 33 App. Div. (N. Y.) 161; s. c. 53 N. Y. Supp. 460; 87 N. Y. St. Rep. 460 (anything so connected with work being done as to be an essential part of its performance and necessary to insure its safe completion, is a detail of the work, for the omission of which a servant cannot recover against the master for a resulting injury—sewer caved in because sheathing was not driven all the way to the bottom—no recovery); *Kudik v. Lehigh Valley R. Co.*, 78 Hun (N. Y.) 492; s. c. 61 N. Y. St. Rep. 210; 29 N. Y. Supp. 533 (the necessary coupling and braking of cars upon a coal-trestle are mere details of work, for error or omission in the performance of which the master is not liable); *Leary v. Lehigh Valley R. Co.*, 76 Hun (N. Y.) 575; s. c. 58 N. Y. St. Rep. 258; 28 N. Y. Supp. 187 (railroad company not liable for death of fireman caused by explosion of locomotive-boiler, produced by the water getting too low while running at night, the boiler being properly supplied with gauge-cocks, although it had no fusible plug, and no stationary light to enable engineer to see the test-cocks and determine easily whether water or steam issued from them—seemingly untenable decision); *Keegan v. New York Cent. & C. R. Co.*, 45 App. Div. (N. Y.) 629; s. c. 64 N. Y. Supp. 595; 98 N. Y. St. Rep. 595 (escape of steam from engine causing brakeman attempting to make a coupling to be injured, attributed to negligence of engineer, a fellow servant, who had ample means to repair the defect in the steam-chest or cylinder); *Ford v. Lake Shore & C. R. Co.*, 117 N. Y. 638; s. c. 22 N. E. Rep. 946; 27 N. Y. St. Rep. 246; 41 Am. & Eng. R. Cas. 369; rev'g s. c. 2 N. Y. Supp. 1; 17 N. Y. St. Rep. 393 (death of switchman caused by falling of lumber from an improperly loaded car); *Rozelle v. Rose*, 3 App. Div.

forming their duties.¹⁰ The fact that an employer failed to comply with a request by an employé for material to make a new floor in one

(N. Y.) 132; s. c. 39 N. Y. Supp. 363 (mending of a belt used in transmitting power, is a detail of work belonging to servants and not to master); Whallon v. Sprague & Elevator Co., 1 App. Div. (N. Y.) 264; s. c. 37 N. Y. Supp. 174; 72 N. Y. St. Rep. 519 (elevator company which furnishes proper planks for the use of employés in constructing an elevator, not liable for an injury to an employé resulting from the failure of a fellow servant to use the same); Flynn v. Maine S. S. Co., 14 Misc. (N. Y.) 446; s. c. 35 N. Y. Supp. 1031; 70 N. Y. St. Rep. 735 (owner of a steamer which supplies, and has on hand, fenders and gang-plank, the use of which will render safe the unloading of the steamer on to another vessel, not liable for an injury to an employé caused by the failure of the stevedore, who superintends the unloading, to use the same); Doyle v. White, 9 App. Div. (N. Y.) 521; s. c. 75 N. Y. St. Rep. 1025; 41 N. Y. Supp. 628; aff'g s. c. 14 Misc. (N. Y.) 417; 35 N. Y. Supp. 760; 70 N. Y. St. Rep. 417 (breaking of a defective eyebolt purchased from a responsible dealer and put in place by a fellow servant); Hogan v. Field, 44 Hun (N. Y.) 72; s. c. 7 N. Y. St. Rep. 444; 26 Wkly. Dig. (N. Y.) 191 (fall of a scaffold constructed by servants from defective materials where they had good materials to choose from); Marvin v. Muller, 25 Hun (N. Y.) 163 (good derrick furnished by master, but a servant insecurely fastened a guy-rope attached to it and it fell, injuring another servant); Nugent v. Atlas S. S. Co., 51 Hun (N. Y.) 306; s. c. 3 N. Y. Supp. 861; 21 N. Y. St. Rep. 761 (men employed by a contractor to paint a ship refused to use defective ropes furnished by the ship-owner for them, but selected another rope belonging to the ship and got hurt—no recovery against ship-owner); Judson v. Olean, 116 N. Y. 655 (*mem.*); s. c. 22 N. E. Rep. 555; 2 Silv. C. A. (N. Y.) 414; 26 N. Y. St. Rep. 706; rev'g s. c. 40 Hun (N. Y.) 158 (falling of a scaffold insufficiently nailed by a fellow servant); Thompson v. Libbey, 46 N.

Y. St. Rep. 324; s. c. 19 N. Y. Supp. 680 (fellow servants used too few spikes in building a scaffold where there were plenty of them, or carpenters cut planks too short); Hogan v. Smith, 125 N. Y. 774; s. c. 3 Silv. C. A. (N. Y.) 422; s. c. *sub nom.* Hogan v. Henderson, 35 N. Y. St. Rep. 870; 26 N. E. Rep. 742; rev'g s. c. 56 Hun (N. Y.) 649 (*mem.*); 9 N. Y. Supp. 881, 31 N. Y. St. Rep. 881 (servant killed by the failure of his fellow servants to use enough planks about the platform on which their work was to be done); Watts v. Beard, 18 App. Div. (N. Y.) 243; s. c. 45 N. Y. Supp. 873; 79 N. Y. St. Rep. 873 (falling of a heavy pump due to the giving way of an eyebolt insecurely fastened by a fellow servant); Ulrich v. New York & C. R. Co., 25 App. Div. (N. Y.) 465; s. c. 51 N. Y. Supp. 5; 85 N. Y. St. Rep. 5 (injured in consequence of a servant selecting an appliance and method not adapted to the work); Ferguson v. Galt Public School Board, 27 Ont. App. 480 (employer not liable to hod-carrier for the giving way of a plank in the gangway constructed by the hod-carrier and his mason, where the planks furnished by the employer were strong enough for the purpose had they been properly nailed); Prescott v. Ball Engine Co., 176 Pa. St. 459; s. c. 53 Am. St. Rep. 683; 38 W. N. C. (Pa.) 476; 35 Atl. Rep. 224 (fellow servant selected an unsuitable rope from a supply containing suitable ones, or placed a suitable rope so as to be cut and weakened unnecessarily); Ross v. Walker, 139 Pa. St. 42; s. c. 23 Am. St. Rep. 160; 21 Pitts. L. J. (N. S.) 256; 27 W. N. C. (Pa.) 165; 21 Atl. Rep. 157 (not the employer's duty, after having provided materials ample in quality and quantity, to supervise the selection of every article used by his employés out of the mass for every purpose); Cunningham v. Fort Pitt Bridge Works, 197 Pa. St. 625; s. c. 47 Atl. Rep. 846 (master not

¹⁰ Wosbigian v. Washburn & C. Man. Co., 167 Mass. 20; s. c. 44 N. E. Rep. 1058.

piece, to replace a section of floor which it had been necessary frequently to remove and replace, did not render him liable to a fellow

liable for defects in the construction of skids on which a "shipping-gang" is moving iron beams, where the materials are selected and the skids built by the gang under general orders from the master, which orders do not limit the materials or the mode of construction); *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162; s. c. 33 Atl. Rep. 1102 (doctrine that the master discharges his duty by providing his servants with the means of protecting themselves—failure to shore up sides of trench); *Burke v. National India Rubber Co.*, 21 R. I. 446; s. c. 44 Atl. Rep. 307 (employé injured by falling upon a slippery floor left greasy by other employes); *Allen v. Galveston & C. R. Co.*, 14 Tex. Civ. App. 344; s. c. 37 S. W. Rep. 171 (a bridge-carpenter hurt in consequence of stepping upon a plank negligently left unfastened by a fellow servant); *Throckmorton v. Missouri & C. R. Co.*, 14 Tex. Civ. App. 222; s. c. 39 S. W. Rep. 174 (master not liable for injuries to a servant from the breaking of an appliance under an extraordinary strain to which it was put by servants in the discharge of their duties, the necessity for which extraordinary strain could not reasonably have been foreseen); *Lambert v. Missisquoi Pulp Co.*, 72 Vt 278, s. c. 47 Atl. Rep. 1085 (instruction to jury in case where servant was injured by the breaking down of a staging improperly constructed by a fellow servant); *Prybiski v. Northwestern Coal R. Co.*, 98 Wis 413, s. c. 74 N. W. Rep. 117 (bucket used at a coal-dock failed to right itself and latch automatically, and hoister neglected to latch it by hand, whereby it hung so low as to brush down a quantity of coal upon a workman, it having operated properly until fifteen minutes prior to the accident, the negligence leading to the injury being that of a fellow servant who controlled the machinery); *Liermann v. Milwaukee Dry Dock Co.*, 110 Wis. 599; s. c. 86 N. W. Rep. 182 (improper construction of a skidway by workmen, whereby one of them was injured); *Peschel v. Chicago & C. R. Co.*, 62 Wis. 338; s. c. 21 N. W.

Rep. 269 (hoisting-apparatus fell by reason of carelessness of one of the men in setting an anchor-post—not deemed a machine for the construction of which the master was responsible); *Callaway v. Allen*, 64 Fed. Rep. 297; s. c. 24 U. S. App. 388; 12 C. C. A. 114 (employer not liable for an injury to an employé through the failure of an additional device provided by the employes in violation of the orders of the superintendent, for the purpose of making the work easier for themselves, by reason of which a car capsized, due to overloading); *Kelly v. Jutte & Co.*, 44 C. C. A. 274; s. c. 104 Fed. Rep. 955 (derrick gave way by reason of the fact that its fastenings were not yet secured so as to make it safe—foreman, who was a fellow servant with the plaintiff, ordered it to be used—master exonerated); *Ryan v. Smith*, 85 Fed. Rep. 758; s. c. 56 U. S. App. 604; 29 C. C. A. 427 (piece of rope attached to buckets in which coal was hoisted, for the purpose of pulling the buckets toward the dumpers, was improperly spliced and gave way—rope was not defective—servants spliced the piece which gave way—negligence deemed that of fellow servants); *Baird v. Reilly*, 92 Fed. Rep. 884; s. c. 35 C. C. A. 78; 63 U. S. App. 157 (employer not obliged to keep the working-place in a safe condition at every moment of the work, so far as its safety depends upon the due performance of the work by fellow servants of the employé); *Peirce v. Kile*, 80 Fed. Rep. 865; s. c. 26 C. C. A. 201; s. c. *sub nom.* *Peirce v. Davis*, 53 U. S. App. 291 (master not responsible for negligent or unskillful use by the servant, or by the foreman of his gang of laborers, of the necessary and safe tools and appliances furnished); *Hermann v. Port Blakely Mill Co.*, 71 Fed. Rep. 853 (failure of an employé upon a wharf to give a signal to those in the vessel upon starting a piece of lumber down a chute was the negligence of a fellow servant of one engaged upon the vessel in stowing the lumber and struck by such piece); *Slavens v. Northern Pac. R.*

servant of such employé for injuries due to the fact that such employé, in replacing the old floor without instructions to do so, failed to nail down the boards, where, had that been done, the floor would have been entirely safe.¹¹ An employer was held not liable for the death of his employé, caused by the blowing off of a door of a blast-stove while he was engaged in tightening a nut on it, where there was no danger in working at the door unless the blast was on, and the blast was on, of which fact he was ignorant, solely through the negligence of his co-employé, under whose direction he was working.¹² A telegraph company was not liable for the fall of a pole upon an employé engaged in raising it, due to the slipping of the pole upon a shovel with a pointed end, directed by the foreman to be used instead of a crutch, which had been broken, in the absence of evidence that the company did not furnish a sufficiency of proper tools at the depot from which those which were used were taken, or within convenient reach.¹³

§ 3762. Cases Denying or Failing to Apply this Principle.—Cases are not wanting which, though seemingly apt for the application of this principle, either deny it or refuse to apply it. One of these cases holds that an employé who has received general instructions to let down a heavy cylinder of boiler-iron and to rivet it to the wheel-case in a mill, has authority, by necessary implication, to select and use appliances, such as a rope and tackle for the work, so as to charge the employer with liability for his negligence, which results in injury to another employé, although a rope and tackle belonging to other parties was already in position for the work, where this was taken away before the work was completed by the party in charge of it.¹⁴ In another such case it was held that where a railroad brakeman was injured in consequence of a defective road-bed, the defense that such injury was caused by the negligence of a fellow servant

Co., 97 Fed. Rep. 255; s. c. 38 C. C. A. 151 (railway section-man killed by the failure of the crew properly to drain a bluff overhanging the track, whereby a landslide was produced).

¹¹ *Nemier v. Riter*, 179 Pa. St. 557; s. c. 36 Atl. Rep. 335; 28 Pitts. L. J. (N. S.) 58.

¹² *Dahlke v. Illinois & C. R. Co.*, 100 Wis. 431; s. c. 76 N. W. Rep. 362.

¹³ *Carroll v. Western Union Tel. Co.*, 160 Mass. 152; s. c. 35 N. E. Rep. 456. An employer was held not liable for the death of an employé engaged in cleaning an oven used

for heating air to blow into a blast-furnace, caused by the unexplained opening of a cock, letting through such oven a blast of air heated to nearly 1,000 degrees, where the machine was reasonably safe to operate, and its safe operation necessarily depended upon the care, intelligence, and fidelity of the fellow workman of the person killed: *Dana v. Crown Point Iron Co.*, 67 Hun (N. Y.) 586; s. c. 51 N. Y. St. Rep. 238; 22 N. Y. Supp. 455.

¹⁴ *Telander v. Sunlin*, 44 Fed. Rep. 564.

could not apply; since the fellow-servant doctrine never extended further than to those things happening through negligence in the operation of the road, in contradistinction to negligence in failing to furnish a safe road-bed and appliances.¹⁵ That the restriction which the North Carolina court thus places on the fellow-servant doctrine in its application to railway service is not shared by other courts will appear from many of the decisions already cited.¹⁶ Another such case makes a distinction between the primary duty of the master of furnishing reasonably safe appliances, and the responsibility of the servants for their own safety in the mere details of their work, by holding that a railway company is liable for injuries to an expressman in its employ, received in a collision caused by defective brakes, where it is the duty of the inspectors in the yards to see that the brakes are in order, the train-hands having no duty in that respect.¹⁷ Still another case impinges on the doctrine announced in the paragraph above, by holding that where the defect in the planking over a railroad-crossing, by reason of which a brakeman was injured while coupling cars, had existed for so long a time that the company may be presumed to have had notice of it, the fact that the section-foreman was furnished with materials, and instructed generally to make repairs when needed, does not relieve the company from the charge of negligence.¹⁸ Another court, which has perhaps pushed the doctrine as far as any other court, has held that if a servant is injured by the breaking of a chain designed for his permanent use in hoisting goods, in consequence of a fellow servant's negligence in using old instead of new iron in replacing a link, the master is liable for the injury, though the proximate cause of it was the negligence of the fellow servant in making the link; since, as the chain was a *permanent appliance*, the master was bound to see that it was safe, as well as to furnish proper material and a competent smith to make it.¹⁹ Nor,

¹⁵ Wright v. Southern R. Co., 128 N. C. 77; s. c. 38 S. E. Rep. 283.

¹⁶ Terre Haute & C. R. Co. v. Leeper, 60 Ill. App. 194; Ling v. St. Paul & C. R. Co., 50 Minn. 160; s. c. 52 N. W. Rep. 378; Oelschlegel v. Chicago & C. R. Co., 73 Minn. 327; s. c. 76 N. W. Rep. 56, 409 [following Lindvall v. Wood, 41 Minn. 212]; Stourbridge v. Brooklyn City R. Co., 9 App. Div. (N. Y.) 129; s. c. 41 N. Y. Supp. 128; 75 N. Y. St. Rep. 586; Ulrich v. New York & C. R. Co., 25 App. Div. (N. Y.) 465; s. c. 51 N. Y. Supp. 5; 85 N. Y. St. Rep. 5; Prybilski v. Northwestern Coal R. Co., 98 Wis. 413; s. c. 74 N. W. Rep. 117; Peschel v.

Chicago & C. R. Co., 62 Wis. 338; Dahlke v. Illinois & C. R. Co., 100 Wis. 431; s. c. 76 N. W. Rep. 362; and especially Slavens v. Northern Pac. R. Co., 97 Fed. Rep. 255; s. c. 38 C. C. A. 151.

¹⁷ Wood v. Long Island R. Co., 159 N. Y. 546; s. c. 54 N. E. Rep. 1095; aff'g s. c. 42 N. Y. Supp. 140; 11 App. Div. (N. Y.) 16.

¹⁸ Fluhrer v. Lake Shore & C. R. Co., 121 Mich. 212; s. c. 80 N. W. Rep. 23.

¹⁹ Haskell v. Cape Ann Anchor Works, 178 Mass. 485; s. c. 59 N. E. Rep. 1113.

in the view of another court, is the master relieved from liability for an injury to a servant caused by a defective appliance constructed for his use by a fellow servant, by reason of the fact that the construction of similar appliances was ordinarily left to fellow servants.²⁰ This is quite in conformity with the principle that the servant, of whatever grade, to whom the master commits the duty of constructing the appliances to be used by his servants, is, to that extent, the vice-principal of the master.²¹

§ 3763. What Instructions on this Subject are Proper and what Improper.—As elsewhere seen,²² the duty of the master to exercise reasonable care to the end that the place in which his servant is required to work is reasonably safe is a *primary duty* of the master in the sense that it cannot be delegated, or that, if delegated, the person to whom it is delegated is the *alter ego* or vice-principal of the master, and that his negligence in the discharge of this duty is the master's negligence. Therefore, if there has been a failure in the performance of the duty, it will be no defense on the part of the master that he employed a competent superintendent or foreman, supplied him with necessary appliances, and gave him all needful instructions;²³ therefore, in an action by a servant against his master grounded upon negligence in this particular, for injuries occasioned by the fall of a building which was being erected over a mill in which the plaintiff was

²⁰ *Donnelly v. Booth Bros. & Co.* Granite Co., 90 Me. 110; s. c. 37 Atl. Rep. 874.

²¹ *Post*, §§ 3988, 4923, *et seq.* So, it has been held that a servant injured by a fall from a scaffold, caused by the tipping of an unfastened ladder, may recover therefor, although the ladder was placed by a fellow servant, since it is the duty of the master to furnish a safe place for the employé to work: *Swift & Co. v. Wyatt*, 75 Ill. App. 348; s. c. 3 Chic. L. J. Wkly. 165. See also, *Prescott v. J. Ottmann Lithographing Co.*, 20 App. Div. (N. Y.) 397; s. c. 46 N. Y. Supp. 812 (master responsible for the neglect to oil a machine, where no employé is charged with that duty); *Pursley v. Edge Moor Bridge Works*, 67 N. Y. Supp. 719; s. c. 56 App. Div. (N. Y.) 71 (circumstances under which erection of a scaffold between piers in a river for the erection of a bridge is a primary duty of the master and not a mere detail of work intrusted to a fellow servant); *Rice & Co. Malting Co. v.*

Paulsen, 51 Ill. App. 123 (employer liable for an injury to an employé from a defect due to the negligence of a fellow employé where the employer had no notice of the defect and the employé injured had not); *Mullane v. Houston & Co. R. Co.*, 21 Misc. (N. Y.) 10; s. c. 46 N. Y. Supp. 957; aff'g s. c. 20 Misc. (N. Y.) 434; 45 N. Y. Supp. 1039 (an assurance by a track-master of a street-railway company to a workman under his control, to induce the latter to enter a hole which was dangerous while the cable was in operation, that he would order the engineer not to start the cable, is a matter pertaining to the duty of the master to provide a safe place of work, and is not a mere detail of work).

²² *Post*, § 3874.

²³ *Baird v. Reilly*, 92 Fed. Rep. 884; s. c. 35 C. C. A. 78; 63 U. S. App. 157; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; s. c. 63 N. E. Rep. 649; aff'g s. c. 96 Ill. App. 248.

working, a request for instructions to the effect that if the defendants employed an experienced carpenter to erect the building they were not liable, was condemned as attempting to apply to the obligation of the master to furnish a reasonably safe place for his servant to work, the same principles which would have controlled his liability to third persons had they been injured by the fall of the building. The Court said: "The obligation of an employer to his employé arises out of their contractual relation and is not necessarily the same as his duty to strangers in the management of his property."²⁴ In such an action it was not error to instruct the jury that if the defendant unnecessarily and dangerously permitted shavings to accumulate in a passageway between a moulding-machine and a rip-saw, and if the plaintiff, in obedience to orders, was compelled to pass near them, and if they caused him to fall and injure himself, that would constitute negligence on the part of the master.²⁵

§ 3764. Personal Negligence of the Master.—If an injury to the servant is owing to the direct negligence of the master,—as, where he is personally present, superintending the work and giving orders,—the master is answerable for the damages to the same extent as though the relation of master and servant did not exist.²⁶ The master, although engaged at a common labor with the servant, does not become a fellow servant within the meaning of the rule, and his servant does not impliedly undertake to assume the risk of injury from his negligence when so acting.²⁷ The rule is the same where a negligent injury is visited upon a servant in consequence of acts which are done by

²⁴ Hearn v. Quillen, 94 Md. 39; s. c. 50 Atl. Rep. 402.

²⁵ Myers v. Concord Lumber Co., 129 N. C. 252; s. c. 39 S. E. Rep. 960. In an action against a mining company for injuries to an employé the court had elsewhere instructed the jury that "the defendant was under no obligation to keep the plaintiff absolutely safe and free from danger," but that its duty was "to use ordinary care, which is the care ordinarily exercised by persons of average prudence under the circumstances." Another instruction to the effect that it was the duty of the defendant to keep its premises in a reasonably safe condition,—in such a condition as they would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be performed,—was held not er-

roneous by reason of the fact that it did not use the words "skilled in the business" after the words "person of ordinary prudence": Downey v. Gemini Min. Co., 24 Utah 431; s. c. 68 Pac. Rep. 414.

²⁶ Lorentz v. Robinson, 61 Md. 64 (defendant called to plaintiff to step on an elevator which defendant knew was out of order, in order to stop it, and it fell with plaintiff).

²⁷ *Ante*, § 3754; Ashworth v. Stanwix, 3 El. & El. 701; s. c. 7 Jur. (N. S.) 467; 30 L. J. (Q. B.) 183; 4 L. T. (N. S.) 85; Roberts v. Smith, 2 Hurl. & N. 213; Keegan v. Kavanagh, 62 Mo. 230; Ryan v. Fowler, 24 N. Y. 410; McMahon v. Walsh, 11 Jones & Sp. (N. Y.) 96; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 291, per Boynton, J.; Blink v. Hubinger, 90 Iowa 642; s. c. 57 N. W. Rep. 593.

another servant under the direct orders of the master,—in which case the negligence of the servant in executing the orders is, under the rule of *respondeat superior*, the negligence of the master.²⁸

§ 3765. When Servant may Rightfully Assume that Master has Done his Duty in this Respect.—A servant is entitled to assume, in the absence of notice to the contrary, that the master has exercised reasonable care and skill in providing for the safety of the servants.²⁹ For instance, he may rightfully rely upon the assumption that his employer has done his duty by furnishing reasonably safe machinery, appliances, and surroundings.³⁰

ARTICLE II. DEGREE OF CARE REQUIRED OF THE EMPLOYER.

SECTION

3767. Master not liable as an insurer, but bound only to the exercise of ordinary or reasonable care.

3768. Rule of reasonable care applied to the safety of machinery, appliances, etc.—“Reasonably safe for the purpose intended.”

3769. Rule of ordinary care applied to the safety of machinery, etc.—Not negligence to act in accordance with ordinary usage.

3770. Explanations of this doctrine.

3771. Further explanations.

3772. This care varies according to the danger to be avoided.

SECTION

3773. Master not bound to exercise a high and exhaustive degree of care.

3774. Not liable for accidents not reasonably to be anticipated.

3775. Rule excludes liability for injuries proceeding from the act of God, or from inevitable or inscrutable accident.

3776. Application of this rule of reasonable care in the case of railway service.

3777. Custom, adoption of, how far excuses master.

3778. Doctrine of this chapter restated.

²⁸ Swensen v. Bender, 114 Fed. Rep. 1; s. c. 51 C. C. A. 627 (master ordered walls of a tunnel to be planked so as to hide the fact that the tunnel was insufficiently timbered or propped).

²⁹ Carroll v. Tidewater Oil Co., 67 N. J. L. 679; s. c. 52 Atl. Rep. 275.

³⁰ Illinois Steel Co. v. Mann, 100 Ill. App. 367; s. c. aff'd, 197 Ill. 186; 64 N. E. Rep. 328. An employé has a right to assume that his employer will use reasonable care in the construction of a shed for storing materials, to have it of sufficient strength to bear all of the materials it is designed to bear, and that he

will not overload it so as to cause it to break and fall, while employés are at work upon it: D. Sinclair Co. v. Waddill, 99 Ill. App. 334; s. c. aff'd, 200 Ill. 17; 65 N. E. Rep. 437. In the absence of notice that a place or appliance is dangerous, a servant may properly act upon the assumption that the master has used reasonable care in putting the appliance with which and the place in which he is to work in a reasonably safe condition: Himrod Coal Co. v. Clark, 99 Ill. App. 332; s. c. aff'd, 197 Ill. 514; 64 N. E. Rep. 282. An employé engaged in blasting has the right to assume that his employer

§ 3767. **Master Not Liable as an Insurer, but Bound Only to the Exercise of Ordinary or Reasonable Care.**—In the discharge of these obligations,—that of maintaining safe premises whereat the servant is to work; that of selecting and maintaining safe machinery, tools and appliances wherewith he is to work; that of employing and keeping in his employ safe, competent, sober and fit servants in association with whom to work; that of establishing and enforcing rules and regulations for the safe conduct of his business; that of systematizing his business where it is complicated; that of warning and instructing his servants where they need warning and instruction,—while the obligation of the master is absolute in the sense that it cannot be delegated so as to devolve his responsibility upon another,¹ yet it is not absolute in the sense that he is an insurer or warrantor of results in its performance. He does not warrant the safety or sufficiency of his premises, machinery, tools and appliances, or the competency or fitness of the servants whom he selects to carry on his work, or the sufficiency of the rules and regulations which he may have established for the conduct of his work, or the adequacy of the system which he may have devised to prevent accidents, or the adequacy of the warnings and instructions which he may have given or prescribed to be given to his inexperienced or youthful servants; but in all these and in other risks the limit of his duty and obligation is the exercise of *reasonable or ordinary care*.² Therefore an *instruction* to a jury which imposes

has exercised ordinary care in providing a safe place to work, and may rely on the implied assurance that the place is safe; but the employer cannot be held as an insurer of its safety; and an instruction that the employé has a right to rely on the implied assurance that the place contains *no latent defects* is erroneous: *Lanza v. Legrand Quarry Co.*, 115 Iowa 299; s. c. 88 N. W. Rep. 805.

¹ *Post*, §§ 3874, 3988, 4056, 4057, 4136.

² *Post*, § 3986; *Little Rock & C. R. Co. v. Duffey*, 35 Ark. 602; *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280; s. c. 29 Pac. Rep. 175 (servant cannot recover without proving negligence); *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499; *O'Keefe v. National Folding Box & C. Co.*, 66 Conn. 38; s. c. 33 Atl. Rep. 587 (rule applies in case of employés of tender age); *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338; *Green v. Sansom*, 41 Fla. 94; s. c. 25 South. Rep. 332; *Central R. & C. Co. v. Lanier*, 83 Ga.

587; s. c. 10 S. E. Rep. 279 (ordinary diligence or common prudence); *Chicago & C. R. Co. v. Mahoney*, 4 Ill. App. 262 (is held only to the employment of every precaution against danger which a reasonably prudent man would employ under the same circumstances); *Kranz v. White*, 8 Ill. App. 583; *Chicago & C. R. Co. Brangonier*, 11 Ill. App. 516; *Wabash & C. R. Co. v. Fenton*, 12 Ill. App. 417; *Chicago & C. R. Co. v. Pratt*, 14 Ill. App. 346; *East St. Louis Pack. & C. Co. v. McElroy*, 29 Ill. App. 504; *Chicago & C. R. Co. v. Becker*, 38 Ill. App. 523; *Gartside Coal Co. v. Turk*, 40 Ill. App. 22; *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619; *Chicago Anderson Pressed-Brick Co. v. Sobkowiak*, 45 Ill. App. 317; s. c. aff'd, 148 Ill. 573; 36 N. E. Rep. 572; *Peoria & C. R. Co. v. Hardwick*, 48 Ill. App. 562; *Illinois River Paper Co. v. Albert*, 49 Ill. App. 363; *McCarthy v. Muir*, 50 Ill. App. 510; *Harsha v. Babicz*, 54 Ill. App. 586 (not bound to furnish machinery and appliances absolutely

upon a railway company the duty "to do everything that can be reasonably done" for the safety of its employés, and "to have the struc-

safe and suitable, but only such as are "reasonably" safe and suitable for the purpose for which they are used); *Chicago &c. R. Co. v. DuBois*, 56 Ill. App. 181; *Belleville Pump &c. Works v. Bender*, 69 Ill. App. 189; *Chicago &c. R. Co. v. Garner*, 78 Ill. App. 281; *Western Screw Co. v. Johnson*, 86 Ill. App. 89 (master liable to his servant only for negligence); *Indianapolis &c. R. Co. v. Love*, 10 Ind. App. 554; *Chicago &c. R. Co. v. Lee*, 17 Ind. App. 215; s. c. 46 N. E. Rep. 543; *Cooper v. Iowa Cent. R. Co.*, 44 Iowa 134; *Kansas Pac. R. Co. v. Little*, 19 Kan. 269; s. c. 6 Rep. 199; 6 Cent. L. J. 60; *Atchison &c. R. Co. v. Winston*, 56 Kan. 456; s. c. 43 Pac. Rep. 777; *Wormell v. Maine &c. R. Co.*, 79 Me. 397; s. c. 4 N. Eng. Rep. 696; 10 Atl. Rep. 49; *Wonder v. Baltimore &c. R. Co.*, 32 Md. 411; *Seaver v. Boston &c. R. Co.*, 14 Gray (Mass.) 465; *King v. Boston &c. R. Co.*, 9 Cush. (Mass.) 112; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Jones v. Granite Mills Co.*, 126 Mass. 84; s. c. 7 Rep. 146; *Fort Wayne &c. R. Co. v. Gildersleeve*, 33 Mich. 133; *Marshall v. Widdicomb Furniture Co.*, 67 Mich. 167; s. c. 11 West. Rep. 193; 34 N. W. Rep. 541; *Jungnitsch v. Michigan Malleable Iron Co.*, 105 Mich. 270; s. c. 2 Det. Leg. N. 107; 63 N. W. Rep. 296 (does not extend to such care as will reduce the liability of accident to the minimum); *Hughley v. Wabasha*, 62 Minn. 245; s. c. 72 N. W. Rep. 78; *O'Donnell v. Baum*, 38 Mo. App. 245; *Krampe v. St. Louis Brew. Assn.*, 59 Mo. App. 277; *Lewis v. St. Louis &c. R. Co.*, 59 Mo. 495; *Porter v. Hannibal &c. R. Co.*, 71 Mo. App. 66; *Covey v. Hannibal &c. R. Co.*, 86 Mo. 635; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440; s. c. 10 West. Rep. 405; 4 S. W. Rep. 937; *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468; s. c. 13 West. Rep. 644; 7 S. W. Rep. 476; *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520; *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547; *Swift & Co. v. Holoubek*, 55 Neb. 228; s. c. 4 Am. Neg. Rep. 509; 75 N. W. Rep. 584 (even in case of a servant of immature years); *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Painton v. North-ern Cent. R. Co.*, 38 N. Y. 7 (is bound only to the exercise of due care and diligence, and the burden is on the plaintiff to show negligence); *Bal-lard v. Hitchcock Man. Co.*, 51 Hun (N. Y.) 188; s. c. 21 N. Y. St. Rep. 548; *Kaye v. Rob Roy Hosiery Co.*, 51 Hun (N. Y.) 519; s. c. 21 N. Y. St. Rep. 668; *Carlson v. Phoenix Bridge Co.*, 55 Hun (N. Y.) 485; s. c. 29 N. Y. St. Rep. 553; 8 N. Y. Supp. 634; s. c. aff'd, 132 N. Y. 273; 30 N. E. Rep. 750; *Probst v. Delamater*, 100 N. Y. 266; *Dobbins v. Brown*, 119 N. Y. 188; s. c. 28 N. Y. St. Rep. 957; 23 N. E. Rep. 537 (the adoption of all reasonable means and precautions to provide for the safety of his servants while in the performance of their work); *McGovern v. Central Vermont &c. R. Co.*, 123 N. Y. 180; s. c. 33 N. Y. St. Rep. 416; 25 N. E. Rep. 373; *Biddescomb v. Cam-eron*, 161 N. Y. 637; s. c. 57 N. E. Rep. 1104; aff'g s. c., 35 App. Div. (N. Y.) 561; 55 N. Y. Supp. 127; *Chesson v. John L. Roper Lumber Co.*, 118 N. C. 59; s. c. 23 S. E. Rep. 925; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541; *Manville v. Cleve-land &c. R. Co.*, 11 Ohio St. 417; *Toledo &c. R. Co. v. Beard*, 20 Ohio C. C. 681; s. c., 11 Ohio C. D. 406; *Lake Shore &c. R. Co. v. Gilday*, 16 Ohio C. C. 649; s. c., 9 Ohio C. D. 27; *Sykes v. Parker*, 99 Pa. St. 465; *Le-high &c. Coal Co. v. Hayes*, 128 Pa. St. 294; s. c., 18 Atl. Rep. 387; 5 L. R. A. 441; 24 W. N. C. (Pa.) 559; 47 Phila. Leg. Int. 384; *McCombs v. Pittsburgh &c. R. Co.*, 130 Pa. St. 182; s. c. 18 Atl. Rep. 613; *Gunter v. Graniteville Man. Co.*, 15 S. C. 443; *Ex parte Johnson*, 19 S. C. 492; *Sand-ers v. Etiwan Phosphate Co.*, 19 S. C. 510; *Gulf &c. R. Co. v. Johnson*, 1 Tex. Civ. App. 103; s. c. 20 S. W. Rep. 1123; *Houston &c. R. Co. v. Kel-ley*, 13 Tex. Civ. App. 1; s. c. 34 S. W. Rep. 809; rehearing denied, 13 Tex. Civ. App. 25; s. c. 46 S. W. Rep. 863; *Texas &c. R. Co. v. King*, 14 Tex. Civ. App. 290; s. c. 37 S. W. Rep. 34; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; s. c. 41 S. W. Rep. 117; s. c. rev'd on a question of practice only, 93 Tex. 425 (that prudence and care in respect to the machinery or appliances which persons of cr-

tures along its line reasonably safe," is erroneous. Its duty is to use such care as a person of ordinary prudence would use, under like cir-

ordinary care and prudence would have exercised under like circumstances); *Galveston &c. R. Co. v. Garrett*, 73 Tex. 262; s. c. 13 S. W. Rep. 62; *Trinity County Lumber Co. v. Denham*, 85 Tex. 56; s. c. 19 S. W. Rep. 1012; *Gulf &c. R. Co. v. Wells*, 91 Tex. 685; s. c. 17 S. W. Rep. 511; rev'g on rehearing, 16 S. W. Rep. 1025; *Galveston &c. R. Co. v. Gormley*, 91 Tex. 393; s. c. 9 Am. & Eng. R. Cas. (N. S.) 468; 43 S. W. Rep. 877; rev'g s. c. (Tex. Civ. App.), 42 S. W. Rep. 314 (no off. rep.); *Texas &c. R. Co. v. Taylor* (Tex. Civ. App.), 44 S. W. Rep. 892 (no off. rep.) (that degree of care which an ordinarily prudent person would exercise under similar circumstances); *Missouri &c. R. Co. v. Hauer* (Tex. Civ. App.), 43 S. W. Rep. 1078 (no off. rep.); *Sincere v. Union Compress &c. Co.* (Tex. Civ. App.), 40 S. W. Rep. 326 (no off. rep.) (not liable for failing to observe a customary precaution taken by those engaged in the same business to protect employes from injury, unless ordinary care and prudence require that such precaution be observed); *Galveston &c. R. Co. v. Gormley* (Tex. Civ. App.), 27 S. W. Rep. 1051 (no off. rep.); *Bertha Zinc Co. v. Martin* 93 Va. 791; s. c. 2 Va. L. Reg. 833; 22 S. E. Rep. 869; *Chesapeake &c. R. Co. v. Lash* (Va.), 3 Am. & Eng. R. Cas. (N. S.) 569; s. c. 24 S. E. Rep. 385 (no off. rep.); *Southwest Imp. Co. v. Andrew*, 86 Va. 270; s. c. 13 Va. L. J. 634; 17 Wash. L. Rep. 599; 6 Rail. & Corp. L. J. 252; 9 S. E. Rep. 1015; *Hoffman v. Dickinson*, 31 W. Va. 142; s. c. 6 S. E. Rep. 53 (master not obliged to take more care of his servant than he would be expected, as a prudent man, to take of himself); *Knight v. Cooper*, 36 W. Va. 232; s. c. 14 S. E. Rep. 999; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703; s. c. 26 S. E. Rep. 444; *Promer v. Milwaukee &c. R. Co.*, 90 Wis. 215; s. c. 63 N. W. Rep. 90 (duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger); *Reilly v. Campbell*, 8 C. C. A. 438; s. c. 59 Fed. Rep. 990; *Nelson v. Allen Paper Car Wheel Co.*, 29 Fed. Rep. 840; *Mason &c. R. Co. v. Yockey*, 43 C. C.

A. 228; s. c. 103 Fed. Rep. 265; *The France*, 59 Fed. Rep. 479; s. c. 8 C. C. A. 185; *Ersline v. Chino Valley Beet-Sugar Co.*, 71 Fed. Rep. 270 (must exercise ordinary care in furnishing sufficient and safe materials, machinery, and other means for performance of the service, and must keep them in repair and order, and make inspections, tests, and examinations at the proper intervals); *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192 (relation of master and servant is not analogous to that of guardian and ward); *Hough v. Texas &c. R. Co.*, 100 U. S. 213; *Armour v. Hahn*, 111 U. S. 313; *Choc-taw &c. R. Co. v. Holloway*, 114 Fed. Rep. 458; s. c. 52 C. C. A. 260; *Goheen v. Texas &c. R. Co.*, 3 Cent. L. J. 382; s. c. *sub nom.* *Gohen v. Texas &c. R. Co.*, 10 Fed. Cas. 537; 1 Tex. L. J. 97; *Myers v. Sault St. Marie Pulp &c. Co.*, 3 Ont. L. Rep. 600 (employer bound by the common law to take all reasonable precautions for the safety of his workmen). In *Nashville &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27, the action was for the death of a railway fireman killed by the explosion of the boiler of the locomotive. The case was put to the jury on instructions which measure the duty of the company by the standard of *ordinary or reasonable* care; but the court, for the most part, in its opinion, cites carrier cases, without noticing that the courts generally impose a higher degree of care upon carriers toward their passengers than upon masters toward their servants. In *Allerton Packing Co. v. Egan*, 86 Ill. 253, it was ruled that a master cannot be held liable for an injury to one of his employes from the use of the machinery which he has provided, if he has used a high degree of care in its manufacture and selection. Whether ordinary prudence and care would excuse the master, the court did not deem it necessary to decide. As to the degree of care to be taken of a *hired slave*, see *Heathcock v. Pennington*, 11 Ired. (N. C.) 640. "To provide a safe place where the servant can work, would seem to be one of the most obvious duties of the em-

cumstances, to furnish structures and appliances which are reasonably safe, and to use such care to maintain them in that condition.³

§ 3768. **Rule of Reasonable Care Applied to the Safety of Machinery, Appliances, etc.**—"Reasonably Safe for the Purpose Intended."—It will not escape attention that this rule of reasonable care is generally formulated, in defining the obligation of the master to furnish his servants with safe machinery, tools, and appliances with which to work, by saying that he is not bound to furnish the safest and best appliances known or in use, yet he is bound to furnish such as are reasonably safe for the purposes intended.⁴

§ 3769. **Rule of Ordinary Care Applied to the Safety of Machinery, etc.**—Not Negligence to Act in Accordance with Ordinary Usage.—It must not escape attention that many of the courts, in defining the liability of the master with respect to the safety of the machinery, tools and appliances which he places in the hands of his servants, reduce the measure of his duty to the level of the care employed by employers generally in the same business or situation, by saying that he

ployer. A master is bound to exercise proper care in the materials and machinery given to a servant to work upon, or with, and if this duty is neglected, he is liable for injuries": *Whalen v. Centenary Church*, 62 Mo. 327, per Napton, J. In the application of this doctrine, it has been held that the mere fact that an injury to a railroad engineer would not have occurred if a *semaphore* had been put up in a different place, does not render the railroad company liable for the injury, where the semaphore had been placed by men of experience in railroading, had always before proved sufficient, and would have done so at the time of the accident but for the unaccountable failure of the air-brakes to work: *Whalen v. Michigan &c. R. Co.*, 114 Mich. 512; s. c. 4 Det. Leg. N. 653; 72 N. W. Rep. 323.

³*Galveston &c. R. Co. v. Gormley*, 91 Tex. 393; s. c. 27 S. W. Rep. 1051; *Nolan v. Montana &c. R. Co.*, 25 Mont. 107; s. c. 63 Pac. Rep. 926 (accident due to insufficiency of means used by fellow servants).

⁴Substantially to this effect see the following cases: *Arizona Lumber &c. Co. v. Mooney* (Ariz.), 42 Pac. Rep. 952 (no off. rep.); *Chi-*

cago &c. R. Co. v. Finnan, 84 Ill. App. 383; *Meyer v. Meyer*, 86 Ill. App. 417 (master bound to furnish appliances reasonably safe for a person in the exercise of ordinary care for his own safety); *Bender v. St. Louis &c. R. Co.*, 137 Mo. 240; s. c. 37 S. W. Rep. 132 (not bound to adopt any particular kind of machinery, but he is bound to procure that which is reasonably safe for the work designed, whatever kind he adopts); *Lincoln St. R. Co. v. Cox*, 48 Neb. 807; s. c. 4 Am. & Eng. R. Cas. (N. S.) 273; 67 N. W. Rep. 740 (master bound to use only such care as the circumstances reasonably demand, to see that appliances furnished to the servants are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition); *Spencer v. Worthington*, 60 N. Y. Supp. 873; s. c. 44 App. Div. (N. Y.) 496; *Fritz v. Salt Lake &c. Co.*, 18 Utah 493; s. c. 5 Am. Neg. Rep. 727; 56 Pac. Rep. 90; *Mulligan v. Montana &c. R. Co.*, 19 Mont. 135; s. c. 47 Pac. Rep. 795 (and is not responsible, if the same were good of their kind and in good repair, although other machinery or appliances of different construction would have been safer); *post*, § 3989, *et seq.*

can only be required to provide such machinery as is in common, ordinary use in the trade or business wherein he is engaged.⁵ The rule as to the measure of the employer's duty is also stated by saying that if, by the use of ordinary care in testing the strength of machinery placed in the hands of an employé with which to labor, its weakness and dangerous character for the work to be done could have been ascertained, the employer will be chargeable with notice of any defect in the machinery, and liable for any injury resulting to such employé from such defect.⁶ The master's negligence depends not only upon the dangerous character of the machine and his knowledge of it, but it must also appear that, with such knowledge, the master neglected to do what a person of ordinary care could and would have done under such circumstances.⁷ This ordinary care is deemed to be reasonable care for the reason that it is ordinary care. Thus, the test of negligence is said to be the ordinary usage of the business; and whatever is according to the general, usual, and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law.⁸ Upon this subject it has been said: "What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers and responsibilities, and then say, What would and should a reasonable and prudent man do in such an exigency? The word 'ordinary' has a popular sense, which would greatly relax the rigor of the rule. The law means by 'ordinary care' the care reasonable and prudent men use under like circumstances."⁹

⁵ *Post*, §§ 3991, 3993; *Flick v. Jackson*, 3 Pa. Super. Ct. 378; s. c. 39 W. N. C. (Pa.) 534; *Chicago & C. R. Co. v. DuBois*, 56 Ill. App. 181 (not negligent when machinery is as safe as ordinary care, prudence, and skill can make it).

⁶ *Gulf & C. R. Co. v. Stillphant*, 70 Tex. 623; s. c. 8 S. W. Rep. 673. Substantially to the same effect, see *O'Neil v. St. Louis & C. R. Co.*, 3 McCrary (U. S.) 423; *Palmer v. Denver & C. R. Co.*, 3 McCrary (U. S.) 635; *Boardman v. Brown*, 44 Hun (N. Y.) 336.

⁷ *Findlay Brew. Co. v. Bauer*, 50 Ohio St. 560; s. c. 30 Ohio L. J. 298; 48 Alb. L. J. 477; 35 N. E. Rep. 55.

⁸ *Flick v. Jackson*, 3 Pa. Super. Ct. 378; s. c. 39 W. N. C. (Pa.) 534.

⁹ *Cayzer v. Taylor*, 10 Gray (Mass.) 274, 280, per Thomas J. This, variously stated, is the doctrine of nearly all the cases: *Camp Point Man. Co. v. Ballou*, 71 Ill. 417; *Chicago & C. R. Co. v. Sweet*, 45 Ill. App. 197; *St. Louis & C. R. Co. v. Vairius*, 56 Ind. 511; *Cooper v. Iowa Cent. R. Co.*, 44 Ind. 134; *Seaver v. Boston & C. R. Co.*, 14 Gray (Mass.) 467; *Daubert v. Pickel*, 4 Mo. App. 590; *Connolly v. Poillon*, 41 Barb. (N. Y.) 366; s. c. aff'd, 41 N. Y. 619; *Nashville & C. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *International & C. R. Co. v. Doyle*, 49 Tex. 190; s. c. 5 Rep. 631; *Jones v. Yeager*, 2 Dill. (U. S.) 64.

§ 3770. **Explanations of this Doctrine.**—In this and other relations, except that of carriers of passengers, the judges, in describing the care which the law requires of one person to avoid injury to another, use the words “ordinary or reasonable care” in conjunction, as though ordinary care means the same thing as reasonable care. It is quite apparent that ordinary care,—that is to say, the care which men ordinarily take under particular circumstances,—may be a much lower standard of care than reasonable care,—that is to say, the care which men *ought* to take under the same circumstances. The standard of ordinary care is the care which men ordinarily apply under similar circumstances,—that is to say, the general custom of the business. Applied to the case where a workman is injured by machinery furnished him by his master, the rule of ordinary care directs the jury to consider, not whether the machinery was dangerous, but whether it was of the kind ordinarily used for similar work.¹⁰ Under this rule even the customary care of corporations becomes the standard where a corporation is the employer of the injured servant.¹¹ Thus individual and even incorporated employers are allowed by their general custom or habit of acting, or by their general neglect and inattention to their social duty, to make a rule of law for their own exoneration. As applied to the subject of unsafe railway car-couplings, the “ordinary care” of the railway companies was habitually and criminally negligent, they making no adequate exertions to protect the lives or limbs of their employes, and thousands were annually killed and maimed by this “ordinary care,” and the judges did nothing, or next to nothing, to arrest “that stream of slaughter ere it sank.” But it became necessary for the legislatures, State and National, to interpose and to establish a rule of “reasonable care” in the place of the rule of ordinary care prescribed by the railroad companies and judges.¹² But, even without compulsion from the legislatures, the judges are, of their own accord, breaking loose from this standard of ordinary care where it results in the condoning of negligence and in the doing of injustice. The standard is not the ordinary care of men or of corporations under like circumstances unless that care is also reasonable care. Applied to the subject of machinery and appliances furnished by the employer to

¹⁰ Washington Asphalt Block &c. Co. v. Mackey, 15 App. (D. C.) 410.

¹¹ Thus, it has been reasoned that the test of whether defendant railway company was guilty of a want of ordinary care in caring for its locomotive-boilers was whether its conduct came up to the customary care exercised by corporations *generally* in the same line of business,

so far as such practice was not obviously insufficient: Baxter v. Chicago &c. R. Co., 104 Wis. 307; s. c. 80 N. W. Rep. 644.

¹² Allusion is here especially made to the Act of Congress requiring all interstate railway companies to adopt, within a stated period after the passage of the act, railway car-couplings of a prescribed character.

his employé, the meaning is that the employer does not perform his duty to an employé by furnishing appliances or machinery such as are ordinarily used by persons in the same line of business, *unless they are reasonably safe and sound* or he has used due care to have them reasonably safe and sound.¹³ But there can be no valid objection to the use of the words "ordinary" or "ordinary care" in defining the care which ought to be exercised under given circumstances, where the definition is so framed as to make ordinary care in point of fact reasonable care,—as in the following definition: "Ordinary care simply implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as, under all the circumstances of the particular service, a careful, prudent man or officer of a corporation would exercise under the same or similar circumstances. And by the term 'same circumstances' is meant to include all the circumstances of time, place, and attendant conditions."¹⁴ The standard is not what men ordinarily do under like circumstances, but what reasonably prudent and careful men, having due regard for their social obligations,—that is to say, for the rights and safety of others,—do under like circumstances.¹⁵

§ 3771. **Further Explanations.**—A slight inconvenience or expense is no excuse to the master for failing to furnish safe machinery or appliances for the use of servants.¹⁶ Even where the element of skill or art comes in, as against a workman without special skill, the master is not bound to exercise exhaustive care or the highest degree of diligence.¹⁷ The test of liability is therefore said to be, not whether the master omitted to do something which he *could have done*, and which would have prevented the injury, but whether he did anything which,

¹³ Sawyer v. J. M. Arnold Shoe Co., 90 Me. 369; s. c. 38 Atl. Rep. 333.

¹⁴ Dowey v. Gemini Min. Co., 24 Utah 431; s. c. 68 Pac. Rep. 414. An instruction, in an action of this kind, that negligence on the part of the defendant is the want of such care and prudence as persons skilled in that business observe under similar circumstances, and that want of care on the part of plaintiff is the absence of such care as ordinary persons, skilled in the business the master was engaged in, ordinarily observe under similar circumstances, was held erroneous, on the ground that the conduct of a man of ordinary prudence under all circumstances of the case is the standard by which the law tests the question

of ordinary negligence: English v. Galveston &c. R. Co., 22 Tex. Civ. App. 3; s. c. 23 S. W. Rep. 57. It is believed that the decision is refined and untenable. It should seem that the law ought to demand on the part of a master prosecuting a dangerous business, such as the operation of a railway, the care of persons skilled in the business, and not the "ordinary care and prudence under all circumstances of the case,"—*e. g.*, that of a farmer, a mule-driver or a ditch-digger.

¹⁵ Vol. I, §§ 1, 2.

¹⁶ Trainor v. Philadelphia &c. R. Co., 137 Pa. St. 148.

¹⁷ Whart. on Neg., §§ 212, 213; Nolan v. Shickle, 3 Mo. App. 300, 307.

under the circumstances, in the exercise of ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would have taken.¹⁸

§ 3772. **This Care Varies According to the Danger to be Avoided.**—As in other situations,¹⁹ this ordinary or reasonable care, by whatever term it is designated, varies according to the danger to be avoided.²⁰ For example, the care required of the master, under this rule, in respect to machinery and appliances, is much less where the service required to be performed is on the surface of the earth, in open day, and its character and appliances are simple, than when the machinery used is dangerous and complicated, or the work is performed in a place or at a time when the surrounding dangers are not so obvious.²¹

¹⁸ *Cummings v. Collins*, 61 Mo. 520. *Contra*, *Lalor v. Chicago & C. R. Co.*, 52 Ill. 401. Tested by this rule, it has been held, with obvious propriety, that a *declaration* in an action by a railway engineer for injuries sustained in consequence of his engine running off the track, which merely alleges that the engine "ran off the track in spite of the reasonable care and diligence of the plaintiff, and which running off was in consequence of the imperfection and insufficient connection of the track where the said track crossed other tracks, the defendants being bound to keep said track in good running condition," is bad on demurrer, because it fails to allege negligence on the part of the defendant, and asserts an absolute duty to keep the track in good repair: *Gartland v. Toledo & C. R. Co.*, 67 Ill. 498; *Chicago & C. R. Co. v. Harney*, 28 Ind. 28; *Ohio & C. R. Co. v. Hammersley*, 28 Ind. 371. See also, *King v. Boston & C. R. Co.*, 9 Cush. (Mass.) 112; *Brown v. Maxwell*, 6 Hill (N. Y.) 592; *Murphy v. Smith*, 19 C. B. (N. S.) 360; s. c. 12 L. T. (N. S.) 605; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611. And, in general, an *instruction* which assumes a universal rule that it is always the duty of an employer to furnish suitable appliances, is ground for reversing a judgment: *Robinson v. George F. Blake Man. Co.*, 143 Mass. 528.

¹⁹ Vol. I, §§ 25, 26.

²⁰ *Boyd v. Blumenthal*, 3 Pen.

(Del.) 564; s. c. 52 Atl. Rep. 330 (the care required being in proportion to the dangerous character of the employment); *Huhn v. Missouri & C. R. Co.*, 92 Mo. App. 440; s. c. 10 West. Rep. 405; 4 S. W. Rep. 937 (as the danger increases, the care should be increased); *Harroun v. Brush Electric Light Co.*, 12 App. Div. (N. Y.) 126; s. c. 42 N. Y. Supp. 716; appeal dismissed, 152 N. Y. 212; s. c. 46 N. E. Rep. 291 (must be proportioned to what may properly be expected of him under the circumstances, and increase in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliances); *Galveston & C. R. Co. v. Gormley*, 91 Tex. 393; s. c. 9 Am. & Eng. R. Cas. (N. S.) 468; 43 S. W. Rep. 877; rev'g s. c. (Tex. Civ. App.) 42 S. W. Rep. 314 (no off. rep.) (refinement that the *degree* of care does not vary with the increase or diminution of the danger, but that the *quantum* of diligence to be used differs under different circumstances); *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah 468; s. c. 11 Pac. Rep. 612; *Gowen v. Harley*, 56 Fed. Rep. 973; s. c. 56 Am. & Eng. R. Cas. 238; 6 C. C. A. 190; *Texas & C. R. Co. v. Barrett*, 67 Fed. Rep. 214; s. c. 14 C. C. A. 373 (a care and skill in proportion to the consequences liable to follow from the want of such care and skill).

²¹ *Gowen v. Harley*, 56 Fed. Rep. 973; s. c. 56 Am. & Eng. R. Cas. 238; 6 C. C. A. 190.

§ 3773. **Master Not Bound to Exercise a High and Exhaustive Degree of Care.**—The definition of the degree of care which a master is bound to exercise to the end of promoting the safety of his servants, as reasonable or ordinary care,²² necessarily excludes the conclusion that he is liable for failing to exercise a high and exhaustive degree of care, as a carrier of passengers.²³

§ 3774. **Not Liable for Accidents Not Reasonably to be Anticipated.**—In applying this doctrine of reasonable care it is well held that a master is not liable for injuries to his servant resulting from an accident of such a character that reasonable men, proceeding with reasonable caution, would not ordinarily have foreseen and anticipated it,²⁴—such as an injury happening under very exceptional circumstances, although the proper precautionary measures, if taken, would have prevented it.²⁵ It is not at all necessary to the liability of the master that the *particular* injury which did happen could not have been foreseen; it is enough that the machine was negligently allowed to become defective and out of order, so that mischief was likely to happen to the servant from its ordinary use.²⁶

²² *Ante*, §§ 3767, 3772.

²³ *Wabash R. Co. v. Farrell*, 79 Ill. App. 508; s. c. 31 Chic. Leg. N. 199; *Hart & Co. Man. Co. v. Tima*, 85 Ill. App. 310 (the law does not require him to go out and find a machine as safe as can be procured); *Allerton Packing Co. v. Egan*, 86 Ill. 253 (the conclusion is quite easy that where an employer has exercised a very high degree of care both in the selection of the materials and in the construction of the machinery, he will not be liable for an injury to his servant resulting from a defect therein); *Jungnitsch v. Michigan & Co. Iron Co.*, 105 Mich. 270; s. c. 63 N. W. Rep. 296; 2 Det. Leg. N. 107 (duty of reasonable care does not extend to such care as will reduce the liability of accident to the minimum); *Stiller v. Bohn Man. Co.*, 80 Minn. 1; s. c. 82 N. W. Rep. 981; *Kent v. Yazoo & Co. R. Co.*, 77 Miss. 494; s. c. 27 South. Rep. 620; *National Malleable Castings Co. v. Luscomb*, 19 Ohio C. C. 673; *Texas & Co. R. Co. v. Bingle*, 91 Tex. 287; aff'g s. c. 16 Tex. Civ. App. 653; 9 Tex. Civ. App. 322; 29 S. W. Rep. 674 (master's duty is to use such care as persons of ordinary prudence would employ in such matters, to see that the machinery and appliances are reason-

ably safe; but he is not required to do everything that can reasonably be done for the safety of his employés); *Norfolk & Co. R. Co. v. Phillips*, 100 Va. 362; s. c. 41 S. E. Rep. 726; *Cleveland & Co. R. Co. v. McClinck*, 91 Fed. Rep. 223; s. c. 33 C. C. A. 466; 63 U. S. App. 550.

²⁴ *Little Rock & Co. R. Co. v. Duffy*, 35 Ark. 602 (section-man lost eye by bursting of iron maul with which he was driving spikes); *Sjogren v. Hall*, 53 Mich. 274 (not liable for omitting to guard against accidents that are not likely to happen); *Del Sejnore v. Hallinan*, 153 N. Y. 274; s. c. 27 N. E. Rep. 308 (not liable for injuries to servant resulting from an accident of such character that reasonable men, proceeding with reasonable caution, would not ordinarily have foreseen or anticipated it).

²⁵ *Hysell v. Swift & Co.*, 78 Mo. App. 39; s. c. 2 Mo. App. Repr. 124 (bacteria germinated by decaying animal matter in a packing-house, floating in the atmosphere, lodged in servant's eye and destroyed it—no recovery); *Beasley v. Linehan Transfer Co.*, 148 Mo. 413; s. c. 50 S. W. Rep. 87.

²⁶ *Illinois & Co. R. Co. v. Creighton*, 63 Ill. App. 165; s. c. on former ap-

§ 3775. **Rule Excludes Liability for Injuries Proceeding from the Act of God, or from Inevitable or Inscrutable Accident.**—Where an employé receives a personal injury as the result of a mere accident, or an inevitable accident or an inscrutable accident, or what is deemed “the act of God,” something which is so far outside the range of ordinary human experience that the duty of exercising reasonable care does not require his employer to anticipate it or provide against it, and no fault of the employer mingles with the accident,—the servant cannot recover damages.²⁷ Within the catalogue of “acts of God” has been placed the fall of a railroad-bridge caused by a cloudburst, in which case the railroad company could not be held liable unless its negligence, to an extent amounting to a want of ordinary care, contributed to the disaster.²⁸ More doubtfully, it has been held that a result so unusual and extraordinary as an injury from the heat of an engine-shed of a manufacturing company, from the lack of ventilation in such shed, when constructed in the usual manner, is one which the employer is not bound to anticipate and provide against, and for which he is consequently not liable.²⁹ But where the night was dark

peal, 53 Ill. App. 45 (locomotive-engineer who injured himself by the strain necessary to reverse the lever of a defective engine quickly in order to prevent a collision).

²⁷ *Rodgers v. Central Pac. R. Co.*, 67 Cal. 607; *McNally v. Savannah &c. R. Co.*, 86 Ga. 262; s. c. 12 S. E. Rep. 351; *Stewart v. Seaboard &c. R. Co.*, 115 Ga. 624; s. c. 41 S. E. Rep. 981; *Western Stone Co. v. Earnshaw*, 98 Ill. App. 538; s. c. aff'd *sub nom.* *Earnshaw v. Western Stone Co.*, 200 Ill. 220; 65 N. E. Rep. 661; *Illinois Cent. R. Co. v. Schumann*, 101 Ill. App. 668 (fireman of stationary boilers injured by an explosion or gush of flame while firing boilers with refuse from mill consisting of sawdust and shavings, which had been used twice before without accident—the usual gush of flame from using such fuel having the unusual result of setting fire to the dust outside of the boiler); *Kelley v. Forty-second St. &c. R. Co.*, 58 Hun (N. Y.) 93; s. c. 33 N. Y. St. Rep. 816; 11 N. Y. Supp. 344; *Hickey v. Taaffe*, 105 N. Y. 26; s. c. 7 Cent. Rep. 72; 12 N. E. Rep. 286 (plaintiff caught her finger in the button-hole of a collar which she was feeding through an ironing-machine, whereby her hand was drawn into the rollers and in-

jured, the rollers being unguarded); *McPherson v. Pacific Bridge Co.*, 20 Or. 486; s. c. 26 Pac. Rep. 560; *Grant v. Union Pac. R. Co.*, 45 Fed. Rep. 673.

²⁸ *Rodgers v. Central Pac. R. Co.*, 67 Cal. 607 (error to instruct that if act of defendant coöperated and commingled to any extent, however slight, defendant would be liable). It is worthy of consideration to what extent a cloudburst can be regarded as an act of God,—that is to say, an occurrence not to be anticipated and hence provided against,—in a country where cloudbursts are common phenomena at particular seasons of the year.

²⁹ *Western Stone Co. v. Earnshaw*, 98 Ill. App. 538; s. c. aff'd *sub nom.* *Earnshaw v. Western Stone Co.*, 200 Ill. 220; 65 N. E. Rep. 661. It would seem that the ample ventilation of an engine-shed, so as to reduce the heat therein, and prevent injuries to employés required to work therein, from excessive heat, would be an obvious dictation of prudence, humanity and decency. The servant of a railroad company who is injured by a rare and peculiar accident, such as being struck in the eye by a flake of iron knocked from a swage being worked with by other servants and shown

and foggy, but by the use of reasonable care it was possible to run a train without accident, the fact that a collision occurred because of the

to have been in average condition, cannot recover damages from the company for such injury, his place of labor being elsewhere than at the place where the swage was located, but his call there being to procure a bolt needed in his department: *McNally v. Savannah &c. R. Co.*, 86 Ga. 262; s. c. 12 S. E. Rep. 351 ("swage,"—a tool for shaping wrought iron by hammering). Where the evidence showed that while plaintiff was working near the bottom of a bucket-and-chain elevator, with a lighted lantern between his feet, shovelling a ground product of bone, rock and slaughterhouse refuse away from the foot of the elevator, which had become clogged by it, defendant's superintendent started the elevator, which caused a current of air to carry the dust from such product to the flame of plaintiff's lantern, causing an explosion, which injured plaintiff, he cannot recover where it does not also appear that such superintendent knew, or ought to have known, that the dust was inflammable, or that it was a matter of common knowledge that it was inflammable: *O'Reilly v. Bowker Fertilizer Co.*, 174 Mass. 202; s. c. 54 N. E. Rep. 534; 6 Am. Neg. Rep. 555. Where plaintiff was injured by the breaking of machinery used in hoisting an iron casting, and the break was a clean break, showing no indication of a previous weakening at the point where it occurred, and the same machinery had been used by defendant for the same purpose in lifting weights equal to the one which was being raised when it broke, and the machinery was of the kind generally used for that purpose, the accident was one which could not, with ordinary care, have been guarded against, and was a hazard incident to the business, which plaintiff therefore assumed: *Cunningham v. Journal Co.*, 95 Mo. App. 47; s. c. 68 S. W. Rep. 592. The plaintiff was engaged in removing an engine-apron on the bumper of a locomotive in a machine-shop, and was some two feet from the track; the bumper extending that distance beyond it. A

piece of iron, one inch thick, three inches wide, and 12 or 14 inches long, running crosswise underneath the bumper, was fastened to it by a bolt and nut. Before plaintiff began work, another workman had removed the nut, but had not taken off the piece of iron, which fell between the rails while plaintiff was working, and, rebounding from the track, in some unaccountable way, struck him. It was held that the company was not liable, on the ground of negligence in the removal of the nut without also removing the piece of iron, as the injury to plaintiff was purely accidental, the likelihood of injury from the act to a man in the position the plaintiff was in being remote: *Raiford v. Wilmington &c. R. Co.*, 130 N. C. 597; s. c. 41 S. E. Rep. 806. Plaintiff was in charge of a lever-car on defendant's railroad, and, while travelling thereon, came up behind a velocipede-car travelling at a slightly slower rate; and the coat of the employé on the velocipede fell in the gearing, derailing the velocipede, and plaintiff's car collided with it, injuring the plaintiff. It was held that the evidence was insufficient to sustain a judgment for plaintiff, no negligence being shown: *Bingham v. Carolina Cent. R. Co.*, 130 N. C. 623; s. c. 41 S. E. Rep. 807. Where a force-pump used in whitewashing the defendant's premises became clogged up, and the plaintiff was directed to remove a cap from the pump and clean it out, and upon loosening one of the screws holding the cap in place the whitewash was forced by the compressed air into his eyes, blinding him, it was held that he could not recover damages from the defendant, his employer, for the injury, it appearing that the pump had been bought of a reputable manufacturer, who had subjected it to the ordinary tests for defects without discovering any, and there being nothing to indicate that the removal of the cap would be attended with any danger: *Kelley v. Forty-second St. &c. R. Co.*, 58 Hun (N. Y.) 93; s. c. 33 N. Y. St. Rep. 816; 11 N. Y. Supp. 344. The

fog, whereby an employé was injured, did not show that such injury was caused by the "act of God."³⁰

§ 3776. **Application of this Rule of Reasonable Care in the Case of Railway Service.**—There are expressions to the effect that a *railroad company* is bound to exercise a *high degree of care* in furnishing and keeping in repair machinery which its servants are required to use;³¹ yet, as we have seen, the standard which is generally exacted by the judicial decisions is that which passes under the name of "ordinary care," which is the care that an *ordinarily prudent man* would exercise under like circumstances.³² And while a railway company is bound to exercise this measure of care in the protection of employés against the dangers of their employment,—e. g., against the destruction of a railway-bridge,—it is not bound, as it is in favor of a passenger,³³ to exercise the utmost human foresight or skill to guard against possible accidents;³⁴ nor is it bound to exercise an exhaustive care in the inspection of the machinery which it commits to the use of its serv-

slipping of a carpenter directing laborers engaged in setting a post, whereby he loses his hold on the post while it is being lowered into a hole, in consequence of which the post falls upon one of such laborers standing in the hole and injures him, is not negligence which will render the employer liable, where it is due to the character of the ground on which he is obliged to stand, and all the precautions necessary to the seeming exigencies of the situation are observed. The injury is clearly accidental: *Hunter v. Kansas City & C. R. Co.*, 85 Fed. Rep. 379; s. c. 54 U. S. App. 653; 29 C. C. A. 206.

³⁰ *Southern Pac. Co. v. Schoer*, 114 Fed. Rep. 466; s. c. 52 C. C. A. 268; 57 L. R. A. 707. Where a railway employé was injured by a flying fragment from a wrecked car which he was assisting to remove from the track, the injury resulting from the negligent manner in which the derrick-chain was fastened to the car, the fact that such employé would not have been injured had he stood still, but that, in running to escape danger, he reached the point where the fragment struck him, did not release the company from liability for its negligence on the ground that the injury resulted from a fortuitous accident: *Reed*

v. Missouri & C. R. Co., 94 Mo. App. 371; s. c. 68 S. W. Rep. 364.

³¹ *International & C. R. Co. v. Williams*, 82 Tex. 342; s. c. 18 S. W. Rep. 700.

³² *Ante*, § 3767, *et seq.*; *International & C. R. Co. v. Bell*, 75 Tex. 50; s. c. 12 S. W. Rep. 321; *Nelson v. Allen Paper Car-Wheel Co.*, 29 Fed. Rep. 840; *Texas & C. R. Co. v. Hoffman*, 83 Tex. 286; s. c. 18 S. W. Rep. 741; *Eddy v. Adams (Tex.)*, 18 S. W. Rep. 490 (no off. rep.); *Burlington & C. R. Co. v. Liehe*, 17 Colo. 280; s. c. 29 Pac. Rep. 175.

³³ Vol. III, § 2720, *et seq.*

³⁴ *Galveston & C. R. Co. v. Daniels*, 1 Tex. Civ. App. 695; s. c. 20 S. W. Rep. 955. Substantially to the same effect, see *Cleveland & C. R. Co. v. Selsor*, 55 Ill. App. 685 (not bound to do all that human care, vigilance, and foresight can do consistently with the practical operation of the road); *Texas & C. R. Co. v. Lyons (Tex. Civ. App.)*, 3 Am. & Eng. R. Cas. (N. S.) 316; 34 S. W. Rep. 362 (no off. rep.); *Houston & C. R. Co. v. Hartnett (Tex. Civ. App.)*, 48 S. W. Rep. 773 (no off. rep.) (railroad employés in charge of a train are not required to use "all reasonable means in their power" to prevent injury to another employé).

ants, which is incompatible with the proper conduct of its business.³⁵ Therefore, an instruction to a jury that the company should protect its servants from injuries by reason of latent defects, so far as "human care and foresight" can go, is erroneous;³⁶ and judicial authority has even condemned an instruction that it is the duty of an employer to "furnish reasonably safe machinery,"³⁷ and to keep it "in a safe condition."³⁸ It follows, of course, that where the work and the place are not dangerous, and the materials are those in common use, there is no liability on the part of the master as for a breach of the duty of protection.³⁹

§ 3777. **Custom, Adoption of, How Far Excuses Master.**⁴⁰—That a railroad company adopts the custom of other well-managed roads in the construction of a switch, will not excuse it from liability to an employé for injuries sustained therefrom, if the custom is of itself negligent and disregards the employé's safety.⁴¹

§ 3778. **Doctrine of this Chapter Restated.**—From all the foregoing it will appear that the theoretical degree of care which the law exacts of a master to the end of promoting the safety of his servant is the same in every department of his service, and is measured by the expression "ordinary or reasonable care." For example, the fact that the master is a railroad company and is operating a machine-shop in which its servant is killed, does not put upon it any higher degree of care than that which is incumbent upon other machine-owners toward their employés engaged in shop-work; nor is any different rule to be applied, when sued in its corporate name for damages given by the law for negligence resulting in death.⁴²

³⁵ Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301; s. c. 13 Atl. Rep. 286; 21 W. N. C. (Pa.) 166. Error to instruct a jury that a master is bound to exercise "the utmost care and diligence" in providing machinery to be used by his employés,—the measure of his diligence being ordinary care: Daubert v. Pickel, 4 Mo. App. 590.

³⁶ Missouri Pac. R. Co. v. Lyde, 57 Tex. 505.

³⁷ Chicago &c. R. Co. v. Merckes, 36 Ill. App. 195. This instruction was perfectly accurate: *Ante*, § 3768.

³⁸ Peoria &c. R. Co. v. John, 43 Ill. App. 83.

³⁹ Melchert v. Robert Smith Brewing Co., 140 Pa. St. 448; s. c. 27 W. N. C. (Pa.) 477; 48 Phila. Leg. Int. 243; 21 Atl. Rep. 755.

⁴⁰ See *ante*, §§ 3769, 3770; *post*, § 3991, *et seq.*

⁴¹ Austin v. Chicago &c. R. Co., 93 Iowa 236; s. c. 61 N. W. Rep. 849. That the fact of the adoption of a negligent practice by a railroad company is no justification in an action for an injury to one of its employés,—see Hosc v. Chicago &c. R. Co., 75 Iowa 683; s. c. 37 N. W. Rep. 963.

⁴² East Tennessee &c. R. Co. v. Aiken, 89 Tenn. 245; s. c. 14 S. W. Rep. 1082.

ARTICLE III. DUTY OF INSPECTING AND FINDING OUT.

SECTION	SECTION
3781. Obligation of master to keep machinery, etc., in safe repair.	3794. Master chargeable with knowledge of what a reasonable inspection would disclose.
3782. Effect of knowledge or notice, or want of knowledge or notice, on the part of the master, of the danger or defect.	3795. Effect of want of such knowledge on the part of the master.
3783. Degree of care, skill and diligence required in performing this duty of inspection.	3796. Notice or knowledge that the appliance has got out of repair.
3784. Duty to apply what tests in making inspections.	3797. What will be notice to the master of such a defect.
3785. Master not liable for hidden defects not discoverable by the exercise of ordinary care.	3798. Constructive notice of the defect from lapse of time.
3786. Master under a continuing duty of inspection.	3799. Circumstances under which knowledge of one defect will impute knowledge of another defect.
3787. Duty to inspect after hearing noises which indicate danger.	3800. Manner of proving such notice or knowledge on the part of the master.
3788. Duty to inspect after making repairs.	3801. Correlative duty of master and servant with respect to knowing and finding out.
3789. Master liable for improper inspection although there has been an official inspection.	3802. Circumstances under which master exonerated from liability for failure to make inspections.
3790. Duty of inspection extends to supervision of conduct of fellow servants.	3803. Burden of proof in actions predicated upon failure to make proper inspections.
3791. This duty of inspection an absolute and unalienable duty.	3803a. Evidentiary effect of long use without accident.
3792. Master cannot absolve himself from this duty by a rule devolving it upon his servants generally.	3803b. Evidence tending to show an insufficient inspection.
3793. Nor by employing competent inspectors, unless their inspection was competent.	3803c. Other evidence speaking upon the question of the adequacy of inspection.

§ 3781. **Obligation of Master to Keep Machinery, etc., in Safe Repair.**—The duty rests upon the master of making, from time to time, such reasonable *repairs* in his machinery, appliances, premises, etc., as to enable his servants to continue to use them safely by the exercise of reasonable care on their part, regard being had to the in-

herent dangers attending the service. Judicial authority is substantially unanimous in affirming this duty on the part of the master;¹

¹ *Post*, §§ 3873, 3995; *Jager v. California Bridge Co.*, 104 Cal. 542; s. c. 38 Pac. Rep. 413 (the same duty devolves upon the master in subsequently *maintaining* an appliance in a safe and suitable condition as rested upon him when it was originally furnished); *McBeath v. Rawle*, 192 Ill. 626; aff'g s. c. 93 Ill. App. 212; *Indianapolis & C. R. Co. v. Watson*, 114 Ind. 20; s. c. 12 West. Rep. 285; 14 N. E. Rep. 721; *Romona Oolitic Stone Co. v. Phillips*, 11 Ind. App. 118; s. c. 39 N. E. Rep. 96 (master had notice for several weeks that a machine had become dangerous from long-continued use, and failed without excuse to make the necessary repairs—liable to servant for accident); *Atchison & C. R. Co. v. McKee*, 37 Kan. 592; s. c. 15 Pac. Rep. 484; *Atchison & C. R. Co. v. Napole*, 55 Kan. 401; s. c. 40 Pac. Rep. 669; *Budge v. Morgan's Louisiana & C. R. & Co.*, 108 La. 349; s. c. 32 South. Rep. 535 (duty of a master to use due care to see that the appliances for the servants are kept in repair must be continuously performed by him, or by one selected by him for that purpose, for whose negligence he is responsible); *Rice v. King Philip Mills*, 144 Mass. 229; s. c. 4 N. Eng. Rep. 59; 11 N. E. Rep. 101; *McDonald v. Chicago & C. R. Co.*, 41 Minn. 439; s. c. 43 N. W. Rep. 380; *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434; *Muirhead v. Hannibal & C. R. Co.*, 19 Mo. App. 634 (bridge-repairer injured by defective derrick on repair-car); *Warner v. Chicago & C. R. Co.*, 62 Mo. App. 184 (master required to use ordinary care to keep the appliances furnished to the servant in repair, whether such appliances are simple or complex); *Comben v. Belleville Stone Co.*, 59 N. J. L. 226; s. c. 36 Atl. Rep. 473 (must exercise reasonable care to *keep* the place safe); *Cole v. Warren Man. Co.*, 63 N. J. L. 626; s. c. 44 Atl. Rep. 647 (includes the duty of making inspection and tests at proper intervals); *Cullen v. National Sheet Roofing Co.*, 46 Hun (N. Y.) 562; s. c. 12 N. Y. St. Rep. 508; *Thorn v. New York City Ice Co.*, 46 Hun

(N. Y.) 497; s. c. 11 N. Y. St. Rep. 845; *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65; s. c. 65 S. W. Rep. 693 (but the servant was held to have assumed the risk, which was obvious); *Goodman v. Richmond & C. R. Co.*, 81 Va. 576; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455; s. c. 43 Pac. Rep. 370 (decayed condition of a plank over which employes were obliged to wheel heavy loads, which existed when a previous break was remedied by the master by inserting a new piece); *Nelson v. Allen Paper Car Wheel Co.*, 29 Fed. Rep. 840. The doctrine of the text is sometimes stated with the qualification that, if the master knew, or ought to have known, that a machine in use was out of repair and dangerous, it was his duty to see that it was put in proper repair, or to *warn those using it of the danger*, if they were ignorant of it: *Rice v. King Philip Mills*, 144 Mass. 229; s. c. 4 N. Eng. Rep. 59; 11 N. E. Rep. 101, and authorities cited. The same court has stated the doctrine by saying that it is the duty of a railway company to use reasonable care and diligence to keep its tracks in a safe condition for its employes to work upon; and so far as the work of keeping its track in repair is left to its servants, it is its duty to exercise reasonable supervision to see that the work is properly done: *Babcock v. Old Colony R. Co.*, 150 Mass. 467; s. c. 23 N. E. Rep. 325. See *post*, § 3788. It is clear that after the attention of the employer has been called to a dangerous defect in a tool or appliance which he requires his employé to use, and a reasonable time has expired within which he ought to have remedied the defect, the continued use of the tool will be imputed to him as culpable negligence: *Atchison & C. R. Co. v. Sadler*, 38 Kan. 128; s. c. 16 Pac. Rep. 46; *Indianapolis & C. R. Co. v. Watson*, 114 Ind. 20; s. c. 12 West. Rep. 285; 14 N. E. Rep. 721. In all these cases, the nature of the defect, the length of time it has existed, and the means taken to remedy it, are important *evidentiary facts* in de-

but always with the qualification that it is not an absolute duty in the sense which renders the master an *insurer* of its proper performance, but that, while he cannot delegate the duty to others so as to escape liability for its non-performance, he discharges it when he exercises that reasonable care already spoken of,² to the end before stated, as in respect of the duty of providing safe machinery, etc., in the first instance.³ This duty is commonly stated by saying that it is incumbent on the master in the first instance to exercise reasonable care to provide a safe place or safe appliances for his servant to perform his work, and thereafter to exercise reasonable care to keep them in a safe condition.⁴ So, in respect of the duty of keeping it in safe repair, the *degree of care*, attention and skill is a varying quantity, having regard to the risks and dangers attending the use of the instrument which the master has furnished the servant,—increasing as those dangers increase, and diminishing as they diminish.⁵ On a principle already stated,⁶ if the servant is injured because of a defect in an appliance which the master should have repaired, the master is not relieved from liability because a proximate cause of the accident was the act of a third person, provided it would not have happened but for the failure to repair.⁷ Finally, in dealing with this subject care must be taken to designate between defects arising from a want of reparation which are of a permanent character, and temporary defects or dangers which arise in the progress of the work which are a part of its details and its risks.⁸ If a machine is known to be dangerously defect-

termining what the master ought to have reasonably known and done: *Rice v. King Philip Mills*, 144 Mass. 229; s. c. 4 N. Eng. Rep. 59; 11 N. E. Rep. 101.

² *Ante*, § 3767, *et seq.*

³ *Chicago & C. R. Co. v. Blevins*, 46 Kan. 370; s. c. 26 Pac. Rep. 687; *Fuchs v. Wm. H. Sweeny Man. Co.*, 58 Hun (N. Y.) 611 (*mem.*); s. c. 34 N. Y. St. Rep. 925; 12 N. Y. Supp. 870.

⁴ *Jager v. California Bridge Co.*, 104 Cal. 542; s. c. 38 Pac. Rep. 413 (same duty devolves upon the master in subsequently *maintaining* an appliance in a safe and suitable condition as rested upon him when it was originally furnished); *Clark County Cement Co. v. Wright*, 16 Ind. App. 630; s. c. 45 N. E. Rep. 817; *Atchison & C. R. Co. v. Napole*, 55 Kan. 401; s. c. 40 Pac. Rep. 669; *Budge v. Morgan's Louisiana & C. R. Co.*, 108 La. 349; s. c. 32 South. Rep. 535; *Comben v. Belleville Stone Co.*, 59 N. J. L. 226; s. c. 36 Atl. Rep.

473 (must exercise reasonable care to *keep* the place safe); *Galveston & C. R. Co. v. Norris* (Tex. Civ. App.), 29 S. W. Rep. 950 (no off. rep.); *Galveston & C. R. Co. v. Crawford*, 9 Tex. Civ. App. 245; s. c. 29 S. W. Rep. 958; *Choctaw & C. R. Co. v. Holloway*, 114 Fed. Rep. 458; s. c. 52 C. C. A. 260.

⁵ Vol. I, § 25; *ante*, § 3772; *New York & C. R. Co. v. Rogers*, 11 Colo. 6; s. c. 7 Am. St. Rep. 198; 16 Pac. Rep. 719; *Hannibal & C. R. Co. v. Kanaley*, 39 Kan. 1; s. c. 17 Pac. Rep. 324; *Clairain v. Western U. Tel. Co.*, 40 La. An. 178; s. c. 3 South. Rep. 625; *Anderson v. Minnesota & C. R. Co.*, 39 Minn. 523; s. c. 41 N. W. Rep. 104; *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340; s. c. 9 S. W. Rep. 262.

⁶ Vol. I, § 75.

⁷ *Larkin v. Washington Mills Co.*, 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6 (defective elevator).

⁸ *Post*, §§ 3876, 3877. The case of *Musick v. Jacob Dold Packing Co.*,

ive, and if a futile effort is made to repair, after which it is left to itself, and in consequence of the defect an accident happens to a servant, the master will be liable though he has no notice that the attempt to repair the machine was ineffectual.⁹

§ 3782. **Effect of Knowledge or Notice, or Want of Knowledge or Notice, on the Part of the Master of the Danger or Defect.**¹⁰—It is a general principle of law, that every person of sane mind, and *sui juris*, is bound to know the natural and probable consequences of his own acts or neglects. This principle applies to the cases we are considering. The master is chargeable with knowledge of the probable consequences of acts which he directs, or of which he is cognizant.¹¹ Applying this principle to the duty of the master, hereafter considered, to see that the place in which he requires his servant to work is reasonably safe for the purposes intended, it is held that it is the duty of a master to exercise reasonable diligence to see that the place at which he puts his servant to work is reasonably safe, and he cannot excuse or exculpate himself by showing that he did not notice any dangers, or that none were obvious to him.¹² Here, as in other cases, a possession of the *means* of knowledge is equivalent, for the purpose of charging the master with liability, to *actual* knowledge. In other words, if the master, by the exercise of ordinary or reasonable care, might have known of a dangerous defect in an appliance or place, provided for the use of his servant in carrying on the work assigned to him, in time to have repaired it, so as to prevent the injury which happened to his servant in consequence of it, he will be liable for the injury; and actual notice of the defect in such a case is not necessary.¹³ It is merely changing the form of expression to say that *constructive notice* of a defect in an apparatus, whereby it breaks and injures an

58 Mo. App. 322, seems to overlook this distinction in so far as it holds that an employer does not fulfill its duty to its employés by providing a cover for a hot-water tank under the floor which will render it reasonably safe when in place, but that he must use reasonable care to keep it in place. Applying the principle of the text, it has been held that where the danger arises from the details of the work or the negligence of a fellow servant, the master will not be chargeable for an accident proceeding from it until it has existed long enough to charge him with the obligation of noticing and repairing it: *Page v. Naughton*, 63 App. Div. (N. Y.) 377; s. c. 71 N. Y. Supp.

503; *Pavey v. St. Louis & C. R. Co.*, 85 Mo. App. 218.

⁹ *Pioneer Coöperage Co. v. Romanowicz*, 85 Ill. App. 407; s. c. aff'd, 186 Ill. 9; 57 N. E. Rep. 864; *post*, § 3788.

¹⁰ See also, *post*, §§ 3794, 3795.

¹¹ *Ryan v. Fowler*, 24 N. Y. 410.

¹² *Western Stone Co. v. Muscial*, 96 Ill. App. 288; s. c. aff'd, 196 Ill. 382; 63 N. E. Rep. 664.

¹³ *Bullmaster v. St. Joseph*, 70 Mo. App. 60 (fireman in municipal electric-light plant slipped from defective and unsafe wall over which he was required to pass to attend to a leaky valve, he having been employed only for ten days, and being on the wall for the first time—recovery).

employé, is enough to charge the employer with liability.¹⁴ To draw an illustration from *railway service*, and from the rule that the master is under an affirmative duty of knowing the condition of his machinery, it follows that if, at the time of its construction, a *railway-car* is wanting in certain appliances that are common to the whole class of cars to which it belongs, and continues in this condition when put and used upon the road, it will not be necessary to show further notice or knowledge of its condition on the part of the company or its agents. If, however, it was at one time safe, and some portions of it, reasonably necessary for the safety of the employés, were subsequently removed, by accident or otherwise, then, in order to charge the company, it must be shown, either that it had notice of that fact, or ought to have had such notice by the use of ordinary care.¹⁵

§ 3783. Degree of Care, Skill and Diligence Required in Performing this Duty of Inspection.—The degree of care, skill and diligence which the law demands of the master in performing this duty of inspection, is the care, skill and diligence which is described in legal phraseology by the use of the adjectives “reasonable” or “ordinary.” This care is not necessarily the care which is ordinarily used by other proprietors engaged in like business,¹⁶ but is such care as reasonably ought to be used.¹⁷ Stated differently, the duty of a master to guard his servant from unreasonable and unnecessary risks extends not only to those that are known to the master, but also to such as a reasonably prudent man in the exercise of ordinary diligence would know or dis-

¹⁴ *Newton v. Vulcan Iron Works*, 199 Pa. St. 646; s. c. 49 Atl. Rep. 339 (evidence, though contradictory, tended to show that a chain which broke was defective, and that an inspection would have shown the defect, but that none had been made for three years); *post*, § 3798.

¹⁵ *Greenleaf v. Illinois & C. R. Co.*, 29 Iowa 14, 46.

¹⁶ *Ante*, § 3770.

¹⁷ *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338; *Linton Coal & C. Co. v. Persons*, 11 Ind. App. 264; s. c. 39 N. E. Rep. 214 (knowledge of defect which might have been acquired by reasonable diligence, imputed to the master); *Atchison & C. R. Co. v. Kingscott*, 65 Kan. 131; s. c. 69 Pac. Rep. 184 (evidence that the care used in inspection of appliances is that *usually exercised*, is not conclusive on the proposition

that due care has been used); *Ches-son v. John L. Roper Lumber Co.*, 118 N. C. 59; s. c. 23 S. E. Rep. 925 (bound to use ordinary care and skill to discover and repair such defects as are calculated to imperil the servant in his employment); *International & C. R. Co. v. Hawes* (Tex. Civ. App.), 54 S. W. Rep. 325 (no off. rep.) (in the case of a railroad company, such care as persons of ordinary prudence would use in like circumstances, and not such care as is ordinarily used by railroad companies in making inspections); *International & C. R. Co. v. Elkins* (Tex. Civ. App.), 54 S. W. Rep. 931 (no off. rep.) (failure to use ordinary care in discovering that appliances had become unsafe and in repairing them, renders master liable).

cover,¹⁸ which, as in other cases, is a care in proportion to the danger to be avoided.¹⁹

§ 3784. **Duty to Apply what Tests in Making Inspections.**—No other rule can be stated upon this subject than to say that it is the duty of the master to resort to such tests as are practicable and reasonable, having reference to the character of the machine or appliance, and to the nature and extent of the danger to be avoided.²⁰ It has been reasoned that the master is not required to resort to tests which are impracticable, unreasonable, or oppressive, or which would be incompatible with the proper furtherance of his business, and which are only required to insure absolute safety;²¹ which is tantamount to saying that the master does not stand liable as an insurer, but is liable only for the exercise of reasonable or ordinary care, which is, as in other cases, a care in proportion to the danger to be avoided.²² But

¹⁸ *Southern Ind. R. Co. v. Moore*, 29 Ind. App. 52; s. c. 63 N. E. Rep. 863 (instruction that the master is bound to exercise such diligence in the examination of the place where the servant works "as to enable him to know that it is safe so far as human foresight can know," is erroneous); *Atchison & C. R. Co. v. Taylor*, 60 Kan. 758; s. c. 14 Am. & Eng. R. Cas. (N. S.) 733; 57 Pac. Rep. 973 (railroad company not liable for injury from defective car unless such company knew or had opportunity to acquire knowledge of the dangerous condition of the car, or it had been in such a condition long enough to charge the company with constructive notice of the defect); *Ashland & C. R. Co. v. Wallace*, 101 Ky. 626; s. c. 19 Ky. L. Rep. 849, 857; 42 S. W. Rep. 744; 43 S. W. Rep. 207; *Galveston & C. R. Co. v. Davis*, 27 Tex. Civ. App. 279; s. c. 65 S. W. Rep. 217 (holding that if the very closest character of inspection only could discover the insecurity of a stirrup attached to the side of a freight-car, the rule of reasonable diligence required that inspection). In a jurisdiction where the judicial tendency is to condone the negligence of employers, it has been held that a railroad company owes no duty to its employes to make an inspection of an appliance in a manner which is unusual and not customary among railroads: *Burns v. New York & C. R. Co.*, 20 R. I. 789; s. c. 38 Atl. Rep. 926.

But this doctrine, which allows the railroad companies to make, by their habitual negligence, the law of the land, is not to be commended. A railroad company, like any other employer, is under the legal duty of making whatever inspection of its appliance may be reasonably necessary to promote the safety of its employes, without reference to what other such companies do or fail to do: *Ante*, § 3770.

¹⁹ Vol. I, § 25; *ante*, § 3772; *Stockwell v. Chicago & C. R. Co.*, 106 Iowa 63; s. c. 4 Am. Neg. Rep. 380; 12 Am. & Eng. R. Cas. (N. S.) 576; 75 N. W. Rep. 665.

²⁰ "Inspection not only involves looking at cars and appliances, but as well all those tests which would ordinarily be used to ascertain the condition of cars and appliances that reasonably prudent men would use in the exercise of such undertaking": *Texas & C. R. Co. v. Allen*, 114 Fed. Rep. 177; s. c. 52 C. C. A. 133.

²¹ *Louisville & C. R. Co. v. Bates*, 146 Ind. 564; s. c. 45 N. E. Rep. 108; *Smoot v. Mobile & C. R. Co.*, 67 Ala. 13.

²² Vol. I, § 25; *ante*, §§ 3767, 3772; *Deane v. Roaring Fork Electric & C. Co.*, 5 Colo. App. 521; s. c. 39 Pac. Rep. 346 (case of a hydraulic valve bought from a maker who guaranteed its sufficiency, but which nevertheless burst, in consequence of a defect which could not have been discovered except by an inspection

on the other hand, where the result of a breaking of the machine or appliance would be a calamity to the servant, the law will not always excuse a mere visual inspection, but will leave it to the jury to say whether some sufficient test ought not to have been applied.²³

§ 3785. **Master Not Liable for Hidden Defects Not Discoverable by the Exercise of Ordinary Care.**—Judicial holdings unite upon the proposition that the master is not liable for an injury to his servant, caused by hidden defects or dangers in the machinery, appliances or premises furnished to the servant, when such defects or dangers were unknown to the master and were not discoverable by the exercise of that reasonable care and skill in inspecting them which has been already spoken of, and when there is nothing in external appearances to create a suspicion of their presence; otherwise if the defect could have been discovered by the exercise of reasonable or ordinary care and diligence.²⁴

by an expert manufacturer, and the master was exonerated).

²³ Thus, it has been held that a mere visual inspection, which would not disclose the weakness of the fastenings of a *grab-iron on a freight-car*, is not sufficient, as matter of law, to relieve the railroad company from liability for injuries to a brakeman due to its defective condition, if it might have been readily discovered by throwing some weight upon it in such a way as to test its strength: *Felton v. Bullard*, 94 Fed. Rep. 781; s. c. 42 Ohio Wkly. L. Bul. 218; 14 Am. & Eng. R. Cas. (N. S.) 547; 37 C. C. A. 1.

²⁴ *Ante*, § 3782; *Lyons v. Knowles* (Cal.), 32 Pac. Rep. 883 (no off. rep.); *Georgia R. & Co. v. Nelms*, 83 Ga. 70; s. c. 9 S. E. Rep. 1049; 29 Cent. L. J. 352; 39 Am. & Eng. R. Cas. 355; *Baxley v. Satilla Man. Co.*, 114 Ga. 720; s. c. 40 S. E. Rep. 730 (a misapplication of the principle, in that the bolt which broke, throwing the servant upon a saw, broke under a pressure of not more than 5 lbs., while the evidence showed that a proper bolt should have stood a strain of 60 lbs.); *Sack v. Dolese*, 137 Ill. 129; s. c. 27 N. E. Rep. 62; aff'g s. c. 35 Ill. App. 636; *Sanden v. Bannon*, 85 Ill. App. 17 (concealed knot in a timber used in the construction of a scaffold); *Chicago & C. R. Co. v. Platt*, 89 Ill. 141; *East St. Louis*

Packing & Co. v. Hightower, 92 Ill. 139 (injury to fireman from defect in blow-off pipe attached to stationary boiler—knowledge or negligent ignorance of defect by master must be shown); *Chestnut v. Southern Indiana R. Co.*, 157 Ind. 509; s. c. 62 N. E. Rep. 32; *Salem Stone & Co. v. Tepps*, 10 Ind. App. 516; s. c. 38 N. E. Rep. 229 (plaintiff was assisting in moving steam-drill which weighed 300 or 400 pounds and rested on those legs, one of which had previously been broken and cracked up in the socket; and on lifting drill the leg fell out and drill fell over on plaintiff—recovery); *Roughan v. Boston & Block Co.*, 161 Mass. 24; s. c. 36 N. E. Rep. 461; *Girard v. Griswold*, 177 Mass. 57; s. c. 58 N. E. Rep. 179 (bursting of a water gauge, it not appearing that there was any defect in the gauge of which he could have known by the exercise of ordinary care); *Essex County Elec. Co. v. Kelly*, 57 N. J. L. 100; s. c. 29 Atl. Rep. 427; *Atz v. Newark Lime & C. Man. Co.*, 59 N. J. L. 41; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 345; 34 Atl. Rep. 980; *Gernand v. Smith*, 66 N. J. L. 390; s. c. 49 Atl. Rep. 427 (breaking of a swedge which servant was holding under a steam hammer); *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273; s. c. 43 N. Y. St. Rep. 942; 30 N. E. Rep. 750;

§ 3786. **Master under a Continuing Duty of Inspection.**—The master is not only bound to make a reasonably careful inspection of the premises, machinery, tools and appliances which he provides for the use of his servants, when they come into his hands, but he is also bound to repeat such inspections from time to time as often as may be reasonably necessary, having regard to the exigencies and risks of his business, to the end that they shall not be used by his servants after they get out of repair in such a sense as to be dangerous.²⁵ On

Smith v. New York &c. R. Co., 164 N. Y. 491; s. c. 58 N. E. Rep. 655 (servant injured by breaking of iron ring in chain while lifting weight; master not chargeable with negligence in making ring, defect being a concealed one in the body of the iron, due to presence of dirt or sulphur, and there being nothing in appearance of iron from which ring was made to indicate any defect, and the workmen employed in making it being competent and skillful); Shambow v. New York &c. R. Co., 39 N. Y. St. Rep. 367; s. c. 15 N. Y. Supp. 146; La Point v. Howland Paper Co., 75 App. Div. (N. Y.) 611; s. c. 77 N. Y. Supp. 669 (breaking of a steam-pipe purchased of approved makers and managed without negligence, where it appeared after the accident that at the point of rupture it was less than half the standard and supposed thickness); Schornring v. Knickerbocker Ice Co., 59 Hun (N. Y.) 618; s. c. 38 N. Y. St. Rep. 27; 13 N. Y. Supp. 434; Klupp v. United Ice Lines, 60 Hun (N. Y.) 586; s. c. 39 N. Y. St. Rep. 782; 15 N. Y. Supp. 597; s. c. aff'd, 133 N. Y. 666; 31 N. E. Rep. 624; Martin v. Highland Park Man. Co., 128 N. C. 264; s. c. 33 S. E. Rep. 876; Warner v. National Malleable Castings Co., 7 Ohio N. P. 331; s. c. 5 Ohio Dec. 106; 1 Toledo Leg. N. 297; Simpson v. Pittsburgh Locomotive Works, 139 Pa. St. 245; McEvoy v. Philadelphia Woolen Co., 140 Pa. St. 1; s. c. 21 Atl. Rep. 246; Alexander v. Pennsylvania Water Co., 201 Pa. St. 252; s. c. 50 Atl. Rep. 991 (a new cast-iron elbow connecting a pump with a main gave way when the machinery was started up. The cause of its giving way could not be shown, and plaintiff's theory seemed wholly unsupported); Davis v. Spencer, 7 Lack. Leg. News (Pa.)

95; Galveston &c. R. Co. v. Buch (Tex. Civ. App.), 65 S. W. Rep. 681 (no off. rep.); Throckmorton v. Missouri &c. R. Co., 14 Tex. Civ. App. 222; s. c. 39 S. W. Rep. 174; Quintana v. Consolidated Kansas City Smelting &c. Co., 14 Tex. Civ. App. 347; s. c. 37 S. W. Rep. 369 (breaking of a wire cable within a hook-socket by which the cable was fastened to a car, which was thereby lowered to and raised from a pit, due to a defect which could not be seen either before or after the cable was placed in the socket); Watts v. Hart, 7 Wash. 178; s. c. 34 Pac. Rep. 423, 771; Nelson v. Allen Paper Car-Wheel Co., 29 Fed. Rep. 840; Erskine v. Chino Valley Beet-Sugar Co., 71 Fed. Rep. 270 (breaking of a rope through a latent defect not open to visual observation or creating anything in the appearance of the rope to suggest a suspicion of its unsoundness). There is a holding to the effect that a master, not an expert, is not chargeable with negligence in not learning of a defect in machinery of such character as not to be apparent to any but an expert: Deane v. Roaring Fork Electric Light &c. Co., 5 Colo. App. 521; s. c. 36 Pac. Rep. 346 (hydraulic valve, apparently in good condition and capable of withstanding the pressure put upon it). But this is quite untenable, since, if the master is not an expert in his own business, it is his duty to employ one who is, and he is responsible for the negligence of such expert, the duty of inspection being an absolute and unassignable duty: *Post*, § 3791.

²⁵ Ocean S. S. Co. v. Matthews, 86 Ga. 418; s. c. 12 S. E. Rep. 632; Central &c. R. Co. v. Grady, 113 Ga. 1045; s. c. 39 S. E. Rep. 441 (railroad company failed to exercise ordinary care in inspecting an em-

the one hand, it has been reasoned that a railway company is not bound to pursue a system of inspection of its cars and locomotives

bankment to discover a washout); *Western Tube Co. v. Polobinski*, 94 Ill. App. 640; s. c. aff'd, 192 Ill. 113; 61 N. E. Rep. 451 (with respect to the *place* of work, such duty extends, not only to such risks as are known to him, but to such as ought to be known by the exercise of due diligence); *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469; s. c. 40 N. E. Rep. 642 (failure of proper inspection, resulting in failure to provide servant with a safe place to work); *Baltimore & C. R. Co. v. Spaulding*, 21 Ind. App. 323; s. c. 1 Repr. (Ind.) 467; 52 N. E. Rep. 410 (piece of sheet-iron in scrap-iron bin fell on plaintiff, injuring him); *Indiana Iron Co. v. Gray*, 19 Ind. App. 565; s. c. 48 N. E. Rep. 803 (dangerous condition of the *place* at which the servant is assigned to work); *Brann v. Chicago & C. R. Co.*, 53 Iowa 595; s. c. 36 Am. St. Rep. 243 (failure to inspect cars); *Stockwell v. Chicago & C. R. Co.*, 106 Iowa 63; s. c. 4 Am. Neg. Rep. 380; 12 Am. & Eng. R. Cas. (N. S.) 576; 75 N. W. Rep. 665; *Kansas City & C. R. Co. v. Ryan*, 52 Kan. 637; s. c. 35 Pac. Rep. 292; *Atchison & C. R. Co. v. Holt*, 29 Kan. 149; *Chesapeake & C. R. Co. v. Venable*, 111 Ky. 41; s. c. 23 Ky. L. Rep. 427; 63 S. W. Rep. 35 (ignorance of a defect in a railroad-bed, which would have been discovered by a proper inquiry, constitutes negligence); *Budge v. Morgan's Louisiana & C. R. Co.*, 108 La. 349; s. c. 32 South. Rep. 535; *Hall v. Emerson-Stevens Man. Co.*, 94 Me. 445; s. c. 47 Atl. Rep. 924 (workman killed by the bursting of a grindstone; defendant requested an instruction that if the defendant exercised ordinary care and fulfilled its duties in the selection of the stone up to the time when it began to run it, it was not its duty subsequently to examine the stone, which was, under the circumstances of the case, properly refused); *Cumberland & C. R. Co. v. State*, 45 Md. 229; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *Toy v. United States Cartridge Co.*, 159 Mass. 313; s. c. 34 N. E. Rep. 461; *Taughney v. Wilson*, 87 Mich. 453; s. c. 49 N. W. Rep. 666; *Miller v. Great Northern R. Co.*, 85 Minn. 272; s. c. 88 N. W. Rep. 758; *Reber v. Tower*, 11 Mo. App. 199; *Krampe v. St. Louis Brew. Assn.*, 59 Mo. App. 277; *Brown v. Hershey Land & C. Co.*, 65 Mo. App. 162; s. c. 2 Mo. App. Repr. 1186; *Nord Deutscher Lloyd S. S. Co. v. Ingebregtsen*, 57 N. J. L. 400; s. c. *sub nom.* *Ingebregtsen v. Nord Deutscher Lloyd S. S. Co.*, 31 Atl. Rep. 619; *Comben v. Belleville Stone Co.*, 59 N. J. L. 226; s. c. 36 Atl. Rep. 473 (duty of making inspection and tests at proper intervals); *Essex County Electric Co. v. Kelly*, 60 N. J. L. 306; s. c. 37 Atl. Rep. 619; s. c. aff'd, 61 N. J. L. 289; 41 Atl. Rep. 1115 (employé injured by the breaking of a defective pole which he was directed to ascend, which had not been inspected for two years, when a proper inspection would have disclosed the defective condition); *Carroll v. Tidewater Oil Co.*, 67 N. J. L. 679; s. c. 52 Atl. Rep. 275 (failure to inspect the condition of a large machine before ordering its removal renders the master liable for an injury to a common laborer ordered to assist in removing it, which would have been prevented by a reasonable inspection); *Stephens v. Hudson Valley Knitting Co.*, 69 Hun (N. Y.) 375; s. c. 52 N. Y. St. Rep. 795; 23 N. Y. Supp. 656; s. c. aff'd, 143 N. Y. 633; *Egan v. Dry Dock & C. R. Co.*, 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188 (rule applied to inspection of steam-boilers in buildings); *Stackpole v. Wray*, 74 App. Div. (N. Y.) 310; s. c. 77 N. Y. Supp. 633; *Fuller v. Jewett*, 80 N. Y. 46; *Bushby v. New York & C. R. Co.*, 107 N. Y. 374; *McGuire v. Bell Tel. Co.*, 167 N. Y. 208; s. c. 52 L. R. A. 437; 60 N. E. Rep. 433; aff'g s. c. 66 N. Y. Supp. 1137 (telephone company under a duty to its own lineman of inspecting poles used by it under a license from another company); *Cameron v. Great Northern R. Co.*, 8 N. D. 124; s. c. 77 N. W. Rep. 1016; 5 Am. Neg. Rep. 454; 12 Am. & Eng. R. Cas. (N. S.) 520; *Dwyer v. Shaw*, 22 R. I. 648; s. c. 50 Atl. Rep. 389; *International & C. R. Co. v. Hawes*

which would embarrass the operation of its road, but is bound simply to exercise ordinary care.²⁶ But, on the other hand, the fact that a machine is of such a character as to require it to be constantly replaced, does not diminish the duty of inspecting every new one as fast as it is supplied and put in service.²⁷

(Tex. Civ. App.), 54 S. W. Rep. 325 (no off. rep.); *Daniels v. Union & C. R. Co.*, 6 Utah 357; *Allen v. Union & C. R. Co.*, 7 Utah 239; *Richmond & C. R. Co. v. Burnett (Va.)*, 14 S. E. Rep. 372; s. c. 16 Va. L. J. 21 (no off. rep.); *Union Pac. R. Co. v. Snyder*, 152 U. S. 684; s. c. 38 L. ed. 597; 14 Sup. Ct. Rep. 756; *Lehigh Valley Coal Co. v. Kiszal*, 80 Fed. Rep. 470; s. c. 51 U. S. App. 265; 25 C. C. A. 566 (continued exercise of due care to keep and maintain machinery in reasonably and adequately safe condition for use by employés); *Chicago & C. R. Co. v. Healy*, 86 Fed. Rep. 245; s. c. 57 U. S. App. 513; 30 C. C. A. 11 (railroad company is bound to its employés to make reasonably frequent and reasonably thorough inspection of the condition of the timbers used in the construction of a bridge, and in making such inspection to apply such tests as are ordinary and usual in the business, for the purpose of developing any defect which exists in the timbers); *Dunn v. New York & C. R. Co.*, 107 Fed. Rep. 666; s. c. 46 C. C. A. 546 (duty of a railway company to inspect "figure-plate" on a switch-engine, which was loose and gave way when a brakeman undertook to support himself by catching hold of it); *Lafayette Bridge Co. v. Olsen*, 108 Fed. Rep. 335; s. c. 47 C. C. A. 367; 54 L. R. A. 33 (bridge company liable for the death of a workman caused by the breaking of a defective plank, which was required to support a heavy load, the unfitness of which would have been disclosed by a proper inspection by a competent person, but was not apparent to an unskilled man); *Texas & C. R. Co. v. Allen*, 114 Fed. Rep. 177; s. c. 52 C. C. A. 133. On the ground of the master having failed in the exercise of this duty, a recovery has been had against him, in an action by his servant, where a hook in an iron foundry, which a careful inspection would have

shown to be weak, broke, and a heavy weight hanging upon it fell and injured the plaintiff: *Spicer v. South Boston Iron Co.*, 138 Mass. 426. Where a railway company, after using a lifting-jack purchased by it, containing a latent defect in the weld of the foot attached to the jack, sent it to its shops for other repairs, and a section-hand was afterward injured because of such defective weld, the company was liable, provided the fact could have been discovered by a reasonable examination at the time of making the repairs: *Kansas City & C. R. Co. v. Ryan*, 52 Kan. 637; s. c. 35 Pac. Rep. 292. A servant was injured by the head of a maul flying off from the handle as the implement was being used by a fellow workman. This workman took the maul from a tool-box, his own having been taken by some one else. There was no evidence to show how long the maul had been in a defective condition. It was held not to show that the employer was negligent in not properly inspecting the tools, or that he had knowledge of the defective condition of the implement: *Dwyer v. Shaw*, 22 R. I. 648; s. c. 50 Atl. Rep. 389.

²⁶ *Smoot v. Mobile & C. R. Co.*, 67 Ala. 13; *ante*, § 3784.

²⁷ *Toy v. United States Cartridge Co.*, 159 Mass. 313; s. c. 34 N. E. Rep. 461. Another court has denied the application of the rule by holding that a *purchaser of cotton* is not liable for an injury to his servant from the giving way of the *bagging* upon a bale while he was moving it, in the absence of evidence of a custom or agreement on the master's part to inspect it and ascertain its strength: *Garragan v. Fall River Iron Works*, 158 Mass. 596; s. c. 33 N. E. Rep. 652. On the other hand, the fact that some of his inspectors have been in the habit of getting drunk on duty will not charge him with liability in favor of a servant, where the evidence shows

§ 3787. Duty to Inspect after Hearing Noises which Indicate Danger.—An employer whose attention is called to a clicking noise made by a machine used by an employé, which would not have been made if the machine had been in proper condition, owes such employé the duty of inspecting the machine to determine if it is defective, and of repairing it in case it is found to be so.²⁸

§ 3788. Duty to Inspect after Making Repairs.—The duty of a master to furnish reasonably safe premises, machinery, tools and appliances, with or about which his servants are to work, necessarily implies and includes the duty of making a reasonable inspection of such premises, machinery, tools and appliances after they have become defective and have been repaired, to the end of seeing that the reparation makes them reasonably safe and sufficient.²⁹

that a proper inspection was actually made prior to the accident: *St. Louis &c. R. Co. v. Gaines* (Ark.), 13 S. W. Rep. 740 (no off. rep.). What is meant by a *reasonable inspection* may be illustrated by a decision to the effect that inspectors of railway-cars are not required to apply tests of physical force to the steps of a ladder upon a freight-car, in order to absolve the company from liability for defects therein, unless some indication of weakness or defect is perceived upon a careful inspection by the eye: *Allen v. Union Pac. R. Co.*, 7 Utah 239; s. c. 26 Pac. Rep. 297. An employer has been held guilty of actionable negligence in favor of his servant where he allowed a chain supporting a door weighing 250 pounds to remain for eight years without inspection, and joined by a wire smaller than the chain itself and materially weaker: *Tangney v. Wilson*, 87 Mich. 453; s. c. 49 N. W. Rep. 666. That the master will be liable where the machine is rendered unsafe by his own act or the act of his vice-principal,—see *Stephens v. Hudson Valley Knitting Co.*, 69 Hun (N. Y.) 375; s. c. 52 N. Y. St. Rep. 795; 23 N. Y. Supp. 656; s. c. aff'd, 143 N. Y. 633. Circumstances under which a railroad company was exonerated, where a brakeman was injured in consequence of the absence of a nut to hold the wheel on top of the brake-rod, which defect, it was alleged, could not have been discov-

ered by a proper inspection: *Chicago &c. R. Co. v. Hagar*, 11 Ill. App. 498.

²⁸ *Kaplan v. New York Biscuit Co.*, 5 App. Div. (N. Y.) 60; s. c. 38 N. Y. Supp. 1049. Compare with this the case of *Frelsen v. Southern &c. R. Co.*, 42 La. An. 673; s. c. 7 South. Rep. 800 (where a *passenger on a moving train* reported to the conductor that he had heard an *unusual noise and felt a jolt*, but the conductor failed to stop the train to make an inspection, and made no other inspection than such as could be made while the train was in motion, and soon afterward a derailment was caused by the breaking of a wheel, and it was held that the passenger could not recover damages for the resulting injuries, it being in the opinion of the court a case of *damnum absque injuria*).
²⁹ *Hoes v. Ocean S. S. Co.*, 170 N. Y. 581 (*mem.*); s. c. 63 N. E. Rep. 1118; aff'g s. c. 56 App. Div. (N. Y.) 259; 67 N. Y. Supp. 782; *Pioneer Coöperage Co. v. Romanowicz*, 85 Ill. App. 407; s. c. aff'd, 186 Ill. 9; 57 N. E. Rep. 864; *Babcock v. Old Colony R. Co.*, 150 Mass. 467; s. c. 23 N. E. Rep. 325; *Kingman v. Pittsburg Traction Co.*, 5 Pa. Super. Ct. 436; s. c. 28 Pitts. L. J. (N. S.) 128; 41 W. N. C. (Pa.) 63 (employé sent to repair reported defect in a street-car, made insufficient repairs and then stated that it was safe—employé injured, company liable).

§ 3789. **Master Liable for Improper Inspection although there has been an Official Inspection.**—The duty of reasonable inspection on the part of the master of his machinery, tools and appliances being primary and unalienable, he is bound to discharge it or to cause it to be discharged in a suitable manner; and he is not relieved from this obligation, in the case of a steam-boiler, by the fact that the boiler has been officially tested as prescribed by a statute and reported safe; and this, although he had no notice, information, or suspicion of any defect therein.³⁰

§ 3790. **Duty of Inspection Extends to Supervision of Conduct of Fellow Servant.**—Referring now to the principle hereafter stated,³¹ that a master is liable to one servant for an injury inflicted upon him by the negligence of a fellow servant in consequence of the unfitness of such fellow servant through want of skill, habitual negligence, habitual intoxication, or other unfitness for the duties which he is employed to discharge, when the master himself is personally negligent in employing or retaining in his services such unfit fellow servant,—we must conclude that this rule puts upon the master a duty of maintaining a reasonably frequent or constant supervision of his servants, such as will prevent them from becoming grossly or criminally negligent.³²

§ 3791. **This Duty of Inspection an Absolute and Unalienable Duty.**—It should be constantly borne in mind that this duty of inspection is an *absolute duty*,³³ in the sense that it is not discharged by the fact that the master furnishes a sufficient number of competent inspectors; he must go further and see that the proper inspections are actually made.³⁴ The meaning is, that the person of whatever grade in the service, appointed to discharge this duty of inspection, is the master's *alter ego* in the sense that if such servant, although competent and careful, negligently fails in the performance of the duty, and an injury to another servant results therefrom, the master is responsible

³⁰ Egan v. Dry Dock &c. R. Co., 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188. But compare *post*, § 3930.

³¹ *Post*, § 4048.

³² Hill v. Big Creek Lumber Co., 108 La. 162; s. c. 32 South. Rep. 372. See *post*, § 3806.

³³ *Ante*, § 3781.

³⁴ *Post*, § 3793; Union Pac. R. Co. v. Snyder, 152 U. S. 684; s. c. 38 L. ed. 597; 14 Sup. Ct. Rep. 756; Chicago &c. R. Co. v. Gillison, 72 Ill. App. 207; s. c. *aff'd*, 173 Ill. 264; 50

N. E. Rep. 657. Upon the same principle, the fact that a railroad car was inspected by a competent inspector in the ordinary way does not conclusively show that *ordinary care* was used in making the inspection, so as to preclude a recovery for an injury to a brakeman, caused by the insecurity of a handhold: International &c. R. Co. v. Hawes (Tex. Civ. App.), 54 S. W. Rep. 325 (no off. rep.).

in damages precisely as though he had undertaken the duty in person and had failed in its performance; nor does the fellow-servant rule apply in such a case.³⁵ Accordingly, it has been held that if a master seeks to excuse himself from liability for an injury to his servant which might have been avoided by a reasonable inspection of the condition of his property on the part of the master, he must show that the duty of making such inspection was one of the *primary* objects of the injured servant's employment.³⁶

§ 3792. Master Cannot Absolve Himself from this Duty by a Rule Devolving it upon his Servants Generally.—Such being the nature of the duty, the master cannot exonerate himself from the obligation to perform it, either by himself or by a competent, skillful person selected by him for the purpose, by the device of a rule in which he undertakes to cast the duty upon his employés generally.³⁷ A railroad company which imposes on its engineers the duty of inspecting their engines, and provides *no other method* of inspecting to keep them in a reasonably safe condition, is liable to one of its brakemen for an injury received through the failure of the engine to respond promptly to the air-brake, which defect was known to the engineer, who continued to use the engine after knowing of the defect,—whether it be considered as a complete neglect of the master's duty of inspection, or the imposition of such duty upon its operatives, in which case the fellow-servant doctrine does not apply. The court makes the distinction that inspection by engineers is to be considered a part of their ordinary

³⁵ Egan v. Dry Dock &c. R. Co., 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188; Bookrum v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. Rep. 919 (no off. rep.); Western Union Tel. Co. v. Tracy, 114 Fed. Rep. 282; s. c. 52 C. C. A. 168; *aff'g* s. c. *sub nom.* Tracy v. Western Union Tel. Co., 110 Fed. Rep. 103; McKnight v. Brooklyn Heights R. Co., 51 N. Y. Supp. 738; s. c. 23 Misc. (N. Y.) 527; Cole v. Warren Man. Co., 63 N. J. L. 626; s. c. 44 Atl. Rep. 647 (the employment, in the reconstruction of a mill, of an expert mill architect and builder, whose competency was unquestioned, does not fully discharge the master's duty of using reasonable care for the safety of his servants); Lafayette Bridge Co. v. Olsen, 108 Fed. Rep. 335; s. c. 47 C. C. A. 367; 54 L. R. A. 33 (bridge company liable for the death of a workman caused by the breaking of a

defective plank, which was required to support a heavy load, the unfitness of which would have been disclosed by a proper inspection by a competent person, but was not apparent to an unskilled man). As to the non-assignability of the master's duty of inspection, see note to Walkowski v. Penokee &c. Mines, 41 L. R. A. 33, 109.

³⁶ Dupree v. Alexander (Tex. Civ. App.), 68 S. W. Rep. 739 (no off. rep.).

³⁷ A railroad established a rule that employés must personally examine all appliances before using them. This did not excuse the company from the duty of inspecting an engine-step with respect to an accumulation of grease thereon, which made it dangerous to mount the engine: Bookrum v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. Rep. 919 (no off. rep.).

duties, and, in the ordinary operation of the road, is to be considered an act of fellow service as toward brakemen; but where the master chooses to *depend entirely* on this mode of inspection, and makes no other provisions therefor, then the engineers become, as to such duty, the vice-principals of the master.³⁸

§ 3793. Nor by Employing Competent Inspectors, unless their Inspection was Competent.—Nor does a master discharge his duty toward his servants by employing competent inspectors to inspect his machinery, unless the inspection itself is a reasonably careful and skillful one, or one such as is usually made by reasonably careful and competent inspectors;³⁹ but if, notwithstanding an inspection by such inspectors, a servant is injured in consequence of a defect which would have been discovered by a reasonably careful and skillful inspection, but which was not discovered, the master will be liable to pay damages.⁴⁰

§ 3794. Master Chargeable with Knowledge of what a Reasonable Inspection would Disclose.—It is a part of this doctrine that the master becomes chargeable with knowledge of the existence of a defect or other source of danger which would be disclosed by such an inspection as, under the circumstances, it is incumbent upon him to make.⁴¹

§ 3795. Effect of Want of such Knowledge on the Part of the Master.—The principle must be kept in view that it is not essential to the liability of the employer for an injury to his employé through defective machinery or appliances, that the employer should have actually known of the defect, but that it is sufficient if he could have known of it by the exercise of reasonable care and diligence in making inspections and repairs.⁴² On the other hand, the want of knowl-

³⁸ McDonald v. Michigan &c. R. Co., 108 Mich. 7; s. c. 2 Det. Leg. N. 774; 65 N. W. Rep. 597 (brakeman attempting to couple engine to car, injured by breaking of push-bar on engine, which engineer knew, moreover, was defective).

³⁹ Cleveland &c. R. Co. v. Ward, 147 Ind. 256; s. c. 45 N. E. Rep. 325; 46 N. E. Rep. 462 (merely looking into fire-box of locomotive not a sufficient examination of condition of stay-bolts, only the heads of which could be seen by such method, the usual method of inspection by the hammer test not having been followed); *ante*, § 3791.

⁴⁰ Cleveland &c. R. Co. v. Ward, 147 Ind. 256; s. c. 45 N. E. Rep. 325; 46 N. E. Rep. 462 (broken stay-bolts in locomotive-boiler, which usual hammer test would have discovered).

⁴¹ *Post*, § 3796; Chesson v. John L. Roper Lumber Co., 118 N. C. 59; s. c. 23 S. E. Rep. 925; Linton Coal &c. Co. v. Persons, 11 Ind. App. 264; s. c. 39 N. E. Rep. 214 (an instruction which was held proper).

⁴² Houston v. Brush, 66 Vt. 331; s. c. 29 Atl. Rep. 380; Baxter v. Roberts, 44 Cal. 187, 192, where the doctrine is forcibly illustrated; *ante*, § 3782.

edge will exonerate the master where the circumstances show that his ignorance was not blameworthy.⁴³ In one case, where there was an evident anxiety to exonerate the master, it was said: "This kind of liability is a very refined one at best, and the essential fact of the existence of the alleged latent danger, as the source of a consequent duty as to information, must necessarily be clearly established before any charge of negligence in that respect can be sustained." It was accordingly held that a brewing company, to whom no notice was shown to have been given of the previous bursting or exploding of bottles, were not chargeable with knowledge of the actual fact of such exploding, and of the latent danger thereof to their employés.⁴⁴ So, a railroad company was exonerated from liability for injuries received by a brakeman, in attempting to make a coupling, by stumbling over a pile of cinders on its track, or from an alleged defective drawhead, which had worked properly but a short time before, where both the cinders and the defect, if any, were recent, and it had no knowledge thereof,⁴⁵—a conclusion which may be regarded as debatable. But where an inspection is not practicable, and there is a presumption of an absence of danger, then, of course, the master will not be held liable because he does not know of some danger which he might have discovered if he could have made an inspection. For instance, it has been held that a railroad company, sending its locomotive-engineer with one of its engines to haul temporarily for another company, is not liable to him for the bad condition of the track, nor for want of adaptation of the engine to the track, where such defects were not known to them.⁴⁶ Upon any theory, it is obvious that the question of the knowledge or want of knowledge of the master will be a very important *evidentiary fact* as bearing upon the question whether he has been guilty of actionable negligence. Thus, where the issue was, whether he had been guilty of negligence in using an unsafe machine, whereby a servant was injured, it was not error to permit the defendant to testify that he had no knowledge or information that it was unsafe.⁴⁷ So, it was held error to reject evidence that the superintendent of a railway company, whose duty it was to employ and supervise the conductors of the company, did not know that a conductor he had employed, and by whose improper conduct an injury was alleged to

⁴³ *Elliott v. St. Louis &c. R. Co.*, 67 Mo. 272; s. c. 7 Rep. 84; 7 Cent. L. J. 305; *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Toledo &c. R. Co. v. Conroy*, 61 Ill. 162; *Columbus &c. R. Co. v. Troesch*, 68 Ill. 545; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324.

⁴⁴ *Melchert v. Robert Smith &c.*

Brew. Co., 140 Pa. St. 448; s. c. 27 W. N. C. (Pa.) 477; 21 Atl. Rep. 755.

⁴⁵ *Welch v. New York &c. R. Co.*, 43 N. Y. St. Rep. 958; s. c. 17 N. Y. Supp. 342.

⁴⁶ *Dunlap v. Richmond &c. R. Co.*, 81 Ga. 136; s. c. 7 S. E. Rep. 283.

⁴⁷ *Boyle v. Mowry*, 122 Mass. 251.

have happened to another employé, was a careless officer.⁴⁸ It is almost unnecessary to add that proof of the fact that the servant was injured or killed in consequence of the use of defective machinery, will not, of itself, make out a case against the employer.⁴⁹ The most that can be said in favor of the necessity of actual knowledge is, that the master or his managing agent should have received sufficient notice that the machinery or appliances had become so defective as to put a reasonably prudent man on inquiry.⁵⁰ But this proposition can have but a limited application, for in most cases the law imposes on the master a continuing duty of inspection and inquiry.⁵¹ There is, however, one case in the reports of the New York Court of Appeals where it was decided that if a servant is fit and competent when employed, his good character may be presumed to continue, and that in order to charge the master with liability for injuries resulting from bad habits subsequently acquired by him, knowledge or notice on the part of the master that he has acquired such bad habits is necessary;⁵² but this holding is subject to the criticism that it ignores the duty of the master to observe the conduct of his servants.^{52a} Moreover, as a matter of experience, it is quite disputable whether there is any presumption that a good character, once established, is likely to continue. There are so many cases in which it does not continue, that it might fairly be considered negligence in a master to trust implicitly that it will. It must be constantly borne in mind that here, as elsewhere, where knowledge is essential to charge a person, negligent ignorance is equivalent to knowledge;⁵³ and this rule applies to the servant as well as the master.⁵⁴

⁴⁸ *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

⁴⁹ *Elliott v. St. Louis & C. R. Co.*, 67 Mo. 272.

⁵⁰ *Chicago & C. R. Co. v. Shannon*, 43 Ill. 338.

⁵¹ *Ante*, § 3786.

⁵² *Chapman v. Erie R. Co.*, 55 N. Y. 579; rev'g s. c. 1 Thomp. & C. (N. Y.) 526.

^{52a} *Ante*, § 3790.

⁵³ "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is stanch and secure, when in fact the master knows, or ought to know, that it is not so"; *Lord Cranworth*, in *Pater-son v. Wallace*, 1 Macq. H. L. Cas. 748; s. c. 28 Eng. L. & Eq. 50. This point was adjudged in *Noyes v. Smith*, 28 Vt. 59; *Toledo & C. R. Co. v. Conroy*, 61 Ill. 164; s. c. 68 Ill. 560, 569; *Walsh v. Peet Valve Man.*

Co., 110 Mass. 23; *Mobile & C. R. Co. v. Thomas*, 42 Ala. 672; *Wright v. New York & C. R. Co.*, 25 N. Y. 562; *Sullivan v. Louisville Bridge Co.*, 9 Bush (Ky.) 81, 90; *Ryan v. Fowler*, 24 N. Y. 410, 414; *Chicago & C. R. Co. v. Swett*, 45 Ill. 197; *Chicago & C. R. Co. v. Shannon*, 43 Ill. 338; *Columbus & C. R. Co. v. Troesch*, 68 Ill. 545; *Greenleaf v. Illinois & C. R. Co.*, 29 Iowa, 14, 16; *Schr. Norway v. Jensen*, 52 Ill. 373; *Colorado & C. R. Co. v. Ogden*, 3 Colo. 497; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324; *Lewis v. St. Louis & C. R. Co.*, 59 Mo. 495; *Gibson v. Pacific R. Co.*, 46 Mo. 163; s. c. 2 Thomp. Neg. (1st ed.), p. 944. See Vol. I, § 8; *ante*, § 3782. Some courts have held that actual notice is necessary, ignoring the

⁵⁴ *Davis v. Detroit & C. R. Co.*, 20 Mich. 105; *Stone v. Oregon City Man. Co.*, 4 Or. 52, 57; *post*, § 4647.

§ 3796. **Notice or Knowledge that the Appliance has Got Out of Repair.**—While here and there an ill-considered decision may crop out, to the effect that the master will not be liable, where the machine was originally furnished in a safe condition, from the fact that it subsequently got out of repair, unless he had notice of that fact,⁵⁵—yet the doctrine relating to the duty of inspection would be vain and nugatory if the rule were not here, as in other situations, that negligent ignorance will have the same effect in charging the master with liability as actual knowledge.⁵⁶ The rule therefore is, that the master will be liable either where he knew,⁵⁷ or by the reasonable exercise of reasonable diligence,—that is to say, of that continuing duty of inspection, spoken of heretofore,⁵⁸—might have known, that the machine, the premises, etc., had fallen into such a state of dilapidation or non-repair as to render their further use dangerous to his servant.⁵⁹

fact that negligent ignorance is, for this purpose, equivalent to notice: *McMillan v. Saratoga & C. R. Co.*, 20 Barb. (N. Y.) 450; *Anderson v. New Jersey Steamboat Co.*, 7 Robt. (N. Y.) 611; *Kunz v. Stewart*, 1 Daly (N. Y.) 431. But the rule as thus stated is so obviously unsound as not to require discussion. Moreover, as seen by preceding cases in this note, the highest court in the State where these rulings occur has held otherwise.

⁵⁵ *Louisville & C. R. Co. v. Allen*, 47 Ill. App. 465; *Chicago & C. R. Co. v. Merriman*, 86 Ill. App. 454 (instruction condemned which disregards the knowledge of the master of both the defects and dangers); *Richardson v. Cooper*, 88 Ill. 270 (lack of notice decisive, in connection with other circumstances),

⁵⁶ Vol. I, § 8; *ante*, § 3782.

⁵⁷ *Murtaugh v. New York & C. R. Co.*, 49 Hun (N. Y.) 456.

⁵⁸ *Ante*, § 3786.

⁵⁹ *Ante*, § 3794; *Myers v. American Steel Barge Co.*, 64 Ill. App. 187; s. c. 1 Chic. L. J. Wkly. 228; *Pioneer Cooperage Co. v. Romanowicz*, 85 Ill. App. 407; s. c. *aff'd*, 186 Ill. 9; 57 N. E. Rep. 864 (enough that the master might have been informed by the use of such diligence as the law imposes upon him); *Illinois Cent. R. Co. v. Schumann*, 101 Ill. App. 668; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; s. c. 44 N. E. Rep. 876; *aff'd* s. c. 59 Ill. App. 32; *Monmouth Min. Co. v. Erling*, 148 Ill. 521; s. c. 36 N. E. Rep. 117;

aff'd s. c. 45 Ill. App. 411; *Caruthers v. Chicago & C. R. Co.*, 55 Kan. 600; s. c. 40 Pac. Rep. 915 (unless the master knew of the defect, or it was of such a nature, or had existed for such length of time, that, in the exercise of ordinary care, the master should have discovered it); *Rice v. King Philip Mills*, 144 Mass. 229; *Gray v. Commutator Co.*, 85 Minn. 463; s. c. 89 N. W. Rep. 322; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202; *Elliott v. St. Louis & C. R. Co.*, 67 Mo. 272; *Covey v. Hannibal & C. R. Co.*, 86 Mo. 635; *Burnes v. Kansas City & C. R. Co.*, 129 Mo. 41; s. c. 31 S. W. Rep. 347 (master not liable for injury caused to his servant by a temporary obstruction placed in a walk which his servant was required to use, where there is nothing to show that it was placed there by any one for whose conduct the master was responsible, or that the master had, or might have had by reasonable care, notice of it); *Do- ing v. New York & C. R. Co.*, 151 N. Y. 579; *rev'd* s. c. 73 Hun (N. Y.) 270; 26 N. Y. Supp. 405; 58 N. Y. St. Rep. 64 (where the rule is negatively stated); *Maitland v. Cleveland & C. R. Co.*, 5 Ohio Dec. 636; s. c. 3 Ohio Leg. N. 289, 303 (railroad company exonerated from blame for dangerous condition of its roundhouse caused by poisonous gases); *Kingan v. Pittsburgh Traction Co.*, 5 Pa. Super. Ct. 436; s. c. 28 Pitts. L. J. (N. S.) 128; 41 W. N. C. (Pa.) 63; *Bennett v. Standard*

On the one hand, mere notice that the machine, etc., is defective in a dangerous sense, will not render an employer liable for negligence in failing to remedy it, unless he had a reasonable time and opportunity for doing so after receiving the notice;⁶⁰ yet, on the other hand, the lapse of time during which it has been thus defective prior to the accident, will be a very material evidentiary fact upon the question whether he was negligent in not discovering the defect, or in not repairing it after discovering it.⁶¹ Clearly, where the defect is recent, and unknown to the superior officers of the employing company, but known to the employé who is injured thereby, who neglects to report it prior to the accident,—he will have no ground of action for the injury received in consequence of it.⁶²

§ 3797. What will be Notice to the Master of such a Defect.—In nearly all the cases of this kind with which lawyers and judges have to deal, the employer is an incorporated company, and, therefore, the solution of the question under consideration will depend upon the question of what is, under a given state of facts, notice to a corporation,—which opens up a very extensive inquiry.⁶³ It is believed that the following propositions may be affirmed, as applicable to all cases, whether the employer is a natural person or a corporation:—1. Notice to the employer is well communicated when it is given either (a) to that agent or servant of the master whose duty it is to communicate it to the master, or (b) to that agent or servant of the master who is charged with the duty of keeping the machine, the appliance, the place, etc., in repair,⁶⁴—at least, where the notice is com-

Plate Glass Co., 158 Pa. St. 120; s. c. 27 Atl. Rep. 874; Smith v. Gulf & C. R. Co. (Tex. Civ. App.), 65 S. W. Rep. 83 (no off. rep.) (holding that an *instruction* in an action for injuries to a servant, requiring the jury, before they could find for plaintiff, to find that the bar furnished him was an "unsuitable, unsafe, or improper instrument," to the knowledge of the defendant,—was erroneous, in that it was immaterial whether defendant knew it was unsuitable and unsafe or not, if he could have known of it by the use of ordinary intelligence); Klochinski v. Shores Lumber Co., 93 Wis. 417; s. c. 67 N. W. Rep. 934.

⁶⁰ Seaboard Man. Co. v. Woodson, 98 Ala. 378; s. c. 11 South. Rep. 733; s. c. on former appeal, 94 Ala. 143; 10 South. Rep. 87; United States Rolling Stock Co. v. Weir, 96 Ala. 396; s. c. 11 South. Rep. 436.

⁶¹ Monmouth Min. & C. Co. v. Erling, 128 Ill. 521; s. c. 36 N. E. Rep. 117; aff'd s. c. 45 Ill. App. 411.

⁶² Essex County Elec. Co. v. Kelly, 57 N. J. L. 100; s. c. 29 Atl. Rep. 427. Circumstances under which the negligence of the employer, after he had received notice that a machine had become dangerous and had taken steps to renew it, was held a question for a jury: Murphy v. Crossan, 98 Pa. St. 495. That hot cinders frequently exploded when unloaded upon wet surfaces tends to establish the fact that cinders are liable to explode when so unloaded, and tends to charge an employer or workman with notice of such fact: Western Tube Co. v. Polobinski, 94 Ill. App. 640; s. c. aff'd, 192 Ill. 113; 61 N. E. Rep. 451.

⁶³ See 4 Thomp. Corp., § 5189.

⁶⁴ Patterson v. Pittsburgh & C. R. Co., 76 Pa. St. 389; Colorado & C. R.

municated to him when he is acting in the discharge of such duty to his master.⁶⁵ Under this rule, notice of a defect in a railway-track to the superintendent and foreman,⁶⁶ to the assistant superintendent,⁶⁷ to the foreman of a gang of men employed by the company to repair its track,⁶⁸ to an engineer in charge of an engine engaged in pushing freight-cars up an incline,⁶⁹ has been held notice to the company. So, notice of the condition of a defective railway-locomotive is notice to the company if given to the foreman of the roundhouse and superintendent of machinery,⁷⁰ or to the foreman of the company's repair-shops.⁷¹ And, generally speaking, *notice* of a danger or a defect given to the foreman of an employer in charge of the particular work, will be deemed notice to the employer;⁷² and, for the same reason, *knowledge* of such a danger or defect possessed by such a foreman will be deemed the knowledge of the employer.⁷³ And if the master's superior agent in general control of the premises and operations en-

Co. v. Ogden, 3 Colo. 499; Brabbitts v. Chicago &c. R. Co., 38 Wis. 289; Nashville &c. R. Co. v. Elliott, 1 Coldw. (Tenn.) 611, 618; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; Hess v. Rosenthal, 160 Ill. 621; s. c. 43 N. E. Rep. 743; Wellston Coal Co. v. Smith, 65 Ohio St. 70; s. c. 61 N. E. Rep. 143; 55 L. R. A. 99 (owner or operator of a mine chargeable with knowledge of whatever the "mine-boss" knows, or ought to know, respecting the condition of the mine).

⁶⁵ Wade on Notice, § 672; Story on Ag., §§ 140, 451; Whart. on Ag., § 178.

⁶⁶ Patterson v. Pittsburgh &c. R. Co., 76 Pa. St. 389.

⁶⁷ Colorado &c. R. Co. v. Ogden, 3 Colo. 499.

⁶⁸ Gage v. Delaware &c. R. Co., 14 Hun (N. Y.) 446.

⁶⁹ Nashville &c. R. Co. v. Elliott, 1 Coldw. (Tenn.) 611. The opinion of the court at the same time concedes that the engineer and the wiper who was injured were fellow servants,—a conclusion hard to reconcile with the preceding.

⁷⁰ Chicago &c. R. Co. v. Shannon, 43 Ill. 338.

⁷¹ Brabbitts v. Chicago &c. R. Co., 38 Wis. 289.

⁷² Boyd v. Blumenthal, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330.

⁷³ Chicago &c. R. Co. v. Scanlan, 170 Ill. 106; s. c. 48 N. E. Rep. 826; aff'g s. c. 67 Ill. App. 621 (knowl-

edge by foreman of carpenters of defects in scaffold he had aided in erecting for use of brick-masons). Where a servant notifies a foreman of the master of a defect in a machine, and the foreman, though not charged with the care of such machine, attempts to remedy the defect, but by reason of his negligence in failing properly to do such work the servant is injured, he cannot recover for such injuries of the master; since he should have notified the master or the foreman having charge of the repair of the machine: Thomas v. Bellamy, 126 Ala. 253; s. c. 28 South. Rep. 707. Circumstances under which notice to a *shipping-clerk* of a defect in an elevator under the control of the shipping-clerk, was notice to the proprietor: Larkin v. Washington Mills Co., 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6 [distinguishing McCarthy v. Washburn, 42 App. Div. (N. Y.) 252; s. c. 58 N. Y. Supp. 1125]. Circumstances under which a stove manufacturer is represented by its employé so far as concerns the safety of the machinery used in mounting its stoves, and is chargeable with the knowledge of such employé that the machinery is out of repair, and is bound by the promise of such employé to have it repaired: Toledo Stove Co. v. Reep, 18 Ohio C. C. 58; s. c. 9 Ohio C. D. 467.

joins the performance of his duties upon a common servant, the negligence of this servant will be the negligence of the owner or operator, and whatever notice such servant has concerning the premises, the appliances, and the operations, will be imputed to the owner or operator.⁷⁴ On the other hand, knowledge of defects possessed by an ordinary workman having no duty to instruct or repair, is not imputable to the proprietor;⁷⁵ and on this principle notice of a defect given by one servant to a fellow servant,—for example, by a locomotive-fireman to the engineer,—it not chargeable to the master, unless the servant receiving the notice stands toward the master in the relation of vice-principal.⁷⁶ It follows, from the preceding, that the knowledge of a defect possessed by a mere fellow servant of the servant who sustains an injury thereby, does not charge the master with knowledge of it, unless it was the duty of the fellow servant either to communicate it to the master or to repair it himself.⁷⁷ 2. The employer is chargeable with notice when, without reference to the question whether notice has been so *communicated* or not, the machine, appliance, or place has been out of repair for so long a time that the master, in the exercise of the reasonable duty of inspection which he owes to the end of promoting the safety of his servants,⁷⁸ *ought* to have discovered it. The doctrine of this last proposition is constantly applied for the purpose of charging municipal corporations with dangers springing out of the neglect to keep their highways in repair; and for the purpose of charging corporations owning private works with dangers arising from their failure to keep such works in repair.⁷⁹ Outside of these considerations, it has been held that notice to a railroad company that cars, on passing over a certain place in its track, had a jumping or jarring motion, is not notice to it of a latent internal seam in a rail at that place, which subsequently caused the rail to split and break, when the motion of the cars did not suggest the defect in the rail.⁸⁰

§ 3798. **Constructive Notice of the Defect from Eapse of Time.**—The principle that negligent ignorance on the part of the master of a dangerous defect in the machinery, tools, or appliances with or

⁷⁴ Wellston Coal Co. v. Smith, 65 Ohio St. 70; s. c. 61 N. E. Rep. 143; 55 L. R. A. 99 (mine-boss having general control of a mine delegated his duties to a common miner—notice to the miner was notice to the mine-owner or operator).

⁷⁵ St. Louis &c. R. Co. v. Threat, 12 Tex. Civ. App. 375; s. c. 34 S. W. Rep. 152; 3 Am. & Eng. R. Cas. (N. S.) 358.

⁷⁶ Chicago &c. R. Co. v. Merriman, 95 Ill. App. 628.

⁷⁷ Smoot v. Mobile &c. R. Co., 67 Ala. 13.

⁷⁸ *Ante*, § 3782; *post*, § 3798.

⁷⁹ See 4 Thomp. Corp., § 5235.

⁸⁰ James v. Northern Pac. R. Co., 46 Minn. 168; s. c. 48 N. W. Rep. 783.

about which his servant is required to work, has the same effect in law as actual knowledge of such defect, is often expressed by saying that where the length of time and other circumstances are such that the master ought, by the exercise of the diligence which the law requires of him, to have acquired knowledge of the defect, the law will impute constructive notice of it to him and will charge him for the consequences of its existence.⁸¹ The operation of this doctrine is simply to charge the master with constructive notice of whatever he might have discovered by the use of ordinary or reasonable care.⁸²

§ 3799. Circumstances under which Knowledge of One Defect will Impute Knowledge of Another Defect.—A very interesting question is, under what circumstances knowledge of one defect in an appliance ought to put the master on inquiry and raise the duty of inspection as to other defects so as to impute constructive notice to him of such other defects although he may have no actual knowledge of them. It has been held that one defect in a machine, consisting of the striking of the piston in the cylinder, caused by the bending of the piston, does not charge him with knowledge of *another* defect, consisting of the tilting back of the cylinder of its own accord while the employé was filling it, and the descent of the piston into it.⁸³

§ 3800. Manner of Proving such Notice or Knowledge on the Part of the Master.—As to the manner of *proving*⁸⁴ knowledge on the part of the master, it has been held that evidence of the general reputation of the appliances or coemployés through the defect in which or the

⁸¹ *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; s. c. 88 N. W. Rep. 817 (fall of rock from the roof of a mine—circumstances justifying a finding that the defective condition of the roof had existed for such a length of time as to charge the owner with constructive notice of it); *Fluhrer v. Lake Shore & c. R. Co.*, 121 Mich. 212; s. c. 80 N. W. Rep. 23 (defect in the planking over a railroad-crossing, by reason of which a brakeman was injured while coupling cars); *Stapf v. Loewer's Gambrinus Brewery Co.*, 1 App. Div. (N. Y.) 405; s. c. 72 N. Y. St. Rep. 578; 37 N. Y. Supp. 256 (constructive notice of a defect in a pitch-kettle where it had existed for six or eight weeks); *Burke v. National India-Rubber Co.*, 21 R. I. 446; s. c. 44 Atl. Rep. 307 (constructive notice of the

dangerous condition of the floor of a mill in consequence of grease having been left thereon by employés in the mill for the space of three hours).

⁸² *Chicago & c. R. Co. v. Merriman*, 95 Ill. App. 628. That a yard conductor, appointed to care for a switch during the temporary absence of the regular switchman, does not remain continuously at the switch, does not give the company implied notice that the switch is unattended, so as to make it liable for injuries to a fireman on a train caused by failing to have the switch closed: *Parker v. New York & c. R. Co.*, 18 R. I. 773; s. c. 30 Atl. Rep. 849.

⁸³ *Schulz v. Rohe*, 149 N. Y. 132; s. c. 43 N. E. Rep. 420.

⁸⁴ See also, *post*, § 3803a, *et seq.*

incompetency of whom the injury was inflicted, may be received to charge the employer with knowledge, notwithstanding he may have been actually ignorant of it. Ignorance on the part of the employer will be negligence, in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative.⁸⁵ But it has been held that the mere fact that a locomotive-engine has been in the use of a railway company for several years is not sufficient evidence to charge it with notice of a defect in its original construction.⁸⁶ Where the issue was, whether the defendant, a railway company, had been negligent in retaining in its employment a servant, competent and fit when he was employed, evidence that the division superintendent had been heard to say that he must quit drinking, and that he had reprimanded him for it, was held admissible.⁸⁷

§ 3801. Correlative Duty of Master and Servant with Respect to Knowing and Finding Out.—Juries are frequently misled by the habit of courts of charging them concerning this obligation of the master, without at the same time bringing to their attention the correlative duty of the servant. In ordinary cases (for there are exceptions), they should be told that to authorize a recovery these two things must stand in conjunction: knowledge on the part of the master, or its equivalent, negligent ignorance; and a want of knowledge on the part of the servant, or its equivalent, excusable ignorance.⁸⁸ While this rule is not universal, as will be seen,⁸⁹ yet, in most cases which arise, the rights of the parties must be adjusted by it. Perhaps the rule cannot be better formulated than in the statement that, to render the master liable for injury caused to his employés by reason of defective machinery, it must appear that the master knew, or by the exercise of proper diligence ought to have known, of its unfitness, and that the servant did not know, or could not reasonably be held to have known, of the defect, regard being had to his situation and opportunities.⁹⁰ The better opinion is that the rule does not apply where the servant has equal means of knowledge with the master. In other words, the law does not require the master to exercise greater care in providing

⁸⁵ *Davis v. Detroit &c. R. Co.*, 20 Mich. 105; *Cook v. Parham*, 24 Ala. 21; *Chicago &c. R. Co. v. Shannon*, 43 Ill. 338.

⁸⁶ *Mobile &c. R. Co. v. Thomas*, 42 Ala. 672.

⁸⁷ *Chapman v. Erie R. Co.*, 55 N. Y. 579. See *post*, § 4907, *et seq.*

⁸⁸ *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Mobile &c. R. Co. v.*

Thomas, 42 Ala. 672; *Union Pac. R. Co. v. Milliken*, 8 Kan. 647, 652; *Indianapolis &c. R. Co. v. Love*, 10 Ind. 554; *Jones v. Yeager*, 2 Dill. (U. S.) 64, 67. See *McGlynn v. Brodie*, 31 Cal. 376; *Stone v. Oregon City Man. Co.*, 4 Or. 52.

⁸⁹ *Post*, § 4652.

⁹⁰ *Hull v. Hall*, 78 Me. 114; *Nason v. West*, 78 Me. 253.

for the safety of the servant than it requires the servant to exercise in providing for his own safety. Negatively stated, the rule agreed upon by many of the courts therefore is, that the servant cannot recover for an injury resulting from defective machinery, appliances or premises, unless the master knew, or ought to have known, of the defect, and unless the servant was ignorant of it and had not equal means of knowledge with the master.⁹¹ Where it becomes a question of knowledge merely, and not of diligence in acquiring knowledge, then the rule is correctly formulated in the proposition that a master is liable for an injury to his servant caused by a *latent defect* of which the master had notice and of which the servant was ignorant.⁹² If it does not appear that the master knew of the defect, or was ignorant of it through a want of that reasonable care for the safety of his servant which, as already seen, the law puts upon him,—then the master is not liable, and the question of the negligence of the servant becomes immaterial.⁹³ An illustration of this correlative duty of knowing, where the duty was more immediate on the part of the servant than on the part of the master, is found in a case where it was held that a railway company is not liable for injuries to a brakeman on a freight-train, alleged to have been due to a defective lantern which he used in giving signals, if the company did not know and had no means of learning of the defect, and the brakeman, although not knowing of it, had the sole care and custody of the lantern, and by proper diligence might have known its defective condition and reported the fact to the company.⁹⁴

§ 3802. Circumstances under which Master Exonerated from Liability for Failure to Make Inspections.—A number of cases have been collected under this head, some of them badly decided, exonerating the master from liability to servants killed or injured in consequence of the master's failure to discharge the duty of making suitable inspections of the machinery and appliances about which his servants were required to work:—As, for example, decisions exonerating the master from liability for an accident caused by the wrongful interference of

⁹¹ *Humphreys v. Newport News & Co.*, 33 W. Va. 135; s. c. 10 S. E. Rep. 39; 39 Am. & Eng. R. Cas. 363; *Hoffman v. Dickinson*, 31 W. Va. 142; s. c. 6 S. E. Rep. 53; *Bailey v. Rome & C. R. Co.*, 49 Hun (N. Y.) 377; s. c. 19 N. Y. St. Rep. 656; *Chicago & C. R. Co. v. Stites*, 20 Ill. App. 648; *Washington & C. R. Co. v. McDade*, 135 U. S. 554; s. c. 34 L. ed. 235; 18 Wash. L. Rep. 526; 42 Alb. L. J. 175; 10 Sup. Ct. Rep. 1044; *Goltz v. Milwaukee & C. R. Co.*, 76 Wis. 136; s. c. 44 N. W. Rep.

752; 41 Am. & Eng. R. Cas. 282; *post*, § 4643.

⁹² *Columbia & C. R. Co. v. Hawthorn*, 3 Wash. Ter. 353; s. c. 19 Pac. Rep. 25; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 124.

⁹³ *Chicago & C. R. Co. v. Stites*, 20 Ill. App. 648; *Hobbs v. Stauer*, 62 Wis. 108; *Nelson v. Dubois*, 11 Daly (N. Y.) 127.

⁹⁴ *Pennsylvania Co. v. Congdon*, 134 Ind. 226; s. c. 33 N. E. Rep. 795. See *post*, § 4616.

his employés with the machinery, which interference he was not bound to anticipate;⁹⁵ for failure to inspect machinery, otherwise in good repair, with respect to the cleaning and oiling of it,—this being, in the theory of the court, a mere detail of the work;⁹⁶ for failing to inspect “exploders” given to quarry-men for use, where the manufacturers of them make repeated inspections in the process of construction, and the exploders are as good as any made, and no one but an expert could make a competent inspection, and no defect in one has been discovered after their use for several years;⁹⁷ for the failure of a railway company to inspect, during its use, a push-pole eight feet long and six inches in diameter,—the master being entitled to rely upon the presumption that the servant using it will first discover any defect in it;⁹⁸ for the failure on the part of an employer to inspect stone, after it is delivered from the quarry, to ascertain whether any explosives are left about it, where such inspections were always made at the quarry, and were never made after the stone had been delivered;⁹⁹ for the failure of ship-repairers, employed to make such repairs upon a vessel as the engineer of it should direct, to inspect the riveting of the lower section of a ventilator which was being repaired, they having no opportunity to do so;¹⁰⁰ for the failure to inspect a plank in a scaffolding, apparently of ample size and strength, which had been used for over two years, in which no defect had been discovered, but which broke while a workman was on it.¹⁰¹ In a case of an injury to a servant by

⁹⁵ *Schwandt v. William Wright Co.*, 126 Mich. 609; s. c. 85 N. W. Rep. 1107 (servant unnecessarily climbed on roof and removed a board placed there to prevent weights at ends of cables from striking employés working underneath; and cable broke, allowing weight to fall and kill the servant; master not negligent in not inspecting cable, as the board was a sufficient protection if not interfered with).

⁹⁶ *Quigley v. Levering*, 167 N. Y. 58; s. c. 60 N. E. Rep. 276; 54 L. R. A. 62; aff'g s. c. 50 App. Div. (N. Y.) 354; 63 N. Y. Supp. 1059 [citing *Webber v. Piper*, 109 N. Y. 496; s. c. 17 N. E. Rep. 216 (keeping circular saw sharp is a detail of work); *Crispin v. Babbitt*, 81 N. Y. 516; s. c. 37 Am. Rep. 521 (letting steam into engine is a detail of work); *Cregan v. Marston*, 126 N. Y. 568; s. c. 27 N. E. Rep. 952 (selection of “fall” for use with a derrick, out of an adequate supply, is a detail of work)].

⁹⁷ *Shea v. Wellington*, 163 Mass. 364; s. c. 40 N. E. Rep. 173.

⁹⁸ *Miller v. Erie R. Co.*, 21 App. Div. (N. Y.) 45; s. c. 47 N. Y. Supp. 285.

⁹⁹ *Mooney v. Beattie*, 180 Mass. 451; s. c. 62 N. E. Rep. 725.

¹⁰⁰ *Brown v. Terry*, 67 App. Div. (N. Y.) 223; s. c. 73 N. Y. Supp. 733.

¹⁰¹ *Ehni v. National Tube Works Co.*, 203 Pa. St. 186; s. c. 52 Atl. Rep. 166. See *Dompier v. Lewis*, 131 Mich. 144; s. c. 9 Det. Leg. N. 299; 91 N. W. Rep. 152 (master not liable to servant for failing to inspect a hammer, *the property of another servant*, purchased from a reputable dealer); *Wyman v. Clark*, 180 Mass. 173; s. c. 62 N. E. Rep. 245 (no duty on the part of an employer to inspect a machine, whenever it was used by his own workmen or by contractors, to see that it was left in a proper condition; and servant leaving the work had no right to assume that the machine

a *temporary obstruction* on a walk which the servant was required to use, placed there by one with whom the master had contracted for the performance of the work, the master was not liable, unless he had notice of the obstruction, or it was necessarily required to be made in the performance of the work.¹⁰²

§ 3803. Burden of Proof in Actions Predicated upon Failure to Make Proper Inspections.—Here, as elsewhere, the plaintiff is bound to make out his case; and in order to do this he must show that reasonably careful inspections were not made, and at reasonable intervals;¹⁰³ and that if such inspections had been made, they would have disclosed the defect which led to the injury in time to permit of its reparation in the exercise of reasonable care.¹⁰⁴ Where a reasonably careful and skillful inspection would not have disclosed the defect which caused the injury, there is of course no liability; and this, although there has been a failure for several years to inspect the part of the instrument which contained the defect.¹⁰⁵

§ 3803a. Evidentiary Effect of Long Use without Accident.¹⁰⁶—The fact that machinery or appliances not obviously dangerous have been in daily use for a long time and have uniformly proved safe and sufficient, will not, as matter of law, relieve the master from the duty of making suitable inspections and needed repairs, or relieve him from the imputation of negligence in case of a servant sustaining a personal injury owing to a defect therein.¹⁰⁷

§ 3803b. Evidence Tending to Show an Insufficient Inspection.—Briefly stated, evidence tending to show the following conditions of fact warrants the conclusion of an insufficient inspection on the part of the master of machinery and appliances which his servant is required to use:—The operation of a freight-car with a hanger-pin out

would be in the same condition on his return half an hour later). A servant was injured by the head of a maul flying off from the handle as the implement was being used by a fellow workman. This workman took the maul from a tool-box, his own having been taken by some one else. There was no evidence to show how long the maul had been in a defective condition. It was held not to show that the employer was negligent in not properly inspecting the tools, or that he had knowledge of the defective condition of the implement: *Dwyer v. Shaw*, 22 R. I. 648; s. c. 50 Atl. Rep. 389.

¹⁰² *Burnes v. Kansas City &c. R. Co.*, 129 Mo. 41; s. c. 31 S. W. Rep. 347.

¹⁰³ *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188 (inspection of steam-boiler).

¹⁰⁴ *Stackpole v. Wray*, 74 App. Div. (N. Y.) 310; s. c. 77 N. Y. Supp. 633.

¹⁰⁵ *Boess v. Clausen &c. Brew. Co.*, 12 App. Div. (N. Y.) 366; s. c. 42 N. Y. Supp. 848.

¹⁰⁶ See also, *post*, § 3996.

¹⁰⁷ *Houston v. Brush*, 66 Vt. 331; s. c. 29 Atl. Rep. 380.

of its sockets, and a nut missing from a bolt which holds a friction-plate in position;¹⁰⁸ in the case of an accident from the breaking of a crowbar, evidence that some days before the injury the bar was in a fire in the defendant's shops, and was injured and weakened by the heat and water, and had not since been inspected by the defendant;¹⁰⁹ the failure to discover an old break in a coupling on a car which had been in the defendant's yard for over twenty days, its defective condition being easily discoverable;¹¹⁰ evidence that a break in a jackscrew had begun before the jackscrew was given to the servant who was injured by its breaking, that an inspection would have disclosed it, and that no inspection was made;¹¹¹ in the case of an injury to a locomotive-engineer caused by the turning of the engine-step, occasioned by the looseness of a nut, evidence that the nut was not tampered with after the engine had been inspected at the roundhouse, and would not have worked loose unless it was too loose at the time of the inspection, which consisted only in the inspector kicking the step to see if it was tight;¹¹² in case of an injury from a defect in the appliances for the starting and stopping of a machine, evidence that an inspector had daily looked over the machine while it was in operation without discovering any defect therein, but that he did not make a minute inspection of the shafts, pulleys, belts and other appliances, as regarded the stopping and starting of the machine;¹¹³ in the case of an injury from a defective brake-rod, the existence of the defect being uncontroverted, evidence that it was of such a nature that it could have been discovered by a proper inspection, and that it was not in fact discovered;¹¹⁴ evidence that the rods supporting an electric lamp had become rusted after several years' use, so that a trimmer using them to support himself while caring for the lamp was injured by their breaking, and further evidence that the receiver in charge of the properties of the electric company had never had the rods inspected,

¹⁰⁸ *Budge v. Morgan's Louisiana &c. R. &c. Co.*, 108 La. 349; s. c. 32 South. Rep. 535 (negligence to tolerate system of inspection which proceeds on the theory of the car-inspector, not experienced in the running of cars, that it is as safe to operate a freight-car with such defects as if those parts were properly adjusted).

¹⁰⁹ *Miller v. Great Northern R. Co.*, 85 Minn. 272; s. c. 88 N. W. Rep. 758.

¹¹⁰ *Munch v. Great Northern R. Co.*, 75 Minn. 61; s. c. 12 Am. &

Eng. R. Cas. (N. S.) 586; 77 N. W. Rep. 541.

¹¹¹ *Kennedy v. Chicago &c. R. Co.*, 57 Minn. 227; s. c. 58 N. W. Rep. 878.

¹¹² *San Antonio &c. R. Co. v. Lindsey*, 27 Tex. Civ. App. 316; s. c. 65 S. W. Rep. 668.

¹¹³ *Gulf &c. R. Co. v. Hayden*, 29 Tex. Civ. App. 280; s. c. 68 S. W. Rep. 530.

¹¹⁴ *Galveston &c. R. Co. v. Buch*, 27 Tex. Civ. App. 283; s. c. 65 S. W. Rep. 681 (such evidence warrants a finding that no sufficient inspection was made).

though the climate was damp, and though such rods were rapidly weakened by rust.¹¹⁵

§ 3803c. **Other Evidence Speaking upon the Question of the Adequacy of Inspection.**—Upon the question whether adequate care in inspecting the machinery, appliance, etc., has been exercised, it is, of course, an evidentiary fact that it was built or prepared by a competent and skillful undertaker; that it was apparently in good condition, and that it has been used for a considerable length of time in that condition without accident.¹¹⁶ It follows, from the preceding, that the mere fact of a latent defect in machinery is not *prima facie* evidence of negligence on the part of the master; and that a discovery and repair of the defect, after an injury to the servant has happened from it, will not constitute evidence of such negligence; but that the question of negligence is to be determined by the appearances existing prior to the accident.¹¹⁷ Evidence that the appliance which broke had been purchased from a manufacturer of good repute, and that it had been subjected to reasonable external inspections; that it broke in consequence of a hidden flaw which could not be seen or discovered without taking it to pieces,¹¹⁸ will generally exonerate the master. But under a proper system of jury trial, where disputed questions of fact

¹¹⁵ Dupree v. Tamborilla, 27 Tex. Civ. App. 603; s. c. 66 S. W. Rep. 595. Evidence that cars were so loaded as to increase the hazard to a brakeman, and that there was no provision made for inspecting them, has been held sufficient to sustain a finding that *no inspection was made*: Irving v. Flint & Co., 89 Mich. 416; s. c. 50 N. W. Rep. 1008. Evidence held not sufficient to establish the existence of a rule of a railroad company requiring the inspection of loaded cars before they are sent out: Byrnes v. New York & C. R. Co., 71 Hun (N. Y.) 209; s. c. 54 N. Y. St. Rep. 288; 24 N. Y. Supp. 517.

¹¹⁶ See to this effect a very clear charge of Blodgett, J., to a jury, in Nelson v. Allen, 29 Fed. Rep. 840; also, La Pierre v. Chicago & C. R. Co., 99 Mich. 212; s. c. 58 N. W. Rep. 60; Kelly v. Forty-Second St. & C. R. Co., 58 Hun (N. Y.) 93; s. c. 11 N. Y. Supp. 344. The same element is found in many of the preceding cases.

¹¹⁷ O'Donnell v. Baum, 38 Mo. App. 245. That a municipal corporation

is not guilty of negligence rendering it liable to an employé engaged in using an *explosive* having the reputation of being safe and efficient, although its composition has been changed by the manufacturer without knowledge or notice of the change to the village officers,—see Prentice v. Wellsville, 66 Hun (N. Y.) 634; s. c. 50 N. Y. St. Rep. 557; 21 N. Y. Supp. 820.

¹¹⁸ Thus, where, in an action for injuries sustained by a brakeman owing to the breaking of a brake-staff, the special findings disclosed that the defect in the staff consisted of a hidden flaw in the metal, which could not have been discovered without removing the ratchet-wheel from the staff, and that the car had been purchased from a manufacturer of good repute, and had been inspected the day previous to the accident, and that an inspection would not have revealed the defect,—it was proper to overrule a motion for judgment for plaintiff on the findings: Chestnut v. Southern Indiana R. Co., 157 Ind. 509; s. c. 62 N. E. Rep. 32.

are left to the determination of juries, and are not decided by the judge in disregard of the opinion of the jury, if there is any substantial evidence tending to show that the appliance which broke gave way in consequence of a visible defect, or of a defect which should have been discovered by the master in the exercise of reasonable care, then the question of his negligence will go to the jury.¹¹⁹

ARTICLE IV. INJURIES TO SERVANTS THROUGH FAULTS OF OPERATION.

SECTION

3804. Preliminary.

3805. Duty of master as to control and supervision of his own business.

3806. Duty of master to correct habitual abuse or non-use of appliances.

3807. Failure of master to furnish adequate help.

3808. Master adopting unusual or unsafe methods of work.

SECTION

3809. Negligence of master or his representative in giving orders.

3810. Negligence of a foreman of work in handling a pile-driver.

3811. Operation of blast-furnaces.

3812. Oiling, cleaning, or repairing machinery while in motion.

§ 3804. **Preliminary.**—In discussing the subject of injuries to servants through faults in the operation of the master's appliances, or in the conduct of his work, it is necessary to distinguish at every step between those faults which the law lays at the door of the master, and those which are attributable to the negligence of fellow servants. It is to the former that we now direct our attention, the latter being reserved for a future Subdivision.

§ 3805. **Duty of Master as to Control and Supervision of his Own Business.**—It is the duty of the master to supervise, direct, and control the operation and management of his business so that no injury shall ensue to his employes through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor.¹

¹¹⁹ This may be illustrated by a case where a man employed in a quarry was injured by the breaking of a hook which was attached to a cable and hooked to cars loaded with stone, which were by means of the cable drawn up an inclined track. In an action for the injuries, an employe testified that he picked up the broken pieces of the hook and that there was a visible flaw in

it, that he could see where it had been broken, and that it was an old break and rusty. It was held that the question whether the hook was defective, and whether the defendant knew, or ought to have known, of such fact, was for the decision of the jury: *Momence Stone Co. v. Groves*, 197 Ill. 88; s. c. 64 N. E. Rep. 335; aff'g s. c. 100 Ill. App. 98.

¹ *Post*, § 4175, *et seq.*; *Hunn v.*

§ 3806. **Duty of Master to Correct Habitual Abuse or Non-Use of Appliances.**—A corporation engaged in a dangerous business is charged with the duty, not only of furnishing reasonably safe appliances for its employes to use, but also of correcting a habitual abuse or non-use of such appliances, or of discharging the offending employes.²

§ 3807. **Failure of Master to Furnish Adequate Help.**³—An employer is bound to exercise reasonable care to the end not only of furnishing reasonably safe machinery, tools, and appliances for the use of his servants, but also to the end of furnishing a *sufficient number of servants* for the safe accomplishment of a task imposed upon a servant, and is liable for an injury caused by his neglect of duty in this respect, in the absence of contributory negligence on the part of the servant;* but not for an injury of which the failure to furnish sufficient men was not the proximate cause.⁵ The fellow-servant rule is not allowed to defeat recovery against the master for injury to a servant, where it is shown that the establishment where the accident occurred was being run with a force *insufficient to secure safety* to the employes, and that the accident resulted from such short-handedness.⁶ A petition in an action for personal injuries to an employe from failure of the employer to furnish a *sufficient number of men* to do the work does not, by its statement of such fact, show that the employe knew at the time of the injury of such *insufficiency*, although it pre-

Michigan &c. R. Co., 78 Mich. 513; s. c. 7 L. R. A. 500; 44 N. W. Rep. 502; 41 Am. & Eng. R. Cas. 452 (holding that a train-despatcher is a vice-principal).

²Brookside Coal Min. Co. v. Dolph, 101 Ill. App. 169. See *ante*, § 3790; *post*, §§ 4001, 4048.

³See also, *post*, §§ 4175, 4768, 4829, 4865, 4868.

⁴Craig v. Chicago &c. R. Co., 54 Mo. App. 523 (assigning two men to work of moving heavy timbers on a trestle, the evidence showing that five men would be required to do it safely—but plaintiff guilty of contributory negligence as a matter of law, preventing a recovery).

⁵O'Connell v. Thompson-Starrett Co., 72 App. Div. (N. Y.) 47; s. c. 76 N. Y. Supp. 296 (not shown how presence of more men would have prevented a timber from "kicking" when a cleat was knocked off).

⁶Hill v. Big Creek Lumber Co., 108 La. 162; s. c. 32 South. Rep. 372 (servant whose duty it was to keep transfer-table and conveyer of

an "edger" in a saw-mill free from obstructions, without which being done the machine would be extremely dangerous, left his post for a short time, allowing the "edger" to become clogged with lumber and kill another operator of the same machine; the rule of reasonable care requiring that the master should have had on hand constantly *another man to take his place* in case he left it, in view of the extreme danger). But the fact that on the particular occasion, use could have been made of another brakeman, does not make a railroad company guilty of negligence, in failing to provide more than the number of brakemen *usually necessary* upon a freight-train of like character, which will render it liable to a fireman of another train injured in a collision with such train: Relyea v. Kansas City &c. R. Co., 112 Mo. 86; s. c. 18 L. R. A. 817; 53 Am. & Eng. R. Cas. 578; 20 S. W. Rep. 480.

supposes his knowledge of the fact at the time he makes the statement, and although it may be assumed that he knew, at the time of the injury, the *number* of men employed.⁷

§ 3808. **Master Adopting Unusual or Unsafe Methods of Work.**⁸—Negligence in a master is not shown by the mere fact that the method of doing work is unusual. It must also be more dangerous in itself than the ordinary one.⁹ A questionable decision is to the effect that a railroad company owes no duty to an employé to make an inspection of an appliance in a manner which is unusual and not customary among railroads, or in a manner which it is not shown that prudent men engaged in operating railroad-trains consider essential.¹⁰ A railroad company has been held liable for an injury to an employé free from contributory negligence, caused by the fall of a stack of railroad-ties left in a dangerous condition, if its servants and agents charged with the duty of keeping the premises in a safe condition knew or could have known of the dangerous condition of such stack in time to remove the danger.¹¹ Therefore, the misdirection of the superintendent in charge of the work of removing a stack of railroad-ties, to leave such stack, at the time of quitting work, in a condition in which it is liable to topple over and fall on employés subsequently engaged in work about the pile, renders the company liable to an employé injured by the fall of the ties.¹² But it has been held that an employer

⁷ McMullen v. Missouri &c. R. Co., 60 Mo. App. 231; s. c. 1 Mo. App. Repr. 230. An employé ordered by a foreman to assist a porter in loading boxes of glass, and injured by several boxes of glass which the porter directed him to support, falling upon him, cannot recover of his employer on the ground that an *insufficient number of men* were employed to do the work, when there were several employés handling boxes near by, whom the foreman could have directed to assist, and no request for assistance was made by the plaintiff or by the porter, the evidence tending to show that the accident was due either to the negligence of the foreman, who was a fellow servant, or to the negligence of the plaintiff: Alberts v. Bache, 69 Hun (N. Y.) 255; s. c. 53 N. Y. St. Rep. 230; 23 N. Y. Supp. 502.

⁸ See also, *post*, § 4628.

⁹ Cunningham v. Fort Pitt Bridge Works, 197 Pa. St. 625; s. c. 47 Atl. Rep. 846 (moving heavy girders by hand instead of using a crane).

¹⁰ The view of the court was that to remove spindles from draw-bars in order to inspect such spindles, is not required by the obligation of ordinary or reasonable care, it being the custom on the defendant's road to inspect only that part of the spindle which was visible, it being the weakest part: Burns v. New York &c. R. Co., 20 R. I. 789; s. c. 38 Atl. Rep. 926.

¹¹ Texas &c. R. Co. v. Echols, 17 Tex. Civ. App. 677; s. c. 41 S. W. Rep. 488.

¹² Texas &c. R. Co. v. Echols, 17 Tex. Civ. App. 677; s. c. 41 S. W. Rep. 488. In a similar case it appeared that the superintendent of the defendant, a manufacturer of printing-presses, while preparing a large press for shipment, placed part of the frame in a hallway pending its removal. The frame was not securely propped, and by reason thereof fell and injured plaintiff, an employé, who was passing through the hallway. The manner of supporting and caring for

is not liable to an employé on the ground of having failed to furnish a safe place to work, where the premises were in a reasonably safe condition when the work was undertaken, but were rendered unsafe by the alleged negligent manner in which the boss of the gang of which such employé was a member directed the work to be performed.¹³

§ 3809. Negligence of Master or his Representative in Giving Orders.¹⁴—The liability of the employer for the negligence of one of his employés in giving orders to the others, whereby an injury to one of them happens, will depend upon whether the employé giving the orders is to be deemed in law the employer's vice-principal, or a fellow servant of the injured employé,—a question to be considered hereafter.¹⁵ If the servant giving such orders stands in the relation of vice-principal to the common master, then the master will be liable to the servant injured in consequence of obeying them, unless the danger of obeying them was so obvious to the comprehension of a servant of his capacity, and situated as he was, that the act of obedience ought to be ascribed to recklessness or rashness on his part.¹⁶ This principle has been so applied that where an employé acts in the interest of an employer in demanding the assistance of other employés, or, where work is imposed upon him which he cannot perform alone, in obtaining such assistance as he may choose, and another employé so called upon to assist him is injured while complying with his orders, such injured employé can recover damages of the master, the orders being negligently given.¹⁷ As we shall see,¹⁸ the rule is more imperative where a minor employé is ordered, by the vice-principal of the master, into a situation of danger, since he will feel under a greater obligation to obey, and the danger will not be as apparent to his inexperience as to an adult.¹⁹

this frame was different from that customarily pursued in other cases, and the method of propping it was unusual (which relieved the plaintiff from assumption of the risk). It was held that such employé was not barred from recovering under such circumstances on the ground that the frame fell because of the negligence of his fellow servant; since there was evidence justifying a finding that the superintendent in charge undertook to see to the bracing: *Goss Printing Co. v. Lempke*, 90 Ill. App. 427; s. c. aff'd, 191 Ill. 199; 60 N. E. Rep. 968.

¹³ *Richmond Locomotive Works v. Ford*, 94 Va. 627; s. c. 27 S. E.

Rep. 509 (plaintiff injured by fall of locomotive driving-wheel which was being moved by hand).

¹⁴ See also, *post*, § 3814, 3815.

¹⁵ *Post*, §§ 4921, 4398, *et seq.*

¹⁶ *Holmes v. Clarke*, 7 Hurl. & N. 348; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Chicago Anderson Pressed-Brick Co. v. Sobkowiak*, 148 Ill. 573, 582; *East Tennessee &c. R. Co. v. Bridges*, 92 Ga. 399; s. c. 17 S. E. Rep. 645.

¹⁷ *Patnode v. Warren Cotton Mills*, 157 Mass. 283; s. c. 32 N. E. Rep. 161.

¹⁸ *Post*, §§ 3818, 4091, *et seq.*

¹⁹ *McLean County Coal Co. v. McVey*, 38 Ill. App. 158.

§ 3810. **Negligence of a Foreman of Work in Handling a Pile-Driver.**—The foreman employed on a pile-driver may be found guilty of negligence in allowing a workman apparently drunk, to handle a fall liable to become caught on the chocking-guard which holds the driving-hammer in place, while another workman is engaged in swinging the pile to its place, or in giving the order to “hoist” while the fall is caught on such guard, in each of which acts he is “exercising superintendence” within the meaning of a statute.²⁰

§ 3811. **Operation of Blast-Furnaces.**—In removing a defective “bosh-plate” in a blast-furnace for the purpose of replacing it with a new one, it was customary for the superintendent of the furnace to direct the blast to be entirely stopped. Such superintendent ordered an employé to assist in removing the plate without directing the blast to be stopped, and as a consequence of his neglect the removal of the plate was accompanied by a torrent of fire, coke, and gas, inflicting fatal injuries on the employé. It was held that, in failing to direct the blast to be stopped, the superintendent was guilty of negligence for which his principal was liable.²¹

§ 3812. **Oiling, Cleaning, or Repairing Machinery while in Motion.**—A master is not negligent in requiring, in accordance with a universal practice in other mills, a loom to be fanned to cleanse it while in motion, so as to render him liable to an employé injured while so engaged, where by such method time is saved and the work facilitated, resulting in a benefit to the injured employé, who works by the piece, and no similar accident has ever occurred, although the process has to be repeated “sometimes over twice a day.”²² To let a young man without experience, and to whom the foreman has given erroneous instruc-

²⁰ *McPhee v. Scully*, 163 Mass. 216; s. c. 39 N. E. Rep. 1007. See *post*, § 5281, *et seq.*

²¹ *Illinois Steel Co. v. McFadden*, 98 Ill. App. 296; s. c. *aff'd*, 196 Ill. 344; 63 N. E. Rep. 671; *Illinois Steel Co. v. Sitar*, 98 Ill. App. 300; s. c. *aff'd*, 199 Ill. 116; 64 N. E. Rep. 984. In this case, it being an action for the death of a servant while assisting in removing from the walls of a blast-furnace certain “bosh-plates,” which it was customary to remove only when the blast was off, and while there was no pressure on the plates from the blast, it was proper to refuse to instruct that, if the superintendent was in the exercise of all the care which

in his judgment was necessary, and if the accident happened notwithstanding such care, defendant was not liable; since, it having been the practice to remove the plates when the blast was off, the superintendent had no right to exercise his own judgment in determining whether it was safe to remove the plate when the blast was on; and for the further reason, that the amount of care necessary will not be left solely to the judgment of a superintendent, thus exonerating the master: *Illinois Steel Co. v. McFadden*, *supra*.

²² *Gideon v. Enoree Man. Co.*, 44 S. C. 442; s. c. 22 S. E. Rep. 598.

tions, undertake the work of lacing a broken belt without stopping the shaft over which it hangs, is negligence for which the employer is responsible, where in consequence thereof the employé is caught in such belt and drawn around the shaft.²³

ARTICLE V. ORDERING SERVANT INTO DANGER.

SECTION	SECTION
3814. Ordering servant into more dangerous place—Exposing him to risks not within the contract of service.	3817. Subjecting servant to hostile attack by servants of another company.
3815. Injuries in consequence of obeying orders of superior.	3818. Liability of master for ordering minor employé into a more dangerous employment.
3816. Ordering a servant to violate an injunction or commit a trespass.	3819. Instances of this liability.

§ 3814. **Ordering Servant into More Dangerous Place—Exposing him to Risks Not within the Contract of Service.**—For a superintendent, or foreman of work, or “boss,” or superior servant of whatever grade or whatever name, who is entitled to command the inferior servant and to receive obedience from him, to order him into a more dangerous situation than that called for by his contract of service, or to do work not called for by such contract, attended with special hazards, or with greater danger than the ordinary work which he has contracted to do, and especially without giving him adequate warning and instruction, and more especially where he is a minor, whereby injury is brought upon him, is generally deemed to be the act of a vice-principal, and, consequently, that of the master, so as to make the master liable for the injury in the absence of contributory fault on the part of the injured servant. In such cases, the master cannot exonerate himself, by invoking the so-called “fellow-servant rule,” on the theory that the wrong of his vice-principal is merely the wrong of a fellow servant of the injured servant.¹ It has been well said that

²³ Archbald v. Yelle, Rap. Jud. Que. 6 B. R. 334 (in French). That an employer is not negligent in directing a boy eighteen years old to clean a revolving shaft with a piece of bagging instead of furnishing him with cotton-waste for the purpose,—see Smith v. Martin, 39 N. Y. St. Rep. 126; s. c. 14 N. Y. Supp. 935.

¹ This conclusion, though not always reasoned in the same way,

may be collected from the following among many other cases: Orman v. Mannix, 17 Colo. 564; s. c. 17 L. R. A. 602; 30 Pac. Rep. 1037; 31 Am. St. Rep. 340 (gang-boss ordered a boy fourteen or fifteen years of age, who was subject to his orders, to run and throw away an ignited stick of giant powder, which act was outside of the duties and employment of the boy, but within the scope of the employment

the rule as to fellow servants has no application where the injury is occasioned by exposing the servant to risks not within his contract of

and duties of the boss); *Augusta Factory v. Hill*, 83 Ga. 709; s. c. 10 S. E. Rep. 450 (railway yardmaster ordered by superintendent to break into a gas-room to extinguish a fire and killed by the walls falling upon him); *Augusta v. Owens*, 111 Ga. 464; s. c. 36 S. E. Rep. 830 (quarryman struck by a rock loosened by a laborer from above him, who had been put to work there by the superintendent without warning plaintiff of the danger); *Hinckley v. Horazdowsky*, 133 Ill. 359; s. c. 23 N. E. Rep. 338; 24 N. E. Rep. 421; 8 L. R. A. 490; aff'g s. c. 33 Ill. App. 259 (boy twelve years old, unable to appreciate the danger, ordered by the foreman to oil dangerous machinery while in motion); *Louisville & C. R. Co. v. Graham*, 124 Ind. 89; s. c. 24 N. E. Rep. 668 (negligence of railway foreman in ordering another employé to work in a dangerous place, is the negligence of the company and not that of a coemployé); *Hawkins v. Johnson*, 105 Ind. 29; s. c. 55 Am. Rep. 169; *Swift & Co. v. Creasey*, 9 Kan. App. 303; s. c. 61 Pac. Rep. 314 (one employed as ash-wheeler in a packing-house, ordered to assist in putting out a fire in the smoke-house, containing much burning wood and grease, and without warning or instruction, turned a hose thereon, causing an explosion, injuring him—instance of a *petition* stating a good cause of action); *Erickson v. Milwaukee & C. R. Co.*, 83 Mich. 281; s. c. 47 N. W. Rep. 237 (common laborer on a gravel-train, ordered by the foreman to uncouple cars and jump from one to the other while they were in motion); *Rowland v. Missouri Pac. R. Co.*, 20 Mo. App. 463 (section-foreman ordered a section-hand to take up a rail, telling him that it was free and clear, but, not being free and clear, it rebounded, injuring the man—foreman acted as vice-principal and not as fellow servant); *Rettig v. Fifth Ave. Transp. Co.*, 6 Misc. (N. Y.) 328; s. c. 56 N. Y. St. Rep. 235; 26 N. Y. Supp. 896; s. c. aff'd, 144 N. Y. 715; 70 N. Y. St. Rep. 868; 39 N. E. Rep. 859 (superintendent ordered plain-

tiff to leave his regular employment and open a heavy door in a manner directed, he having no knowledge of defects in its rolling-gear, of which both the superintendent and the employer knew, in consequence of which he was injured); *Lofrano v. New York & C. Water Co.*, 55 Hun (N. Y.) 452; s. c. 29 N. Y. St. Rep. 557; 8 N. Y. Supp. 717; s. c. aff'd, 130 N. Y. 658; 29 N. E. Rep. 1033 (foreman directed employé to warm a quantity of dynamite, without warning him of the danger, which was unknown to him, and it exploded, injuring him—master liable); *Berry v. Atlantic Storage Co.*, 50 App. Div. (N. Y.) 590; s. c. 64 N. Y. Supp. 292; 98 N. Y. St. Rep. 292 (employé ordered from his usual place of work outside an elevator to a dark place within, and ordered to walk along a platform and ascertain whether a bin was open—platform collapsed, injuring him—master liable); *Boyle v. Degnon-McLean Const. Co.*, 47 App. Div. (N. Y.) 311; s. c. 61 N. Y. Supp. 1043; 95 N. Y. St. Rep. 1043; appeal dismissed, 163 N. Y. 591 (master placed employé, at night, within seven feet of a large hole in an elevated trestle, used for dumping coal into bunkers underneath. Had provided planks to cover the hole, but had not established or enforced any rule to cover the hole at night. The place being insufficiently lighted, the employé fell through and was killed—master liable); *Benzing v. Steinway*, 101 N. Y. 547; s. c. 5 N. E. Rep. 449 (servant ordered by foreman out of the line of his employment to mount a platform which was unsafe, and thereby received an injury—master liable); *Means v. Carolina Cent. R. Co.*, 126 N. C. 424; s. c. 35 S. E. Rep. 813; s. c. on former appeals, 122 N. C. 990; 124 N. C. 574 (specially considered *infra*, note); *Anderson v. Bennett*, 16 Or. 515; s. c. 8 Am. St. Rep. 311; 19 Pac. Rep. 765 (see *infra*, note, for a statement of this case); *Weaver v. Iselin*, 161 Pa. St. 386; s. c. 29 Atl. Rep. 49 (minor employed in a coal mine—employment changed with knowledge of

employment.² In a case in the Queens Court of the Province of Quebec, the doctrine is stated by saying that the owner of a manu-

superintendent, having power to hire and discharge—minor thereby exposed to increased danger and killed—master liable); *Electric R. Co. v. Lawson*, 101 Tenn. 406; s. c. 47 S. W. Rep. 489; 12 Am. & Eng. R. Cas. (N. S.) 669 (track-foreman ordered a section-hand to board a car while in motion, and section-hand injured—foreman held to be a vice-principal and master liable); *Texas &c. R. Co. v. Lewis* (Tex. Civ. App.), 26 S. W. Rep. 873 (no off. rep.) (section-hand ordered by foreman having power to employ and discharge, to assist in removing hand-car from track in front of approaching train; section-hand injured—company liable); *Mahood v. Pleasant Valley Coal Co.*, 8 Utah 85; s. c. 30 Pac. Rep. 149 (foreman ordered a car, the brake of which he knew to be defective, to be sent down a grade—company liable to a servant injured in attempting to stop the car); *Sias v. Consolidated Lighting Co.*, 73 Vt. 35; s. c. 50 Atl. Rep. 554 (servant ordered to climb a telegraph-pole and fell—master not entitled to an instruction on the fellow-servant rule); *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; s. c. 3 Am. St. Rep. 92 (boy thirteen years old, hired by his father “to sweep, carry water, and fill the buckets with quills,” was ordered by a vice-principal of the company to assist in putting on a belt which had broken, and was injured—company liable); *Mason v. Edison Machine Works*, 28 Fed. Rep. 228 (factory foreman with power to employ and discharge, left a single laborer to hold on edge the bed-plate of an engine, when at least four men would seem to have been necessary; laborer injured—master liable); *Hardy v. Minneapolis &c. R. Co.*, 36 Fed. Rep. 657 (act of a yardmaster in directing a call-boy to perform the duty of making switches, imputed to the company and company liable for the boy’s injury).

Other Decisions in Support of the Foregoing Text.—A seaman was compelled by the mate of the vessel, who was in temporary com-

mand, to work in a dangerous situation in unloading lumber. The seaman had protested against the manner in which the mate was discharging the lumber, but the mate refused to adopt any other method. In consequence of pursuing this method some of the lumber fell upon the seaman, injuring him. It was held that he was entitled to recover damages from the ship: *The Frank and Willie*, 45 Fed. Rep. 494. Where one was not only the foreman to direct the work of the hands under him, but the person to provide that they should have a reasonably safe place at which to work, consistent with the exigencies of the situation, it was of no importance by what name he was called, whether a middleman, superintendent, or foreman; and when he ordered an employé to set up machinery and drill holes at the place where the injury occurred, without having taken any care, or at least adopted some precautionary measures, to discover whether there were holes charged with giant powder which had failed to explode, and to guard against the danger of the drills penetrating them, etc.—he committed a negligent or wrongful act, and exposed the plaintiff to a serious danger not contemplated by his contract of service, for which the master was liable: *Anderson v. Bennett*, 16 Or. 515; s. c. 8 Am. St. Rep. 311; 19 Pac. Rep. 765. The plaintiff’s intestate, a servant of defendant company, was a brakeman on a freight-train, carrying a passenger-coach and running on a regular schedule, under the management of one who was both engineer and conductor, and who had the right to employ or discharge any of the crew, which fact intestate knew. As the train was pulling out of a station at night, intestate was ordered by the engineer to collect the fares and bring them to him, which he did, but, after returning with the fares, the train was running too fast for him to safely jump off the

² *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; s. c. 3 Am. St. Rep. 92.

facturing establishment, who causes a workman to perform very dangerous work, especially when such workman is not accustomed to such

engine and on to the passenger-coach as it came by, so he started back over the train, as his duties required him to be at the rear end, and, in going from the tender to a flat-car, he fell and was run over and killed. It was held that defendant was guilty of negligence in giving the order it did, through its vice-principal, the engineer, without allowing instestate time to execute it without endangering his life: *Means v. Carolina Cent. R. Co.*, 126 N. C. 424; s. c. 35 S. E. Rep. 813; s. c. on former appeals, 122 N. C. 990; 124 N. C. 574. Where an employé, while employed to haul stove-bolts to a factory and to unload them at a certain place, to reach which he had to pass through a narrow way under a revolving shaft, which, unknown to him, had been broken and repaired with projecting bolts after his last previous load, and the wagon-way raised so he could not sit on the load and drive under the shaft safely as before, was directed by his employer's foreman to drive under the shaft, then in motion, and unload his wagon at the usual place; and, in attempting to do so, and in ignorance of the danger until it was too late to avert it, he was caught by the projecting bolts and injured,—it was held that the employer was liable, unless, by the exercise of reasonable care, the employé could have discovered and avoided the danger: *Hawkins v. Johnson*, 105 Ind. 29; s. c. 55 Am. Rep. 169. Where a superior servant directed the servant to do a certain act which he was not ordinarily called upon to perform, without giving him proper instructions, by reason of which he was injured, it was held that the master was liable: *La Fortune v. Jolly*, 167 Mass. 170; s. c. 45 N. E. Rep. 83 (son of master directed workman, ignorant of the danger from the door of the fire-box blowing open, to build a fire under a boiler for the purpose of furnishing power, and failed to give him proper instructions, by reason of which he was injured). Where an engineer was sent out in charge of a locomotive

to do switching, without either brakeman or conductor, and the engineer directed the fireman to couple certain cars to the engine, the fireman being without experience and the service being outside the scope of his duty, in the doing of which he was injured, the railway company was liable: *Pennsylvania Co. v. Hickley*, 20 Ohio C. C. 668; s. c. 11 Ohio C. D. 379 (question whether the railroad company was negligent was for the jury).

Decisions Seemingly Opposed to the Foregoing Text.—It has been held that the facts that the foreman of the gang in which plaintiff was engaged directed him, after turning a switch, to mount the second car from the engine for the purpose of aiding in sending the unloaded cars down to the repair-shop, and that plaintiff was injured in mounting said car in consequence of its having a broken jaw-brace, are not sufficient to warrant a jury in finding the foreman guilty of negligence, for which the company might be liable, where there is no evidence that such foreman was charged with the business of inspecting the cars, or knew of the defect in said car, or had any better means of knowledge than plaintiff: *Flanagan v. Chicago & C. R. Co.*, 50 Wis. 462. Another court has held that a superior servant, under whose direction a carpenter is working upon a ladder in front of a car-stable, who promises but fails to remain at the foot of the ladder to give the workman notice whenever it is necessary to remove the ladder in order to permit the cars or a cart to pass in or out of the stable, does not represent the master, but is at the time doing the work of a servant or employé: *Byrnes v. Brooklyn Heights R. Co.*, 36 App. Div. (N. Y.) 355; s. c. 55 N. Y. Supp. 269; 89 N. Y. St. Rep. 269. See also, *Coosa Man. Co. v. Williams*, 133 Ala. 606; s. c. 32 South. Rep. 232 (servant ordered to put a belt on a rapidly-revolving shaft by raising it with a pole, and hurt); *Martin v. Highland Park Man. Co.*, 128 N. C. 264; s. c. 38 S. E. Rep. 876; *Reed v. Stockmeyer*, 74 Fed. Rep.

kind of work, and does not receive a salary in proportion to the risk he runs, is liable in damages for the death of the workman.³

§ 3815. **Injuries in Consequence of Obeying Orders of Superior.**⁴—This brings up the question whether the superior servant giving the orders acts as a vice-principal or as a fellow servant. The writer believes that where he is placed in a position of authority, superintendence, command, or control over the servant who is injured, he ought to be regarded as a vice-principal, and his acts and commands ought to be regarded as those of the master; so that for his negligence in acting or commanding, whereby the inferior servant is injured, the master ought to pay damages. The Massachusetts statute, with respect to the liability of the master for every act of persons "engaged in superintendence," ought to express the rule of the common law in this particular, and does in many jurisdictions. Thus, in Missouri, where a foreman, with servants under him, was under a superintendent, and one of the servants was injured while obeying the orders of the superintendent, an instruction confining the question of the servant's orders to such as his foreman may have given him, is improper; since, where two agents are over a servant, the latter may obey the superior of the two, and the principal will be bound.⁵

§ 3816. **Ordering a Servant to Violate an Injunction or Commit a Trespass.**—There is a holding to the effect that a servant of a corporation, who does acts in obedience to its orders, which are in violation of an injunction or amount to a trespass, the wrongfulness of which acts is known to the corporation but not to the servant, is entitled to be *indemnified* by the corporation for his consequent arrest and detention.⁶ The liability of a principal or master, who knowingly, but

186; s. c. 20 C. C. A. 381; 34 U.S. App. 727 (experienced quarryman called from a safe place of work to drill under a stone which had seams in it, at the top of which the foreman was hammering upon the wedges—could see the seams and appreciate the danger as well as anyone else).

³Price v. Roy, Rap. Jud. Que. 8 Q. B. 170 (reported in the French language).

⁴See *ante*, § 3809; *post*, §§ 4921, 4938, *et seq.*; and CONTRIBUTORY NEGLIGENCE OF THE SERVANT, in Vol. V.

⁵Sims v. Omaha & C. R. Co., 89 Mo. App. 197. So, where a track-foreman ordered a hand-car put on the track by plaintiff and others, and ordered them to go on the road,

knowing that there was a past-due train liable to meet them, without informing plaintiff of the danger, and the hand-car met the train at a curve where it could not be seen until it was within 500 feet of the car, and the foreman had not sent a flagman forward to protect plaintiff, it was negligence on the part of the railroad company: Allison v. Southern R. Co., 129 N. C. 336; s. c. 40 S. E. Rep. 91.

⁶Guirney v. St. Paul & C. R. Co., 43 Minn. 496; s. c. 46 N. W. Rep. 78 (attempting to prevent another company from constructing crossing over defendant's tracks—error to grant motion of defendant for judgment on pleadings setting up such facts).

without notice to his servant or agent of the liability or danger of arrest likely to be incurred in the performance thereof, orders the latter to do acts which are in *violation of an injunction*, does not depend upon the ultimate determination of the question whether an alleged trespass by or upon the servant is or is not legally justifiable, or as to the legality or propriety of the issuance of the injunction.⁷

§ 3817. Subjecting Servant to Hostile Attack by Servants of Another Company.—A street-railway company is not liable for personal injuries to a hand employed to help lay a railway-track, caused by an attack upon the hands of such company, made by the employes of a hostile company in an attempt to prevent it from laying its tracks, where the employing company did not know or have reason to believe that any such attack was contemplated. The defendant had employed policemen to protect its employes from an attack by the *L. & N. Co.*, but the attack was made, not by such company, but by the *L. Co.*, who did not make the attack while the employes were laying track where they had been ordered to lay it, but only when it appeared that they were going to lay tracks on the grounds of the *L. Co.*, which they had not been ordered to do.⁸

§ 3818. Liability of Master for Ordering Minor Employé into a More Dangerous Employment.⁹—Although the employer may not have been guilty of negligence in employing a minor in his general service, yet if, while the minor is engaged in such service, the employer, by himself or his foreman or other vice-principal, orders the minor into a dangerous service, and especially without giving him proper warning or instruction, and sometimes although it has been given, whereby the minor is injured, the employer will be answerable in damages.¹⁰ A superior servant who thus orders the minor em-

⁷ *Gairney v. St. Paul & C. R. Co.*, 43 Minn. 496; s. c. 46 N. W. Rep. 78 (error to grant motion by defendant for judgment on pleadings, such facts constituting a *prima facie* case for plaintiff).

⁸ *Kelly v. Shelby R. Co.*, 15 Ky. L. Rep. 311; s. c. 22 S. W. Rep. 445 (no off. rep.). Compare *Lewis v. Taylor Coal Co.*, 112 Ky. 845; s. c. 23 Ky. L. Rep. 2218; 66 S. W. Rep. 1044 (where the plaintiff averred a contract to protect decedent from strikers, but it was held that under the law of Kentucky a cause of action for an assault does not survive, and the contract was of no avail to the administrator of decedent).

⁹ See *post*, § 4091, *et seq.*

¹⁰ *Railroad Co. v. Fort*, 17 Wall. (U. S.) 553; s. c. 21 L. ed. 739; *Noblesville Foundry & Co. v. Yeaman*, 3 Ind. App. 521; s. c. *sub nom.* *Yeaman v. Noblesville Foundry & Co.*, 30 N. E. Rep. 10; *McMillan Marble Co. v. Black*, 89 Tenn. 118; s. c. 14 S. W. Rep. 479. There is an untenable holding to the effect that a master is not liable because the *foreman* of a department of his service orders a boy into a dangerous employment, where the foreman had no power to employ and discharge hands,—the court proceeding on the view that the foreman and the child were fellow servants

ployé out of the employment called for by the terms of his contract, and into the more dangerous employment, is deemed not to act in so doing as a fellow servant of the minor, but as the representative of the master.¹¹ A master who has set a young and inexperienced servant at a dangerous task, beyond his strength and skill to perform safely, cannot escape liability on the ground that the servant was directed where to work by a *fellow servant*.¹²

§ 3819. **Instances of this Liability.**—It was so held where the foreman of an establishment required a minor employé to clean machinery while in motion, although this was within the scope of his employment;¹³ and where an employer placed an apprentice sixteen years old at the work of fastening a scaffolding, it being a question for the jury whether this was the exercise of due care in behalf of the servant;¹⁴ and where a boy ten years old, employed in a coal mine, was directed to couple coal-cars and was injured in the attempt.¹⁵

in the same common employment: *Fisk v. Central Pac. R. Co.*, 72 Cal. 38; s. c. 13 Pac. Rep. 144. As the child was obliged to obey the orders of the foreman, the negligence of the foreman was the negligence of the master.

¹¹ *Foley v. California Horseshoe Co.*, 115 Cal. 184; s. c. 47 Pac. Rep. 42. Compare *Fisk v. Central & C. R. Co.*, 72 Cal. 38; s. c. 13 Pac. Rep. 144. A complaint alleging that a child was killed in consequence of the negligence of a superintendent under whose orders he was at work, and which orders he was bound to obey; and that the child was by its father hired to the common master of both the child and the superintendent to do a particular kind of work, which was not dangerous, and was by the superintendent, without the father's knowledge or consent, required to do other work, which was dangerous, without being instructed as to the danger, or as to how to do the work, and was in consequence killed,—is not demurrable; since the general rule of law exempting a master from liability for injuries caused by the negligence of a coemployé, does not ap-

ply to the case of a *child* injured or killed in consequence of the negligence of a superintendent under whose orders he was at work, and which he was bound to obey: *Southern Agricultural Works v. Franklin*, 111 Ga. 319; s. c. 36 S. E. Rep. 693.

¹² *Noblesville Foundry & Co. v. Yeaman*, 3 Ind. App. 521; s. c. *sub nom.* *Yeaman v. Noblesville Foundry & Co.*, 30 N. E. Rep. 10. In Illinois, the negligence of an employer in putting a boy thirteen years of age at work in a factory within a few inches of an unprotected buzz-saw, in violation of a statute prohibiting such employment without a certificate from the school board, renders it liable for an injury to the employé, although the negligence of a fellow servant contributed to the accident: *Morris v. Stanfield*, 81 Ill. App. 264.

¹³ *Robertson v. Cornelson*, 34 Fed. Rep. 716.

¹⁴ *Henry v. Brady*, 9 Daly (N. Y.) 142.

¹⁵ *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455; s. c. 4 L. R. A. 850; 6 Rail. & Corp. L. J. 152; 21 N. E. Rep. 1102. Compare *Goins v. Chicago & C. R. Co.*, 47 Mo. App. 173.

ARTICLE VI. INJURIES TO MINOR SERVANTS.

SECTION	SECTION
3821. Preliminary.	3828. Minor engaging temporarily in service.
3822. Grounds of recovery generally for injuries to minor servants.	3829. Duty to protect child-servant from dangers.
3823. Liability where the minor is employed without consent of parents or guardian.	3830. Duty to guard dangerous machinery with which child-servant is liable to come in contact.
3824. Children employed without authority of master.	3831. Care required in protecting minor employés in other respects.
3825. Status of minor servants who procure employment by falsely representing themselves to be of age.	3832. When the minor employé is deemed to assume the risks of the employment.
3826. Liability for employing minors who are too young and inexperienced.	3833. Failure of master to conform to other statutory requirements.
3827. Status of children employed in violation of statute.	

§ 3821. Preliminary.—The liability of employers for injury to minor employés arising from the failure of employers to warn and instruct them concerning the danger of the employment, or concerning any unusual dangers attending a special service into which they are ordered, will be considered in another place.¹ It is now proposed to consider some other questions relating to the liability of employers for injuries to minor employés.

§ 3822. Grounds of Recovery Generally for Injuries to Minor Servants.—In the case of children it is the duty of the employer to take notice of their age and disability, and to use ordinary or reasonable care to protect them from risks which they cannot properly appreciate, and to which in the course of their employment they should not be exposed.² On the other hand, a minor fourteen years old can-

¹ *Post*, § 4091, *et seq.*

² *Rummell v. Dilworth*, 131 Pa. St. 509; s. c. 20 Pitts. L. J. (N. S.) 311; 25 W. N. C. (Pa.) 409; 47 Phila. Leg. Int. 224; 19 Atl. Rep. 345 (injury to a boy seventeen years old employed for one duty in iron-mill, allowed to perform different duty properly to be discharged by another employé, and dangerous because of absence of sufficient protective appliances — question for jury whether he had been suffi-

ciently warned and instructed, or whether all reasonable precautions to protect him had been taken—recovery allowed). According to French-Canadian law, the employer must take the necessary precautions to avoid accidents to the employés which can be foreseen, even as a result of their imprudence, inexperience, or inability, and is liable for an unexpected accident to an employé during a dangerous employment ordered by him, especially

not recover for an injury alleged to have been caused by a defective machine at which he was at work, without evidence that the defendant had not exercised ordinary diligence in furnishing a machine equal in kind to that in ordinary use, and reasonably safe for one operating it, and where, on the contrary, the evidence shows that by the use of such care as his age and experience fitted him to exercise, he could have avoided the injury.³ One decision announces the proposition that the mere fact of minority does not, of and in itself, necessarily impose upon an employer any other or greater degree of care in respect of the minor employé than if the latter had attained full age; but that it is only where the minor is immature in mental and physical faculties and capacity that the law requires that the master must have special regard for him.⁴ It is true that the theoretical measure of care which a master owes to his servant is the same in the case of minors and adults, and passes under the designation of reasonable or ordinary care. But here, as in other cases,⁵ reasonable or ordinary care is a care in proportion to the danger; and the danger is much greater in the case of infant than of adult employés, and the care and attention of the master increases accordingly in the case of child-servants.

§ 3823. Liability where the Minor is Employed without Consent of Parents or Guardian.—The mere fact of the employment of a minor in a dangerous service without the consent of his parents or guardian, is not of itself, as a general rule, imputable to the employer as culpable negligence.⁶ There are, on the other hand, holdings to the effect that if a minor has not the mental capacity and experience to appreciate the dangers of a particular employment, a master who employs him therein, without the consent of his parents, knowing that he is a minor, becomes liable to him *per quod* in case of an injury happening

when the employé is an infant unacquainted with the danger incurred, and having neither the prudence nor experience necessary to protect himself: *McCarthy v. Thomas Davidson Man. Co.*, *Rap. Jud. Que.* 18 C. S. 272 (in French).⁷ *Roberts v. Porter Man. Co.*, 110 Ga. 474; s. c. 35 S. E. Rep. 674 (had worked on spinning-machine for two years, and was injured by catching his finger in unguarded cogwheels, the danger from which was obvious).

⁴*Alabama &c. R. Co. v. Marcus*, 115 Ala. 389; s. c. 22 South. Rep. 135 (section-hand, nineteen years old, thrown from hand-car running at high rate of speed).

⁵*Vol I*, § 25; *ante*, § 3772.

⁶*Pennsylvania Co. v. Long*, 94 Ind. 250; *Texas &c. R. Co. v. Carlton*, 60 Tex. 397; *Toledo &c. R. Co. v. Trimble*, 8 Ind. App. 333; s. c. 35 N. E. Rep. 716. A statute prohibiting the employment of children under fourteen years of age without the written permission of the parent or guardian, will not make an employer liable for injuries to a child twelve years old from falling against uncovered cogwheels of which he knew the danger, in a scuffle between him and another boy; since the failure to obtain the written consent of the parents was not the proximate cause of the injury: *Borck v. Michigan Bolt &c. Works*, 111 Mich. 129; s. c. 3 Det. Leg. N. 595; 69 N. W. Rep. 254.

through his lack of years and experience;⁷ and this without reference to the inquiry whether the negligence or other misconduct of the minor contributed to the injury, or whether it was to be ascribed to the negligence of his fellow servants.⁸

§ 3824. Children Employed without Authority of Master.⁹—It has been held that a railroad company is not released from liability for an injury to a boy between ten and twelve years of age, resulting from the *explosion of a torpedo* which it negligently left on the track at a place used by the public, including children, by the fact that he was at the time engaged in performing the duties of an employé of the railroad company under an employment by such employé, though such employment was not known or authorized by the company.¹⁰

§ 3825. Status of Minor Servants who Procure Employment by Falsely Representing Themselves to be of Age.—A minor who, in his application for employment to a railway company, falsely answers that he is of age, and secures employment in violation of a known rule against employing minors, does not thereby become a trespasser, while so employed, or forfeit his right to protection as an employé, when actually engaged in the company's service, but must be judged by the same rules of negligence as an adult.¹¹

§ 3826. Liability for Employing Minors who are Too Young and Inexperienced.—Speaking generally, a master is liable for taking into his service, especially where the service is hazardous, a minor who is too young and inexperienced to appreciate and guard against the dangers of the service, although the requisite instructions are given him.¹²

⁷ *Gulf &c. R. Co. v. Jones*, 76 Tex. 350; s. c. 13 S. W. Rep. 374; *Goff v. Norfolk &c. R. Co.*, 36 Fed. Rep. 299.

⁸ *Texas &c. R. Co. v. Brick*, 83 Tex. 526; s. c. 18 S. W. Rep. 947. The fact that a minor employed by a news company to sell papers on railroad-trains, was employed without his parents' knowledge, will not render the company liable in damages for an accident causing his death, unless it was caused by the negligence of the company: *McMellen v. Union News Co.*, 144 Pa. St. 332; s. c. 22 Atl. Rep. 706 (death caused by jumping off train while it was in motion, in violation of express instructions—nonsuit proper).

⁹ See *post*, § 3828.

¹⁰ *Cleveland Terminal &c. R. Co. v. Marsh*, 17 Ohio C. C. 1; s. c. 9 Ohio C. D. 548.

¹¹ *Lake Shore &c. R. Co. v. Baldwin*, 19 Ohio C. C. 338; s. c. 10 Ohio C. D. 333.

¹² *Hickey v. Taaffe*, 105 N. Y. 26; s. c. 12 N. E. Rep. 286; 7 Cent. Rep. 72; *Gulf &c. R. Co. v. Jones*, 76 Tex. 350; *Railway Co. v. Fort*, 17 Wall (U. S.) 553. Speaking with reference to this subject it has been well said: "Very young persons rarely appreciate danger to its fullest extent, and for the performance of a dangerous task are liable to overrate their capacity. It, therefore, follows that before engaging them by their own contract in a hazardous employment, the employer should know that they have

Upon the question of what will charge the employer with notice of the minority of the employé, it has been held that the *knowledge of a yardmaster*, empowered to employ and discharge employés in a railway-yard, and also of the yard-foreman by whom a minor was put to work in the yard, as to such minor's minority and inexperience, is the knowledge of the railroad company.¹³

§ 3827. **Status of Children Employed in Violation of Statute.**¹⁴—

Upon this subject one idea is, that the hiring of a boy under twelve years of age in violation of a statute declaring it to be a misdemeanor, constitutes negligence *per se*, such as will render the employer liable for all injuries suffered in consequence of and in the course of the employment.¹⁴ Another view is, that to employ a child in violation of such a statute to operate a dangerous machine is *evidence of negligence* in case the child is injured while so working, because the statute indicates that such children are unfit by reason of their immaturity and indiscretion to be so employed.¹⁵ But the view which more nearly comports with juridical analogies is, that such an unlawful employment of a child does not *per se* constitute negligence which will render

the necessary capacity and experience to do the work in safety, or be prepared to take such measures by way of instruction as will secure the same end": *Gulf & C. R. Co. v. Jones*, 76 Tex. 350, 353. That the fact that a telegraph-operator is but seventeen years of age is insufficient to make his employment negligence on the part of a railroad company, when he has had a year's experience, is perfectly conversant with the rules, and a first-class operator,—see *Sutherland v. Troy & C. R. Co.*, 125 N. Y. 737 (*mem.*); s. c. 35 N. Y. St. Rep. 853; 26 N. E. Rep. 609. There is a holding, by a divided court, that it is not negligence to employ a lad seventeen years and ten months old as a railway brakeman, in the absence of evidence that the defendant had knowledge of his age or that his appearance put the defendant upon inquiry as to his age, so as to charge the defendant with damages for an injury to the minor while engaged in the dangerous operation of making what is called a "flying switch": *Youll v. Sioux City & C. R. Co.*, 66 Iowa 346. Compare *McDermott v. Iowa Falls & C. R. Co.* (Iowa), 47 N. W. Rep. 1037; original opinion withdrawn and rehear-

ing granted, 85 Iowa 180; s. c. 52 N. W. Rep. 181.

¹³ *Missouri Pac. R. Co. v. King*, 2 Tex. Civ. App. 122; s. c. 20 S. W. Rep. 1014.

¹⁴ See also, *post*, §§ 4599-4601.

^{14a} *Queen v. Dayton Coal & C. Co.*, 95 Tenn. 458; s. c. 30 L. R. A. 82; 49 Am. St. Rep. 935; 32 S. W. Rep. 460.

¹⁵ *E. P. Breckenridge Co. v. Reagan*, 22 Ohio C. C. 71; s. c. 12 Ohio C. D. 50. This was the view taken of the statute of New York (N. Y. Laws 1876, ch. 122) by one of the departments of the Supreme Court of that State: *Cooke v. Lalance & C. Man. Co.*, 33 Hun (N. Y.) 351; but reversing this decision the Court of Appeals of that State held, on the authority of its own contemporaneous decision (*Hickey v. Taaffe*, 99 N. Y. 204; rev'g s. c. 32 Hun (N. Y.) 7), that, in order for an occupation to be within the purview of the statute, it must either be vicious of itself, or partake of the nature of an amusement, and that the statute did not apply to a useful or necessary business occupation, or a productive industry: *Cooke v. Lalance & C. Man. Co.*, 99 N. Y. 649.

the employer liable for injuries to the child, where such employment is not the direct or proximate cause of the injury.¹⁶

§ 3828. **Minor Engaging Temporarily in Service.**—Where the minor engages temporarily in the service, in pursuance of the invitation of a servant of the master, his right to recover damages, predicated upon a failure of duty toward him on the part of the master, will depend upon whether the servant inviting him into the service or engaging him therein, had authority so to do.¹⁷ Thus, it has been held that a railroad company is not liable for an injury to a boy fifteen years of age, suffered while he was acting as brakeman upon the invitation of the conductor of the train, where the latter had no authority to give such invitation.¹⁸ Where the circumstances are such that the right of the minor to recover damages does not depend on the relation of master and servant subsisting between him and the defendant, but he stands in the mere position of one person injured by the negligence of another without fault of his own,—then, of course, the rule is different and he may recover damages. Thus, where an employé of a railroad company, while engaged in repairing one of its cars, called on his son, eleven years old, to temporarily assist him in holding a timber, and while so engaged, without negligence on the part of either, the son was injured by the negligence of another com-

¹⁶ *Belles v. Jackson*, 4 Pa. Dist. Rep. 194 (boy employed to carry bobbins back and forth in a rope factory, injured while voluntarily meddling with unfenced machinery, though warned not to do so by the operator of the machine—non-suit proper). Proof of the violation of the Ohio statute making it a crime to employ in a factory a child under twelve years of age is not, in itself, sufficient evidence of negligence to justify a recovery in an action for injuries to such child alleged to have been caused by the defendant's negligence: *Evans v. American Iron & C. Co.*, 42 Fed. Rep. 519. The mere employment of a boy under twelve years of age in a factory, contrary to the provisions of Sanb. & B. Wis. Ann. Stat., § 1728, is not such negligence as will render the employer liable for an injury to such boy while operating a planer in the factory: *Kutcher v. Goodwillie*, 93 Wis. 448; s. c. 67 N. W. Rep. 729. This is in

accordance with the later construction of the New York statute already alluded to, which is, that the employment of a child in violation of the statute is only an *evidentiary fact* bearing on the question of negligence; so that, in order to charge the master with liability for an injury to such employé, other negligence on the part of the master must be shown, as well as the absence of contributory negligence on the part of the minor: *White v. Wittemann Lith. Co.*, 58 Hun (N. Y.) 381; s. c. 34 N. Y. St. Rep. 895; 12 N. Y. Supp. 188; s. c. aff'd, 131 N. Y. 631; 30 N. E. Rep. 236. Whether the occupation was dangerous within the meaning of the New York statute, has been held a question for the jury: *Hickey v. Taaffe*, 32 Hun (N. Y.) 7; s. c. rev'd, as to another point, 99 N. Y. 204; 1 N. E. Rep. 685.

¹⁷ *Ante*, § 3824.

¹⁸ *Hot Springs R. Co. v. Dial*, 58 Ark. 318; s. c. 24 S. W. Rep. 500.

pany,—it was held that the son could recover from the latter company.¹⁹

§ 3829. **Duty to Protect Child-Servant from Dangers.**—An employer is liable for an injury to a minor who has had no experience, and is not instructed, in regard to dangerous machinery, resulting from the negligence of an employé in charge of the premises in permitting the minor to remain near such machinery and failing to take reasonable measures to prevent the injury.²⁰ Whether a master was negligent in directing an immature boy, fourteen years old, who had been employed to do such work around a factory as should be suited to his capacity, and which had consisted theretofore of simple and safe work, to perform a dangerous operation, in the course of which the boy was injured, depends upon the capacity of the boy to undertake work of the character required, which is a question for a jury.²¹

§ 3830. **Duty to Guard Dangerous Machinery with which Child-Servant is Liable to Come in Contact.**—If machinery is exposed in such a manner that children employed in the establishment are likely to be caught in it and killed or injured, then it is the duty of an employer to fence, cover or guard such machinery if he can do so consistently with the reasonable and practicable conduct of his business.²² The statutory duty imposed upon a master of seeing that dangerous machinery is properly guarded, applies only to those parts of the machinery which, in reasonable anticipation, may be a source of danger to operatives. It is not within the reasonable expectation of an employer that a child should attempt to adjust material passing through a swiftly-moving machine, which was in no way connected with the child's work in another part of the room; and for an injury to a child-servant thus received, the master is not liable.²³ But if the master has properly covered and fenced a dangerous machine or place, in

¹⁹ *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637; s. c. 48 Am. Rep. 689.

²⁰ *White v. San Antonio Waterworks Co.*, 9 Tex. Civ. App. 465; s. c. 29 S. W. Rep. 252 (set at work wiping grease off of moving machinery).

²¹ *Hayes v. Colchester Mills*, 69 Vt. 1; s. c. 37 Atl. Rep. 269 (plaintiff, while holding a belt off the shaft so that it would not creep while being mended by another employé, was caught by the belt and injured—judgment for plaintiff was affirmed).

²² *King v. Ford River Lumber Co.*, 93 Mich. 172; s. c. 53 N. W. Rep. 10; *post*, § 4017, *et seq.*

²³ *Byrne v. Nye & Co. Carpet Co.*, 46 App. Div. (N. Y.) 479; s. c. 61 N. Y. Supp. 741. So, the failure of an employer to provide proper safeguards to machinery will not render him liable to a minor employé injured upon voluntarily undertaking to *play* with the machinery after having been warned to have nothing to do with it: *Belles v. Jackson*, 4 Pa. Dist. Rep. 194.

compliance with a statute, but the covering is removed by a fellow servant, in consequence of which a minor servant is injured, then the master will not be liable, especially where the contributory negligence of the injured servant is shown, although the dangerous place has often been thus uncovered before.²⁴ It has been held that the failure to fence what is called a *winder* in a cotton factory, whereby the hand of a boy thirteen years old was caught and injured, was not imputable to the employer as negligence, since a winder is not a particularly dangerous machine; but that if the boy had been sufficiently instructed concerning the danger, the duty of the company to him was performed,²⁵—a conclusion which may be regarded as questionable, in the absence of evidence to the effect that it was not convenient or practicable to fence the winder.

§ 3831. **Care Required in Protecting Minor Employés in Other Respects.**—It is a just conclusion that the minor employé does not accept the ordinary risks of the service in the same sense as an adult employé does; but that the employer is under a duty to the minor to exercise a degree of care, to the end of protecting him from the dangers of the service, proportionate to his youth and inexperience.²⁶ The true theory is, that the obligation which the law everywhere puts upon the master,²⁷ of exercising reasonable care to the end that the machinery, appliances and premises about which his servant is required to work are made and kept in a condition of safety, is applicable with increased force in the case where the servant is a minor. In such cases it is a sound conclusion that the degree of care which the law puts upon the master, to the end that the machinery, appliances and premises, about which the infant servant is required to work, shall be safe, due regard being had to the necessary dangers of the same,—increases with the lack of years and capacity of the servant.²⁸ The

²⁴ *Honor v. Albrighton*, 93 Pa. St. 475. This decision, however, seems to be a violation of the rule that the master is bound not only to make, but also to *enforce*, reasonable rules for the protection of his servants: *Post*, § 4161.

²⁵ *Rock v. Indian Orchard Mills*, 142 Mass. 522.

²⁶ *Robertson v. Cornelson*, 34 Fed. Rep. 716. See *post*, § 4685, *et seq.*

²⁷ *Ante*, § 3758.

²⁸ *Steiler v. Hart*, 65 Mich. 644; s. c. 9 West. Rep. 309; 32 N. W. Rep. 875. State of facts under which an employer was held not guilty of negligence in using an elevator of a certain construction,

whereby a boy fourteen was injured: *Hoehmann v. Moss Engraving Co.*, 4 Misc. (N. Y.) 160; s. c. 53 N. Y. St. Rep. 195; 23 N. Y. Supp. 787. The text seems to be well illustrated by a case where a boy fifteen years old was employed to feed a defective press, and there was a rule forbidding him to put his fingers under the punch, as was habitually done, but the work could not well be done without disregarding the rule. The boy, in the course of his work, put his fingers under the punch, and was injured in consequence of a defect in the machine. It was held that the employer was liable: *Hayes v. Bush*

duty of a master to take affirmative action for the safety of his infant servant, is well illustrated by a case where a man employed a girl eleven years old to work at domestic service at his house under an agreement with her father, and permitted her to go home across a prairie so insufficiently clad that she was frost-bitten. It was held that she had an action for damages against her employer for such maltreatment.²⁹

§ 3832. When the Minor Employé is Deemed to Assume the Risks of the Employment.³⁰—As already stated, the minor employé is not deemed to assume the risks of the employment in the same full sense in which an adult employé is deemed to assume such risks. The qualification is, that he assumes them provided he has the discretion to understand and appreciate them, and provided he is fully and properly instructed by his employer as to them,—in which case, if he is injured through one of the ordinary dangers of the employment, he will have no rightful ground for recovering damages against his employer.³¹ Any other rule would operate as a prohibition against the employment of minors in any dangerous service. If the employer, or his representative, orders a minor into a particular place to do work, the minor will ordinarily be excused for indulging in the assumption that the employer, or his representative, has made the proper inspection or the proper tests for the purpose of ascertaining whether the place is dangerous.³² It was so held where a boy fifteen and a half years old was put at work in a marble quarry under a projecting rock, which was liable to slip and fall, by the orders of his superior, whose duty it was to go around and test such overhanging rocks, but who failed in the performance of that duty, and the rock fell and injured the boy.³³

§ 3833. Failure of Master to Conform to Other Statutory Requirements.—In an action for injuries to a boy fifteen years old while working with a buzz-saw in a factory, no inference of negligence of the de-

&c. Man. Co., 41 Hun (N. Y.) 407. Where children, sleeping in a room in a factory, after the close of their day's work at three o'clock in the morning, played hide and seek, and one of them fell through a hole in the passageway, and was injured, the company was held liable: Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137; s. c. 47 Am. Rep. 750.

²⁹ Nelson v. Johansen, 18 Neb. 180; s. c. 53 Am. Rep. 806.

³⁰ See *post*, § 4685, *et seq.*

³¹ Chicago Anderson Pressed-Brick Co. v. Reinneiger, 140 Ill. 334; s. c. 29 N. E. Rep. 1106; aff'g s. c. 41 Ill. App. 324.

³² McMillan Marble Co. v. Black, 89 Tenn. 118; s. c. 14 S. W. Rep. 479.

³³ McMillan Marble Co. v. Black, 89 Tenn. 118; s. c. 14 S. W. Rep. 479.

endants arises from their failure to observe any or all of the provisions of a statute requiring factory-owners to keep posted, in every room where children under sixteen years of age are employed, printed notices stating the hours of labor required, together with a list of the children's names, ages, birth-places and residences, and prohibiting the employment of such children without procuring and filing an affidavit made by the parents, stating the age and date of birth of such child, and providing that no such child who cannot read or write simple English sentences shall be employed except during school vacation.³⁴

ARTICLE VII. DUTY AND LIABILITY OF EMPLOYER WITH RESPECT TO FOOD, SHELTER, AND MEDICAL AND SURGICAL ATTENDANCE OF SERVANTS.

SECTION	SECTION
3836. Duty to provide food and shelter for servants.	3842. When employer liable for negligence or malpractice of physician or surgeon: liable for negligence in selecting incompetent or unfit physician or surgeon.
3837. Power of incorporated employers to employ surgeons, nurses, etc., for their wounded employés.	3843. Duty of employer where he undertakes by contract to furnish medical and surgical attendance.
3838. No duty of master to furnish medical or surgical attendance to sick or wounded servants.	3844. Choice of physician or surgeon by wounded servant relieves master of responsibility.
3839. Agents of master have no implied authority to employ physicians, surgeons, or nurses.	3845. No liability for failing to deliver to widow the amputated portions of her husband's limbs.
3840. Such authority implied in cases of emergency demanding immediate relief.	
3841. Master not liable for negligence or malpractice of physician or surgeon.	

§ 3836. **Duty to Provide Food and Shelter for Servants.**—In the absence of a contract or an established custom, it is not the duty of a master to furnish his servants with food, shelter, or transportation between their homes and places of work.¹ But circumstances may

³⁴ Stephen v. Stevens, 66 Hun (N. Y.) 634; s. c. 21 N. Y. Supp. 721; 49 N. Y. St. Rep. 850.

¹ King v. Interstate Consol. R. Co., 23 R. I. 583; s. c. 51 Atl. Rep. 301. Therefore, a *petition* in an action against a railroad company for in-

juries, alleging that plaintiff, while engaged in removing ice and snow from defendant's tracks at a distance from any shelter, became exhausted, and before he could reach home was badly frozen; that it was the duty of the company to furnish

exist which will modify this rule, and which will put upon the employer this duty.² It has been held that a railroad company is liable if it agrees to supply suitable lodging for a laborer, and then sends him to a high mountain-pass to work, and compels him to sleep on frozen ground with only damp spruce branches for a bed and insufficient blankets, whereby he becomes sick and paralyzed, and his health is shattered.³ Another court has held that the failure to furnish an employé, who has been sent out to repair a wrecked car, transportation to some place where he can procure food and shelter, by reason of which he is compelled to walk nine miles in the night, in cold and dangerous weather, renders the railroad company liable for injuries thereby sustained.⁴ It has been held that a master who, after a servant is injured, undertakes to remove him to his home, is liable where, through the negligence of fellow servants through whom the master assumes to act, the injured servant is exposed, causing his death,—on

him food and shelter, and to provide for his safety, and carry him to his home, all of which, though informed of his condition, it neglected to perform; and that such negligence was the cause of the injury, without any fault of his own,—is demurrable: *King v. Interstate Consol. R. Co.*, *supra*.

²For example, a complaint alleged that plaintiff, being employed to assist in removing snow from defendant's tracks, was conveyed by defendant to a place where snow had collected, and was there kept at work continuously for 36 hours, and exposed to extreme cold; and that when he could no longer work, owing to the severity of the weather, he was ordered to enter and permitted to remain in one of defendant's cars all night, but unaided and without any protection from cold, without food, and not allowed transportation to his home, whereby he was injured. The complaint was demurred to on the ground that defendant owed no duty to plaintiff in the premises. It was held that the *demurrer was not good*; since, if plaintiff was permitted to enter one of the cars and remain there, the jury might find that defendant assumed the duty of taking reasonable care of plaintiff, and of seasonably conveying him to some place where he would be taken care of: *Carll v. Interstate Consol. R. Co.*, 23 R. I. 592; s. c. 51 Atl. Rep. 305.

³*Clifford v. Denver &c. R. Co.*, 9 Colo. 333 (plaintiff received daily assurances, in answer to his protests and threats to quit work, that better accommodation would be afforded).

⁴*Schumaker v. St. Paul &c. R. Co.*, 46 Minn. 39; s. c. 12 L. R. A. 257; 48 N. W. Rep. 559. There is a holding to the effect that a railroad company which gives its section employés but half an hour for rest and refreshments at noon, and has allowed them for several years during inclement weather to eat their dinner in a pump-house on its line of railway belonging to the company, is not, without more, liable for an injury to an employé while so eating, caused by the blowing out of a plug from a steam-boiler due to its unsafe condition. The employé under such circumstances need not prove an invitation to remain on the *premises*; but where he goes to *another part* of the premises than where his work lies—to a pump-house near where he was working, as was the custom with him and his coemployés—he must show an invitation, express or implied, to go to such other place; and the *jury* must expressly find, from all the circumstances, that the employé was in the *pump-house* in the line of his duty by implied invitation of the defendant: *Cleveland &c. R. Co. v. Martin*, 13 Ind. App. 485; s. c. 39 N. E. Rep. 759.

the theory that if the duty of taking him home after the injury is assumed by the master, it becomes an absolute or unalienable duty on his part.^{4a}

§ 3837. Power of Incorporated Employers to Employ Surgeons, Nurses, etc., for their Wounded Employés.—Speaking generally, railroad companies have the *power*, acting through their superior officers, and through their subordinate agents in case of emergency, to employ surgeons, nurses, etc., to care for their employés wounded in the line of their duty.⁵

§ 3838. No Duty of Master to Furnish Medical or Surgical Attendance to Sick or Wounded Servants.—But, in the absence of contract, or of very special and urgent circumstances, there is no such *duty*.⁶

§ 3839. Agents of Masters have No Implied Authority to Employ Physicians, Surgeons, or Nurses.—It follows from the preceding that the agents or superior servants of a master have no implied authority to bind the master by employing physicians, surgeons, or nurses, to attend a sick or wounded servant, however hazardous the service may be, unless in very special emergencies.⁷

^{4a} *Bresnahan v. Lonsdale Co.* (R. I.), 51 Atl. Rep. 624 (no off. rep.) (ruling on demurrer to complaint).

⁵ *Swazey v. Union Man. Co.*, 42 Conn. 556; *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 492; s. c. 46 N. E. Rep. 1022; 60 Am. St. Rep. 172; *Louisville & C. R. Co. v. McVay*, 98 Ind. 391; s. c. 49 Am. Rep. 770; *Terre Haute & C. R. Co. v. McMurray*, 98 Ind. 358; s. c. 49 Am. Rep. 752; *Terre Haute & C. R. Co. v. Brown*, 107 Ind. 336; *Terre Haute & C. R. Co. v. Stockwell*, 118 Ind. 98; *Cincinnati & C. R. Co. v. Davis*, 126 Ind. 99; *Pittsburgh & C. R. Co. v. Sullivan*, 141 Ind. 83; s. c. 50 Am. St. Rep. 313, and note; *Atlantic & C. R. Co. v. Reisner*, 18 Kan. 458; *Quinn v. Kansas City & C. R. Co.*, 94 Tenn. 713; s. c. 45 Am. St. Rep. 767.

⁶ *Denver & C. R. Co. v. Iles*, 25 Colo. 19; s. c. 53 Pac. Rep. 222 (plaintiff, while out with an engineering party, dislocated his shoulder and partially fractured or bruised the bone of his upper arm, and asked to be sent to the hospital, which the foreman of the

party refused to do, but made plaintiff *cook* for the party for seventeen days—no recovery of damages); *Peninsular R. Co. v. Gary*, 22 Fla. 356; *Bedford Belt R. Co. v. McDonald*, 12 Ind. App. 620; s. c. 40 N. E. Rep. 821 (subordinate officer or agent of a railroad company has no such implied authority); *Davis v. Forbes*, 171 Mass. 548; s. c. 4 Am. Neg. Rep. 289; 51 N. E. Rep. 20 (even though the servant is injured under such circumstances as to render the master liable therefor).

⁷ *Peninsular R. Co. v. Gary*, 22 Fla. 356 (neither a roadmaster nor a train-conductor has such implied authority). A railway roadmaster having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, whether an employé, passenger, or person sustaining no relation to the company; but the corporation will be bound by the *ratification* of such contract by the general manager: *Louisville & C. R. Co. v. McVay*, 98 Ind. 391; s. c. 49

§ 3840. **Such Authority Implied in Cases of Emergency Demanding Immediate Relief.**—Such authority on the part of the highest railway servant who is present,—for example, the conductor of a train,—may be implied in the case of an injury to a servant creating an emergency which demands immediate relief; but the authority is implied by reason of the emergency only.⁸ The question has most frequently arisen in cases of injury to the servants of railway companies, and it has been held that the duty of such a company to provide medical or surgical attendance for an injured employé, in the absence of contract, can only arise in case of strict necessity and urgent exigency, and expires with the emergency.⁹

§ 3841. **Master Not Liable for Negligence or Malpractice of Physician or Surgeon.**—The relation of master and servant, or principal and agent, does not exist between an employer,—*e. g.*, a railroad company,—and a surgeon employed by it to render professional services to its injured employé; the reason being that the employer has no right to control him in his treatment of the case.¹⁰ Therefore, the rule of *respondeat superior* does not apply, and the employer is not responsible for the negligence or malpractice of the physician or surgeon, provided the employer has discharged his duty by exercising reasonable care to the end of employing a physician or surgeon who possesses the knowledge and skill ordinarily possessed by other members of his profession.¹¹ This is especially true where the employer is under *no legal obligation* to furnish medical or surgical aid to its wounded employés.¹²

Am. Rep. 770 (injury to person having, seemingly, no contractual relation toward railway company).

⁸ *Terre Haute &c. R. Co. v. McMurray*, 98 Ind. 358; s. c. 49 Am. Rep. 752. This case contains an excellent review of the authorities.

⁹ *Ohio &c. R. Co. v. Early*, 141 Ind. 73; 28 L. R. A. 546; 40 N. E. Rep. 257.

¹⁰ *Quinn v. Kansas City &c. R. Co.*, 94 Tenn. 713; s. c. 28 L. R. A. 552; 30 S. W. Rep. 1036; *South Florida R. Co. v. Price*, 32 Fla. 46; s. c. 13 South. Rep. 638.

¹¹ *Pittsburgh &c. R. Co. v. Sullivan*, 141 Ind. 83; s. c. 50 Am. St. Rep. 313, and note; *Chicago &c. R. Co. v. Howard*, 45 Neb. 570; s. c. 63 N. W. Rep. 872; *Quinn v. Kansas City &c. R. Co.*, 94 Tenn. 713; s. c. 28 L. R. A. 552; 30 S. W. Rep. 1036 (provided he employs a competent and reputable physician or surgeon); *Cummings v. Chicago*

&c. R. Co., 89 Ill. App. 199; writ of error dismissed, 189 Ill. 608; s. c. 60 N. E. Rep. 51; *Atchison &c. R. Co. v. Zeiler*, 54 Kan. 340; s. c. 38 Pac. Rep. 282 (not liable for attempting to transport wounded employé to a hospital in pursuance of the advice of such surgeon. See also, *Ohio &c. R. Co. v. Early*, 141 Ind. 73; s. c. 28 L. R. A. 546; 40 N. E. Rep. 257); *York v. Chicago &c. R. Co.*, 98 Iowa 544; s. c. 67 N. W. Rep. 574 (not liable for error of such surgeon in causing an injured employé to be moved from one place to another); *Secord v. St. Paul &c. R. Co.*, 18 Fed. Rep. 221; *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272; s. c. 13 L. R. A. 329; 28 N. E. Rep. 266; *Southern &c. R. Co. v. Mauldin*, 19 Tex. Civ. App. 166; s. c. 46 S. W. Rep. 650.

¹² *Clark v. Missouri &c. R. Co.*, 48 Kan. 654; s. c. 29 Pac. Rep. 1138.

§ 3842. **When Employer Liable for Negligence or Malpractice of Physician or Surgeon: Liable for Negligence in Selecting Incompetent or Unfit Physician or Surgeon.**—An analogy of the rule which makes the master liable to one of his servants for an injury visited upon him by the negligence, incompetency, or drunkenness of a fellow servant¹³ applies here,—so as to make an employer liable, who, in consideration of money paid by his servant, selects to attend him a drunken or incompetent physician or surgeon, where the circumstances are such that the employer either knew, or in the exercise of reasonable care should have known, the character or reputation of the physician or surgeon. Thus, a railroad company which undertakes, *in consideration of a sum monthly deducted from the wages of its employés*, to provide those sick or injured with medical or surgical attendance, is bound to exercise reasonable diligence in the selection and retention of its physicians, and is liable for malpractice because of incompetency of such a physician, resulting from the excessive use of intoxicants and narcotics, or other cause, which should have been known to the company, especially where his reputation for drunkenness is notorious in the community.¹⁴ Another court has gone so far as to hold that a master which makes a compulsory reduction from the wages of its employés to provide a fund for medical attendance and surgical treatment, *no rebate being allowed to the employés in case the entire fund is not required*, is liable to an employé for unskillfulness or negligence of the physician employed by it to attend him.¹⁵ The rule which exempts the master from liability for the negligence or malpractice of the physician or surgeon employed by him to treat his sick or wounded servant, necessarily assumes that the employer has been careful and diligent in employing a competent and reputable physician or surgeon. If he has been negligent in this regard, and has employed an incompetent and unfit physician or surgeon, not of good reputation, then, obviously, the conclusion will be different. It has been so held where a mining corporation maintained a hospital for the benefit of its employés, assessing them for its support, and one of them sustained damages by

¹³ *Post*, §§ 4048, *et seq.*, 4882, *et seq.*

¹⁴ *Wabash R. Co. v. Kelley*, 153 Ind. 119; s. c. 52 N. E. Rep. 152; 54 N. E. Rep. 752; 1 Repr. (Ind.) 370.

¹⁵ *Texas & C. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642; s. c. 50 S. W. Rep. 173. The evidence tended to show that the whole thing was a money-making scheme for the coal company. Though a record

was kept of the "Hospital Fund," the money was deposited in the bank along with other moneys of the company, and was listed as an asset. "So far from showing the creation of a trust fund for charitable purposes," said the court, "the record suggests a monopoly, with accrued profits, in taking care of the sick": *Texas & C. Coal Co. v. Connaughten*, *supra*.

reason of the unfitness of the surgeon employed by the company in such hospital.¹⁶

§ 3843. Duty of Employer where he Undertakes by Contract to Furnish Medical and Surgical Attendance.—The rule is the same where a railroad company undertakes by *contract* with its employes to furnish them with medical and surgical attendance, or to maintain a hospital where they may be treated in case of being sick or wounded, and where it makes a deduction from the wages of the employes to provide a fund for this purpose. The implication of the law is that it thereby agrees to exercise reasonable care to the end of furnishing competent and skillful medical and surgical attendance, but is not answerable for the mistakes of the physician or surgeon whom it employs.¹⁷

§ 3844. Choice of Physician or Surgeon by Wounded Servant Relieves Master of Responsibility.—The conscious and deliberate choice of an injured employe while in possession of his mental faculties, of the time when, place where, and person by whom he will be treated, relieves the master of any liability for failure to provide other treatment.¹⁸

§ 3845. No Liability for Failing to Deliver to Widow the Amputated Portions of Her Husband's Limbs.—A railroad company is not liable to a widow for failure to deliver to her, after her husband's death, portions of his limbs which were amputated by the company's surgeon because they had been crushed by the cars while he was in the employ of the company, when the operation was performed at a hospital to which he was taken by a policeman in charge of the city

¹⁶ *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648; s. c. 20 L. R. A. 338; 32 Pac. Rep. 1012.

¹⁷ *Southern & C. R. Co. v. Mauldin*, 19 Tex. Civ. App. 166; s. c. 46 S. W. Rep. 650; writ of error dismissed, 1 J. A. (Tex.) 281; s. c. 47 S. W. Rep. 964; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648; s. c. 39 Pac. Rep. 95 (especially where the employer makes no profit out of the undertaking, but conducts the hospital as a charitable institution).

¹⁸ *Ohio & C. R. Co. v. Early*, 141 Ind. 73; s. c. 40 N. E. Rep. 257; 28 L. R. A. 546. Where the best medical treatment that could be obtained for an injured brakeman at

the small town where the servant was injured was procured for him, and he was removed as soon as possible, with his intelligent and conscious consent, and without any objection on the part of the surgeon who had attended him thus far, to another town where a place was provided for him and where competent surgeons were awaiting him, but he insisted upon being taken still further, to the town where he resided, but died soon after reaching that place, from the loss of blood on the way,—it was held that these facts did not exhibit any liability on the part of the railroad company: *Ohio & C. R. Co. v. Early*, *supra*.

ambulance, and the fragments were cremated according to the custom at the hospital; as the company did not assume the obligation, either by its employé who lifted the injured man from the ground, nor by the surgeon who amputated his limbs, to deliver the remains, and the whole of them, to his widow in case death ensued from the injury.¹⁹

ARTICLE VIII. CONTRACTS AND RULES, AS AFFECTING EMPLOYER'S LIABILITY.

SECTION	SECTION
3848. Contracts between railroad companies and their employés by which the employé assumes the burden of inspection and examination.	3852. Contracts with third parties do not affect master's liability to his servant.
3849. Printed rules and notices imposing risks upon employés.	3853. Contracts between railroad companies and their employés by which employés agree to release damages in consideration of participation in sick, accident, or death benefits, relief-funds, etc.
3850. Contract with servant exempting master from liability for his own negligence.	3854. Contracts releasing damages, made after the injury.
3851. Statutes making such contracts null and void.	

§ 3848. **Contracts between Railroad Companies and their Employés by which the Employé Assumes the Burden of Inspection and Examination.**¹—A stipulation by a railroad employé in his application for employment that he understood that at some points of the line there were various specified structures near the tracks which might be dangerous, and that he must inform himself of the location of such obstructions and use due care to avoid injury thereby, was void, as against public policy, in so far as it attempted to relieve the company from its duty of providing a reasonably safe track, and of warning the employé of dangerous obstructions near the track.^{1a}

¹⁹ *Doxtator v. Chicago &c. R. Co.*, 120 Mich. 596; s. c. 6 Det. Leg. N. 294; 79 N. W. Rep. 922; 45 L. R. A. 535; 6 Am. Neg. Rep. 293 (plaintiff sued on account of having been deprived of the right to give the remains of her deceased husband a Christian burial).

¹ See *post*, § 4634.

^{1a} *Gulf &c. R. Co. v. Darby*, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446. A railroad employé was in-

jured by the roof of the company's oil-house, which projected over the track. In his application for employment he had stipulated that he knew that at some points on the line, which was 1,000 miles long, there were some obstructions which might be dangerous, and he must inform himself of their location. It was held that, though such a stipulation was relied on in giving such employé work, he was not thereby

§ 3849. **Printed Rules and Notices Imposing Risks upon Employés.**²—It has been held that printed rules of a mining company, posted in the mine, warning workmen against risking themselves under bad roofs, and requiring them to ascertain whether places have been made safe before entering them, are, in so far as they can be claimed to operate as a contract against the negligence of the mine-owner, void as against public policy.^{2a} A mining company posted notices to the effect that persons accepting employment did so with full notice that the danger of falling roofs was one of the usual risks; that the manager did not assume that the place to which an employé was ordered was not dangerous, but every place was dangerous, and the duty of ascertaining and avoiding the danger was on the employé; that no employé was authorized to run any risk, relying on the timbermen; and that the operator, by employing timbermen, did not agree to secure the roof. It was held that such rules, in so far as operating as a contract against the operator's negligence, were void as against public policy.³

precluded from showing by parol testimony that he did not in fact know of the obstruction which injured him: *Gulf & C. R. Co. v. Darby*, *supra*. That it is competent for the master to impose, and for the servant to accept, by mutual understanding, the additional burden of inspection or examination of the appliances he is required to use, such as he is competent to make,—see *Chicago & C. R. Co. v. Merriman*, 95 Ill. App. 628. A railroad brakeman whose contract of employment provides that he will, for his own safety, examine the things in connection with which he works before using them, to ascertain as far as he reasonably can their “condition and soundness,” is not required to look after dark for defects in a car which he had reason to believe, and which in fact, had been inspected by the company the same day: *Lake Shore & C. R. Co. v. Ryan*, 70 Ill. App. 45 (defective handhold).

²See *post*, § 4636.

^{2a}*Himrod Coal Co. v. Clark*, 197 Ill. 514; s. c. 64 N. E. Rep. 282; *aff'g* s. c. 99 Ill. App. 332.

³*Consolidated Coal Co. v. Lundak*, 196 Ill. 594; s. c. 63 N. E. Rep. 1079; *aff'g* s. c. 97 Ill. App. 109. The mere making of a rule by the proprietor of a coal mine providing that “every person accepting employment in the mine does so with

full notice that the danger from falling roof and coal is one of the usual risks of his service, and he will govern himself accordingly,” and posting the same in the mine, with a notice that “all employés must read and understand the rule, which is required by law and made to secure their safety, and which every employé by remaining in the service of the company agrees to abide by and obey as a contract between him and the company,” will not constitute a contract between the company and its employés for the employés to assume the danger of falls from the roof of the mine as one of the usual and ordinary risks and hazards of their employment: *Consolidated Coal Co. v. Lundak*, *supra*. A rule posted to the effect that timbermen should have no duty except to retimber places in the mine which had once been properly timbered, and should in no case assume the duty of securing the roof, except as therein provided, unless expressly directed to do so by the mine-manager, did not exempt the mine-operator from liability for negligently failing properly to secure the roof: *Consolidated Coal Co. v. Lundak*, *supra*. Such notices are not *rules*, within Illinois Mining Law 1899, § 32, requiring the operator to post rules “which shall

§ 3850. **Contract with Servant Exempting Master from Liability for His Own Negligence.**—Contracts by which a master undertakes to exempt himself from liability for injuries to his servants proceeding from the master's own negligence ought to be regarded as profoundly opposed to public policy. A common carrier of goods is not allowed to exempt himself from responsibility for his own negligence or that of his servant by this means; and surely human life and safety ought to be regarded as standing upon a footing equally favorable. Some of the decisions take this view.⁴ The Supreme Court of Vermont has held that a contract between a railroad company and the next of kin of an employé, whereby the next of kin released the company from all damages that might accrue to him by reason of the company's negligence, is void as against public policy.⁵ Other courts take a contrary view. One of them holds that a contract between a street-car company and laborers in its employ, whereby the laborers release the company from liability for injuries received by them while riding to and from their work on its cars on free passes, is not against public policy. The reason given by the court is that the employés are not bound to enter or remain in the employ of the company, nor to travel otherwise than as ordinary passengers paying fare, and entitled to full redress for injury through negligence.⁶

govern all persons working in the mine," but are mere attempts to make laws under the guise of rules: *Consolidated Coal Co. v. Lundak, supra*.

⁴ *Consolidated Coal Co. v. Lundak*, 196 Ill. 594; s. c. 63 N. E. Rep. 1079; aff'g s. c. 97 Ill. App. 109.

⁵ *Tarbell v. Rutland R. Co.*, 73 Vt. 347; s. c. 51 Atl. Rep. 6. More particularly, the case was that Vt. Stat., § 3924, declares that, if any agent of a railroad company is guilty of negligence whereby an injury is done, he shall be imprisoned or fined, but that the section shall not exempt the corporation from an action for damages. Sections 3886, 3887, forbid railroad companies having ladders and steps on cars to the top on the sides of the cars, and require them to be placed on the inside or ends of the cars, and provide a penalty for a violation of the statute. It was held that, where an employé was killed by being knocked from the ladder on the side of a car, a contract between the

railroad company and the next of kin of the employé, exempting the railroad company from liability for negligence, was no defense to an action for the death; since such a contract is against public policy, and against the policy of the law as declared by statutes: *Tarbell v. Rutland R. Co., supra*.

⁶ *Peterson v. Seattle Traction Co.*, 23 Wash. 615; s. c. 63 Pac. Rep. 539; 65 Pac. Rep. 543. It should seem that employés thus travelling ought to be regarded as passengers for hire, and that the passage granted to and from their place of work ought to be regarded as a part of their compensation. This decision makes the life of a man of less value in the eyes of the law than the life of a dog; for if a dog had been transported by a railway carrier for a consideration, any contract limiting the liability of the carrier for its own negligence in performing the service would have been void.

§ 3851. **Statutes Making Such Contracts Null and Void.**—A statute providing that any contract, express or implied, made by any employé of a railroad company to waive the benefit of another section of such act, which gives him a right of action for injuries caused by defective machinery or the negligence of fellow servants, shall be null and void, is constitutional.⁷ Such statutes declare the public policy of the State, and, whatever the rule might be at common law, they render invalid any contract by which it is sought to release a railroad company from liability to pay damages for the killing of the servant of an express company through the negligence of a servant of the railway company.⁸

§ 3852. **Contracts with Third Parties Do Not Affect Master's Liability to his Servant.**—A contractor is not exonerated from liability for injury to one of his employés by reason of a defect in an appliance, because the other party to the contract was to furnish suitable appliances, where a discretion was left to the contractor with reference to the appliances to be used.⁹ A contract between a railroad company and an express company, whose goods are transported by the railroad company, that the railroad company shall not be liable for any injury done to any employé of the express company, of which contract an employé of the express company had no knowledge and to which he did not assent, is not binding upon him.¹⁰ Under this head we may recur to a reprehensible class of decisions which sanction a contract between an express company and a railroad company by which the railroad company acquires a license to kill the servant of the express company riding on its train in pursuance of his master's business, without paying damages therefor. The sanctioning of this species of contract ignores the consideration that the State is interested in preserving the lives of a meritorious class of its citizens; that the wife or children or next of kin of such a servant have an interest in the preser-

⁷ *Coley v. North Carolina R. Co.*, 128 N. C. 534; s. c. 39 S. E. Rep. 43; rehearing denied, 129 N. C. 407; s. c. 40 S. E. Rep. 195.

⁸ *O'Brien v. Chicago &c. R. Co.*, 116 Fed. Rep. 502.

⁹ *McCall v. Pacific Mail S. S. Co.*, 123 Cal. 42; s. c. 55 Pac. Rep. 706 [citing *Riley v. State Line &c. Co.*, 29 La. An. 791; s. c. 29 Am. Rep. 249].

¹⁰ *Kenney v. New York &c. R. Co.*, 54 Hun (N. Y.) 143; s. c. 26 N. Y. St. Rep. 636; 7 N. Y. Supp. 255; s. c. aff'd, 125 N. Y. 422; 35 N. Y. St. Rep. 447; 26 N. E. Rep. 626. In

the Court of Appeals in this case (125 N. Y. 422) it was held that the contract might be read, not necessarily as releasing or preventing such an action against the railroad company, but as an agreement to indemnify the railroad company in the event of such an action; and hence the plaintiff was entitled to recover. No express contract to assume the risk was shown, as in *Blank v. Illinois &c. R. Co.*, 80 Ill. App. 475; *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21; *Pittsburgh &c. R. Co. v. Mahoney*, 148 Ind. 196.

vation of his life which the law ought not to allow him to contract away, and which it still less ought to allow a third person to contract away; and that contracts of this kind tend to promote negligence, and increase the hazard of the travelling public. Nevertheless, it is held that an employé of an express company who is riding on a railroad-train by virtue of a special contract between the railroad company and the express company, to which he has assented, or which he has empowered the express company to enter into, releasing the railroad company from all liability for injuries to an employé of the express company resulting from the negligence of the railroad company, is bound by such contract, and cannot hold the railroad company liable for injuries received while in such employment. He is bound to know that the express company, and himself as its representative, have a right to ride in the express-car only by special license; and his rights are no greater than those of his employer.¹¹

§ 3853. Contracts between Railroad Companies and their Employés by which Employés Agree to Release Damages in Consideration of Participation in Sick, Accident, or Death Benefits, Relief-Funds, etc.^{11a}—It is generally held that contracts between railroad companies and their employés, whereby, in consideration of the right to participate in sick, accident, or death benefits, in a relief-fund, or in the hospital facilities of the company, the employé releases all right of action for damages for injuries received by him while in the service,—are supported by a good consideration, are not void for want of mutuality, and are not against public policy. Where an employé of a railroad company has become a member of a relief association, and has agreed that the acceptance of benefits from the fund shall operate as a release against the company; and the railroad company has agreed to take charge of the administration of the association, pay all its operating expenses, take care of its funds and be responsible for their safe-keeping, guarantee the obligations of the association, and make appropriations to supply any deficiencies,—the consideration to support the release is sufficient. Such a contract is not against public policy, since it is not the signing of the contract, but the acceptance of benefits under it, that constitutes the release.¹² The *by-law* of a railroad relief association requiring its members to release the rail-

¹¹ *Blank v. Illinois &c. R. Co.*, 80 Ill. App. 475. See also, *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21; s. c. 38 L. R. A. 93; *Pittsburgh &c. R. Co. v. Mahoney*, 148 Ind. 196; s. c. 40 L. R. A. 101 (express-mes-

senger chargeable with notice of such a contract).

^{11a} See *post*, § 4635.

¹² *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529.

road company from any claim for damages before applying to the association for relief, is not against public policy, as it simply puts a claimant to his election whether he will look to the railroad company or the relief association for compensation.¹³ A contract between a railroad company and an employé, whereby the employé is to receive certain sick, accident, and death benefits in consideration of the payment of a monthly fee from his wages, and whereby the master agrees to contribute to the fund for the payment thereof, and an agreement on the part of the employé that the acceptance of any such benefits, in case of injury, is to operate as a release of the master from all liability on account thereof, are not void on account of lack of mutuality.¹⁴ A stipulation, manifestly designed for the benefit of the company, in a contract entered into between a railroad company and an employé, that the employé would not be paid for injuries under the relief and hospital system unless he first filed with the officers satisfactory releases, does not authorize one who has received benefits at the hands of the department, in accordance with the terms of his membership, to prosecute a claim for damages merely because he has failed, or refused, to execute such a release.¹⁵ A stipulation in a by-law, properly published and distributed, by a railroad company with its employés, that, *in consideration of its subscription* to a specified relief association, no member thereof shall have any claim against the company for compensation on account of injury or death from accident, is valid, and will prevent an employé who has agreed thereto from recovering from a railroad company for an accident due to the negligence of his fellow servants.¹⁶ A stipulation, in a certificate of membership in a railroad relief department, that a suit by a member or his representatives to recover for his death or injury, which ripens to judgment or is compromised, shall bar a recovery under the certificate, is not against public policy, and is not a violation of the Iowa Code, § 1307, which forbids contracts restricting liability for negligence.¹⁷

¹³ *Owens v. Baltimore &c. R. Co.*, 35 Fed. Rep. 715; s. c. 1 L. R. A. 75, and note.

¹⁴ *Petty v. Brunswick &c. R. Co.*, 109 Ga. 666; s. c. 35 S. E. Rep. 82; *Railway Co. v. Cox*, 55 Ohio St. 516; s. c. 45 N. E. Rep. 645; 35 L. R. A. 512.

¹⁵ *Carter v. Brunswick &c. R. Co.*, 115 Ga. 853; s. c. 42 S. E. Rep. 239.

¹⁶ *Ferguson v. Grand Trunk R. Co.*, Rap. Jud. Que. 20 C. S. 54 [following *Queen v. Grenier*, 30 Can. Sup. Ct. 42].

¹⁷ *Donald v. Chicago &c. R. Co.*, 93 Iowa 284; s. c. 33 L. R. A. 492.

A railroad company and a relief association operated in connection with it were *separate corporations*, but only those who were employés of the railroad company were entitled to membership in the relief association. The contracts of the relief association were guaranteed by the railroad corporation, but the association funds were sufficient to meet all liabilities likely to arise. An employé who had been injured in a railway accident applied for and obtained sick benefits from the relief association, by fraudulently misrepresenting that his illness was

§ 3854. Contracts Releasing Damages, Made After the Injury.—

Contracts between the master and servant, entered into *after* the servant received the injury, by which a servant releases the master from the damages, are upheld as valid if founded upon a valuable consideration, and not obtained from the servant by means of misrepresentation or fraud.¹⁸ It was accordingly held that the following contract released the cause of action of a railway employé against the company: "Received of the Illinois Central Railroad Company \$46, in full payment and consideration for one month's time in April, while laid by with injuries while braking, and in full satisfaction of all claims, demands, damages, and causes of action against said company, hereby forever releasing said company therefrom."¹⁹ But this would not be so if the employé was induced to sign it under a representation that it covered merely a month's wages or if he was induced to sign it under the belief, induced by words or actions of the company's agents, that it would not operate as a bar to an action; and whether this was so, is a question for the jury.²⁰ Nor would such a release be binding if obtained while the person injured was under the influence of drugs and opiates, so that he was mentally incapacitated to contract; nor would the plaintiff be estopped from maintaining his action

the result of malaria, jaundice, constipation, and perhaps other causes, and not on the ground that his illness was the result of the accident. It was held that, notwithstanding his fraud upon the relief association, he was not thereby estopped from subsequently bringing an action against the railroad company for damages occasioned by such illness, where he proved that the illness was in fact the result of the accident: *Owens v. Baltimore & C. R. Co.*, 35 Fed. Rep. 715; s. c. 1 L. R. A. 75. In *Georgia*, contracts between railway companies and their employés, by which the employés agree to assume all risks incident to the employment, and otherwise limiting the liability of the company to them, are upheld as valid, in so far as they do not operate to condone any crime: *Galloway v. Western & C. R. Co.*, 57 Ga. 512; *Western & C. R. Co. v. Bishop*, 50 Ga. 465; *Western & C. R. Co. v. Strong*, 52 Ga. 461; *Hendricks v. Western & C. R. Co.*, 52 Ga. 467. In the same State the voluntary acceptance by an injured

employé of any benefit under a contract whereby he is to receive from the master certain benefits when injured or sick, in consideration of monthly payments to a fund by him and certain contributions thereto by the master, and in which contract he agrees that the acceptance of *any* benefit under the contract shall work a release of all liability of the master for the injury, is an election on the part of the employé to look exclusively to that source for compensation on account of the injury, and amounts to a complete accord and satisfaction of his claim for damages against his master therefrom arising, though he has not yet received *all* that may be due him under the contract: *Petty v. Brunswick & C. R. Co.*, 109 Ga. 666; s. c. 35 S. E. Rep. 82.

¹⁸ *Illinois & C. R. Co. v. Welch*, 52 Ill. 183.

¹⁹ *Illinois & C. R. Co. v. Welch, supra*.

²⁰ *Illinois & C. R. Co. v. Welch, supra*; *Schultz v. Chicago & C. R. Co.*, 44 Wis. 638. To the same effect is *Butler v. The Regents*, 32 Wis. 124.

by keeping the money paid out, but the jury should credit the defendant with it in their verdict.²¹

ARTICLE IX. DOCTRINE OF PROXIMATE AND REMOTE CAUSE AS APPLIED TO INJURIES TO SERVANTS.

SECTION

3856. Questions of proximate and remote cause in actions by servants against their masters for injuries.

3857. Rule where the injury is the result of the concurrence of several causes.

3858. Rule where negligence of master concurs with negligence of fellow servant.

3859. Rule where negligence of master concurs with negligence of third person.

SECTION

3860. Circumstances under which the question whether the negligence of the master was the proximate cause of the injury, is a question for the jury.

3861. Illustrative cases where the negligence of the master was the proximate cause of the injury, or presented a question for the jury.

3862. Illustrative cases where the negligence of the master was not the proximate cause of the injury.

§ 3856. **Questions of Proximate and Remote Cause in Actions by Servants Against their Masters for Injuries.**—It is barely necessary to suggest that, in an action by a servant, or by the legal representative of the deceased servant, against the master to recover damages for the injury or death of the servant, grounded on the negligence of the master, it is not sufficient merely to prove such negligence, but it must also be proved that the negligence was the proximate cause of the death or injury;¹ and, on the other hand, that there can be no

²¹ Chicago R. Co. v. Doyle, 18 Kan. 58.

¹ Western &c. R. Co. v. Esslinger, 95 Ga. 734; s. c. 22 S. E. Rep. 580 (evidence tended to show that the accident happened five or six feet away from the defect alleged to have caused it—a space between boards in a street-crossing, which was alleged to have made plaintiff stumble); Thompson v. Citizens' St. R. Co., 152 Ind. 461; s. c. 1 Repr. (Ind.) 930; 53 N. E. Rep. 462 (plaintiff threw a switch for an electric car, and was frightened by the prancing of the horses drawing a car immediately behind it, and stepped backward toward a parallel track, and was struck by the front end of the trailer attached to a car

going in the opposite direction); Henry v. Brackenridge Lumber Co., 48 La. An. 950; s. c. 20 South. Rep. 221 (no evidence showing how deceased got entangled in a belt that was being laced, and near which his duty did not require him to be; nor was it negligence to have the shaft so near the ceiling that a person entangled in the belt could not be carried around it in safety); Conley v. American Express Co., 87 Me. 352; s. c. 32 Atl. Rep. 965 (plaintiff stood on a box to push a sliding door which stuck on the runner, and when the door gave way suddenly he lost his balance and fell to the floor, injuring himself); Sullivan v. Wamsutta Mills, 155 Mass. 200; s. c. 29 N. E. Rep.

recovery where the proximate cause of the death or injury was the negligence of the deceased or injured servant himself,² under principles already considered.³

§ 3857. Rule where the Injury is the Result of the Concurrence of Several Causes.—Here, as in other cases,⁴ where an injury is the result of several causes combining or concurring to produce it, the master will be liable if he is responsible for any one of such causes.⁵ Here, as in other relations,⁶ the direct or proximate consequences of a wrongful act are those which occur without any intervening cause; and, where an efficient adequate cause has been found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened.⁷ The test is, to con-

516 (accident caused by a belt-shipper slipping from repairer's greasy hand, and not by the absence of a catch which would have had to be fastened after the belt was shifted; belt failed to stop at loose pulley, but by the impetus given it went on to a fixed pulley, starting the machinery and injuring an assistant); *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202 (no evidence that the looseness of a shaft in its journal had any effect upon its safety, or that any effect upon its safety should have been foreseen and guarded against by the master); *White v. Eidlitz*, 38 App. Div. (N. Y.) 149; s. c. 56 N. Y. Supp. 629; s. c. on former appeal, 19 App. Div. (N. Y.) 256 (act of foreman in allowing plaintiff to use a material-elevator in a building in process of construction was not negligence, where it was in good condition and safe if properly used; and where the elevator struck some planks placed across the shaft at an upper story, causing it to descend, and the noise frightened plaintiff and caused him to jump, and it was not shown that defendant was responsible for the presence of the planks, the defendant was not liable); *Kruse v. Chicago & C. R. Co.*, 82 Wis. 568; s. c. 52 N. W. Rep. 755 (evidence failed to show that injury in coupling cars was due to the difference in height of the draught-irons; but tended to show negligence of engineer in backing with increased speed without signal—recovery on latter ground only under a statute); *Craven v. Smith*,

89 Wis. 119; s. c. 61 N. W. Rep. 317 (no recovery if an injury is solely the result of a coemployé's negligence, or if it is not caused directly by the dangerous character of the work, or if, under the circumstances, he ought to comprehend the danger, or if the injury is directly caused or contributed to by his own lack of ordinary care).

² *Craven v. Smith*, 89 Wis. 119; s. c. 61 N. W. Rep. 317; *McDonald v. Crystal Plate Glass Co.*, 9 Mo. App. 577 (*mem.*).

³ Vol. I, § 168, *et seq.*

⁴ Vol. I, § 75; *post*, § 4856, *et seq.*

⁵ *Malott v. Hood*, 99 Ill. App. 360 (efficient cause of injury to a brakeman while making a coupling was the absence of the handholds required by Act of Congress, combined with the slippery condition of the ground).

⁶ Vol. I, § 43, *et seq.*

⁷ *Schumaker v. St. Paul & C. R. Co.*, 46 Minn. 39; s. c. 12 L. R. A. 257; 48 N. W. Rep. 559. So, in the application of the rule of *respondet superior*, a person is liable for an injury to which the negligence of his employé has contributed, although the negligence of another person also contributed to the injury: *Lipp v. Otis Bros.*, 28 App. Div. (N. Y.) 228; s. c. 51 N. Y. Supp. 13 (negligence of elevator contractor's superintendent in turning steam into an exhaust-pipe full of water without seeing whether its drip-valves were open, blowing scalding water and steam out at the top and scalding a stone-cutter, although the steam-plant contract-

sider where the injury would have happened to the servant but for the negligence of the master with respect to the concurrent act or omission of the third person. Thus, where a servant was injured because of a defective appliance which the master should have repaired, the latter was not relieved from liability because a proximate cause of the accident was the act of a third person, if it would not have occurred but for the failure to repair.⁸ Where, in a suit for personal injuries due to defective machinery, it appears that the defect (insufficiently-protected knives) was due to the defendant's negligence and was the immediate cause of the injury, the fact that the initial and moving cause was the plaintiff's slipping on the floor, in which respect the defendant was not negligent, will not preclude a recovery.⁹ In the manner, where the evidence was sufficient to support a finding that the negligence alleged was a proximate cause of an injury to a servant, without which the injury could not have occurred, it was error not to submit the case to the jury, though *another defect* was also a proximate cause of such injury.¹⁰ On the other hand, a master cannot be held liable for an injury to a servant due to the combination and coöperation of a number of causes for no one of which he was liable; that is, there must be negligence on the part of the master.¹¹

§ 3858. Rule where Negligence of Master Concurs with Negligence of Fellow Servant.—As will be seen hereafter,¹² in jurisdictions where

ors may have been negligent in allowing the pipe to be used before it was capped with an exhaust-head); s. c. rev'd for error in admitting improper evidence, 161 N. Y. 557; 30 Civ. Proc. Rep. (N. Y.) 270.

⁸Larkin v. Washington Mills Co., 45 App. Div. (N. Y.) 6; s. c. 61 N. Y. Supp. 93 (defective automatic gate used to close an elevator-shaft, which failed to close when the elevator was moved by an employé on another floor, whereby plaintiff was precipitated, with a load he was pushing, into the shaft).

⁹Swift & Co. v. Holoubek, 60 Neb. 784; s. c. 84 N. W. Rep. 249; s. c. on rehearing, 62 Neb. 31; 86 N. W. Rep. 900 (case in 60 Neb. reversed judgment for plaintiff for supposed errors in instructions, but on rehearing the instructions, considered in connection with others, were held proper, and a remittitur of damages ordered, upon which judgment would be affirmed).

¹⁰Scandell v. Columbia Const. Co.,

50 App. Div. (N. Y.) 512; s. c. 64 N. Y. Supp. 232; 98 N. Y. St. Rep. 232 (evidence tended to show that derrick-boom fell because appliances at the top of the spar were unsuitable when furnished or had been negligently allowed to become and remain so, as alleged; and the fact that an eyebolt at the *throat of the boom* was found to be broken after the accident, and that negligence was not predicated thereon, did not justify the court in dismissing the complaint).

¹¹Carswell v. Wilmington, 2 Marv. (Del.) 360; s. c. 43 Atl. Rep. 629; 14 Am. & Eng. R. Cas. (N. S.) 625 (fireman driving to fire at night at a speed greater than that allowed by ordinance to everybody, whereby he fails to watch where he is going or to see or hear danger-signals, and falls into a trench being dug by the city, is guilty of contributory negligence, which precludes a recovery for his death).

¹²Post, § 4856, *et seq.*

the so-called "fellow-servant doctrine" prevails, if the negligence of the master concurs with the negligence of one of his servants in producing an injury to another servant, the master will be liable provided the injury would not have occurred but for the master's negligence. But where the injury is produced by the negligence of a fellow servant, commingling with some act or neglect of the master which cannot be imputed to him as negligence, then the master is not liable. Thus, an employer who furnishes necessary and safe tools and appliances is not liable for injuries to an employé if such tools are not employed in the work, or are unskillfully employed, through the negligence or want of skill of the foreman, who is the fellow servant of the workmen under him in respect to the mode adopted for doing work.¹³

§ 3859. Rule where Negligence of Master Concurs with Negligence of Third Person.—A master will be liable in damages to his servant for an injury visited upon the servant by the negligence of the master, although the negligence of a third person¹⁴ coöperates with that of the master.¹⁵

§ 3860. Circumstances under which the Question whether the Negligence of the Master was the Proximate Cause of the Injury, is a Question for the Jury.—Where the evidence in a suit for injuries tends to establish the fact that the injury received by the plaintiff was caused by a set-screw projecting from the collar of a shaft, which collar was at a place where it did not belong, and that he had been directed to do some work near the collar by a vice-principal of the master, it was a question for the jury whether negligence of the defendant was to be considered as the proximate cause of the injury.¹⁶

¹³ *Cleveland &c. R. Co. v. Brown*, 73 Fed. Rep. 970; s. c. 20 C. C. A. 147; 34 U. S. App. 759 (negligence of foreman in tearing down a railway transfer-shed). See also, *Galveston &c. R. Co. v. Sherwood* (Tex. Civ. App.), 67 S. W. Rep. 776 (no off. rep.) (plaintiff and a fellow servant ordered to carry a 160-pound timber; plaintiff had lifted his end to his shoulder, and was injured by reason of his fellow servant dropping his end on attempting to lift it to his shoulder, it being too heavy for him, as was or should have been known to the defendant's foreman).

¹⁴ *Galveston &c. R. Co. v. Adams*, 94 Tex. 100; s. c. 58 S. W. Rep. 831;

aff'g s. c. (Tex. Civ. App.), 55 S. W. Rep. 803 (no off. rep.).

¹⁵ *Ante*, § 3857.

¹⁶ *Regan v. Sargent Co.*, 98 Ill. App. 617. In an action by a switchman to recover for injuries sustained while in the discharge of his duties, it appeared that he received an injury while at the switch, through the negligence of the engineer, after which, as the engine came by slowly, he stepped on the running-board at the front of the engine. Another switchman, accompanying the engine, saw the plaintiff, who had fainted from his injuries, falling from the running-board, and gave the engineer a signal to stop; but the engine was not

§ 3861. **Illustrative Cases where the Negligence of the Master was the Proximate Cause of the Injury, or Presented a Question for the Jury.**—The negligence of the master was either regarded as being, in a juridical sense, the proximate cause of the injury, or the evidence presented a question of fact for the jury whether it was so or not, in the following cases:—Where a train-hand, while on top of a box-car in the night-time, lost his balance, caused by the sudden moving of the train, and in attempting to regain his balance, struck his foot against a bolt negligently allowed to protrude from the top of the car, and was injured,—the condition of the bolt being regarded as the proximate cause of the injury;¹⁷ where a railway switchman was knocked off a ladder maintained on the side of a freight-car, in passing a post in the railroad-yards,—the conclusion being that the position of the ladder on the side of the car was the proximate cause of the accident; and, such a position of the ladder being forbidden by a statute, the switchman did not assume the risk;¹⁸ where a mine-owner leased a level having an ore-tramway running to a shaft, so constructed that an escaping car would run into the shaft, which was operated by the owner for the benefit of the lessee, and an employé of the lessee, without being guilty of negligence, allowed a car to run into the shaft and injured an employé of the owner,—the negligent construction of the tramway with an excessive grade and without barriers being deemed the proximate cause of the injury;¹⁹ where a railway sectionman, while assisting in removing a wreck from the track under the direction of his superiors, was injured by a flying

stopped until it had cut off such switchman's leg, after which it backed and cut off his other leg. It was held that the defendant was liable for the second injury only in the event the engineer was negligent after he had notice of the plaintiff's peril; and if he did not have such notice until after one of plaintiff's legs was crushed, the defendant was not liable for injuries to that leg, but defendant was liable if the injury to the plaintiff's other leg was inflicted after notice to the engineer of his peril, if it happened by reason of *gross* negligence: *Illinois & C. R. Co. v. Stewart*, — Ky. —; s. c. 23 Ky. L. Rep. 637; 63 S. W. Rep. 596. In the case just cited it appeared that, the plaintiff having fainted from loss of blood resulting from a previous injury, and having fallen from the running-board of the engine upon which he had got

after he was injured, the engineer, not being able to see him, was not negligent in running the engine upon him if he did not receive a signal in time to stop; but when he was under the engine, and it had stopped, the engineer was guilty of gross negligence in backing the engine without knowing where he was, and without a signal from another switchman to do so, especially after the other switchman urged him to stop, and told him plaintiff was under the engine: *Illinois & C. R. Co. v. Stewart*, *supra*.

¹⁷ *International & C. R. Co. v. Bayne*, 28 Tex. Civ. App. 392; s. c. 67 S. W. Rep. 443.

¹⁸ *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288; s. c. 52 Atl. Rep. 531.

¹⁹ *Union Gold Min. Co. v. Crawford*, 29 Colo. 511; s. c. 69 Pac. Rep. 600.

fragment of a car,—the accident resulting from the derrick-chain being fastened by the direction of the agents of the company in an improper and negligent manner and place,—such negligent fastening being regarded as the proximate cause of the injury, entitling the plaintiff to recover.²⁰ The negligent failure of a railway company to furnish a car-repairer in its employ with transportation from the scene of a wreck back to his home, or to any other place where he could obtain food and shelter, whereby it became necessary for him to walk nine miles, in the night-time and in dangerously cold and severe weather, to the nearest point where he could obtain food and shelter,—was the proximate cause of the sickness, pain, and disability resulting to him from such walk.²¹

§ 3862. Illustrative Cases where the Negligence of the Master was Not the Proximate Cause of the Injury.—The fact that a switch-engine leaked steam so badly as to prevent the engineer from seeing a signal to stop made by a switchman, who had caught his foot in a frog, and who was run over and injured, was not deemed to be the proximate cause of the injury, where it appeared that the cars were so close to the man when the signal was given that they could not have been stopped in time to prevent the accident, even if the signal

²⁰ Reed v. Missouri &c. R. Co., 94 Mo. App. 371; s. c. 68 S. W. Rep. 364.

²¹ Schumaker v. St. Paul &c. R. Co., 46 Minn. 39; s. c. 12 L. R. A. 257; 48 N. W. Rep. 559. Where the rule of a railroad company provided that block-lights at its stations should show red at all times, against which trains could not proceed except when a white signal was given, a conductor being required to know the rules, and knowing that the train would stop or start as the engineer observed the light to be white or red,—the absence of a rule requiring a signal by whistle or otherwise before stopping or starting a train could not be regarded as the proximate cause of an injury to the conductor, who was thrown off by such stopping or starting; the change in the color of the lights giving him full notice: Crawford v. New York &c. R. Co., 23 Ohio C. C. 207; aff'g s. c. 12 Ohio Dec. 17 (light showed red and train slackened speed; it changed to white before train had completely stopped, and the train started up again. Conductor

was told by a brakeman that the light was white, and knew the train would not stop under such circumstances). Where the defendant's servant was carrying a tub of mortar weighing fifty or sixty pounds up a ladder which was not properly secured, and collided with an iron girder, causing the ladder to slip, and the tub fell on and killed plaintiff's intestate, who was in the *employ of another person*, it was immaterial whether the tub was thrown from the servant's shoulder by the force of the blow, or he involuntarily dropped it under the influence of pressing danger, since in either event the proximate cause of the accident was not the fall of the tub, but was his act in ascending the ladder with the tub and permitting the tub to collide with the girder; and the question of defendant's negligence should have been submitted to the jury, which might properly have found the act to be negligent: Monahan v. Eidlitz, 59 App. Div. (N. Y.) 224; s. c. 69 N. Y. St. Rep. 335.

had been seen and obeyed.²² Failure of a yardmaster to properly make up a train, and to inspect the cars and remedy the condition of the angle-cock and the air-hose of one of the cars, is too remote to furnish a ground of recovery against the company by a freight-conductor, for injuries sustained, in attempting to close a defective angle-cock while rearranging the train and putting the air cars together, by the engine pushing the cars against the one he was working upon.²³

ARTICLE X. PRESUMPTIONS AND BURDEN OF PROOF IN ACTIONS GROUNDED ON INJURIES TO SERVANTS.

SECTION

3864. General presumption in favor of master.

3865. What the servant must prove to overcome this presumption.

SECTION

3866. Further of presumptions and burden of proof.

§ 3864. **General Presumption in Favor of Master.**—In an action by an employé against his employer for injuries sustained by the former in the course of his employment, from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it. In like actions for injuries sustained by reason of incompetent fellow servants, the presumption is that the fellow servant was not incompetent, and that the master was not negligent in employing him or retaining him in his employment.¹ Therefore, in such actions, the *onus probandi* is upon the plaintiff to negative these presumptions, in order to make out a *prima facie* case.^{1a}

²² Hunt v. Kane, 100 Fed. Rep. 256; s. c. 40 C. C. A. 372.

²³ St. Louis & C. R. Co. v. Nelson, 20 Tex. Civ. App. 536; s. c. 49 S. W. Rep. 710. The failure to fence off an unused part of a mine, as required by statute, does not render the owner of the mine liable for the death of a miner killed by an explosion therein, where he was sent into such unused part to perform certain work therein, and the failure to fence it off did not in any degree tend to cause the explosion: Grant v. Acadia Coal Co., 34 Nov. Sco. Rep. 319. An employé in a laundry was at work on an ironing-machine which was operated by the pressure of her feet on a treadle throwing it into gear, and under control of the power operating the

laundry. When the pressure of the feet on the treadle was relieved the machine was at once thrown out of gear, and the rollers separated and ceased their motion after a few revolutions. In operating the machine the clothing which was being ironed became wrapped about the roller of the machine, and while endeavoring to disengage it, without removing her feet from the treadle, her hand was drawn between the rollers and burned. It was held that the pressure of her feet on the treadle of the machine was the cause of her injury, and that she could not recover: Doolittle v. Pfaff, 92 Ill. App. 301.

¹ See *post*, § 4906, *et seq.*

^{1a} Davis v. Detroit & C. R. Co., 20 Mich. 105; Wright v. New York & C.

§ 3865. **What the Servant must Prove to Overcome this Presumption.**—To establish negligence in cases of this kind, the plaintiff must prove either that the master had undertaken personally to superintend and direct the works, or that the persons employed by him were not proper and competent persons, or that the materials were inadequate, or the means and resources unsuitable to accomplish the work. The *onus* is upon him; and failing to do so, he fails to establish negligence.² This principle is clearly pointed out by Lord Cranworth, in the leading Scotch case in the House of Lords, which has constantly been quoted as expounding the law of England equally with that of Scotland: "Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible."³ "It is not enough," said Mr. Justice Willes, "for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."⁴ A servant, in order to recover for defects in the appliances of the business, must establish that the appliance was defective; that the master had notice thereof, or knowledge, or ought to have had; and that he did not know of the defect, and had not equal means of knowing the same with the master.⁵

§ 3866. **Further of Presumptions and Burden of Proof.**—It need not be said that the master is entitled to the benefit of the presump-

R. Co., 25 N. Y. 562; Kansas &c. R. Co. v. Salmon, 11 Kan. 83; s. c. 14 Kan. 512; Central R. &c. Co. v. Sears, 59 Ga. 436; s. c. 5 Reporter, 494; Central R. &c. Co. v. Kelly, 58 Ga. 107; Central R. &c. Co. v. Kenney, 58 Ga. 485; Nolan v. Shickle, 3 Mo. App. 300; Duffy v. Upton, 113 Mass. 544; Murphy v. St. Louis &c. R. Co., 4 Mo. App. 565; Colorado &c. R. Co. v. Ogden, 3 Colo. 499; Summerhays v. Kansas &c. R. Co., 2 Colo. 484; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Way v. Illinois &c. R. Co., 40 Ill. 341; Columbus &c. R. Co. v. Troesch, 68 Ill. 545; s. c. 57 Ill. 155; Beaulieu v. Portland Co., 48 Me. 291; Atlanta &c. R. Co. v. Campbell, 56 Ga. 586; Wonder v. Baltimore

&c. R. Co., 32 Md. 411. In Greenleaf v. Illinois &c. R. Co., 29 Iowa 14, it is held that the employé is not bound to do more than raise a reasonable presumption of negligence on the part of the employer.

² Huddleston, B., in Allen v. New Gas Co., 1 Exch. Div. 254.

³ Bartonshill Coal Co. v. Reid, 4 Jur. (N. S.) 767.

⁴ Lovegrove v. London &c. R. Co., 16 C. B. (N. S.) 692; s. c. 33 L. J. (C. P.) 329. To the same effect, see Cotton v. Wood, 8 C. B. (N. S.) 568; s. c. 1 Thomp. Neg. (1st ed.), p. 364; Feltham v. England, L. R., 2 Q. B. 33.

⁵ Garden City Wire Spring Co. v. Boecher, 94 Ill. App. 96.

tion that he has performed his duty, until the contrary appears;⁶ and the burden is on the servant to show the contrary by a preponderance of evidence.⁷ The master is not compelled to show the cause of the accident, or that it was not caused by himself or by any person in his employ for whose conduct he is responsible.⁸ In an action to recover damages from a railroad company for injuries to an employé by the alleged faulty construction of a split switch, the plaintiff must show, not only the way in which it was constructed, but that such construction was not of a proper and approved kind, or, if of a proper and generally approved kind, that the one complained of was improperly made.⁹ The burden is on an employé, suing for injuries from a defective drawbridge operated by a city, to show that he relied upon and was induced to remain at work by a *promise to repair*, made by some one authorized to bind the city thereby.¹⁰ The burden of establishing that the servant *assumed the risk* is upon the master.¹¹ With respect to *contributory negligence*, the contradiction among the authorities is set out in Volume I.¹²

⁶ Cahill v. Hilton, 106 N. Y. 512; s. c. 13 N. E. Rep. 339; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; s. c. 9 West. Rep. 827; 12 N. E. Rep. 380, and authorities cited (presumption that master furnished such cars as might have been safely coupled by the use of a coupling-stick, the use of which the rules required); Pellerin v. International Paper Co., 96 Me. 388; s. c. 52 Atl. Rep. 842 (presumed to have complied with the obligations resting upon him equally with other men, and not to have been guilty of negligence).

⁷ Boyd v. Blumenthal, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330.

⁸ Giordano v. Brandywine Granite Co., 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332.

⁹ Lane v. Missouri & C. R. Co., 64 Kan. 755; s. c. 68 Pac. Rep. 626.

¹⁰ Houston v. Owen (Tex. Civ. App.), 67 S. W. Rep. 788 (no off. rep.).

¹¹ Dowd v. New York & C. R. Co., 170 N. Y. 459; s. c. 63 N. E. Rep. 541; aff'g s. c. 61 App. Div. (N. Y.) 612; 70 N. Y. Supp. 1138.

¹² Vol. I, § 364, *et seq.* Where a switchman in the employ of a railroad company stands on a car, approaching an obstruction with which he is familiar, but with his back toward it, and so remains until he is struck by it and killed, in

an action for his death, the burden of showing that he was in the exercise of ordinary care at the time rests on his personal representative, without which there can be no recovery: Anderberg v. Chicago & C. R. Co., 98 Ill. App. 207. But in the same jurisdiction, the fact that an employé of a railroad company had knowledge of a defect in the track, through which he received an injury, is a matter of defense, and, in the absence of evidence showing that he had such knowledge, it will not be presumed that he had, since no one is presumed to knowingly incur physical pain and death where he can avoid it: Baltimore & C. R. Co. v. Clifford, 99 Ill. App. 381. The following decision proceeded under a rule which has been abolished in Indiana by statute, but which may nevertheless be a persuasive authority in jurisdictions where such rule still obtains, and is to the effect that there is no presumption that a railroad brakeman injured by a defect in the road-bed knew of such defect, but he must aver that he had no knowledge of it, and he has the burden of proving that he had no knowledge thereof, and could not have known of it by the exercise of ordinary care; and the usual allegation of freedom from fault is insufficient: Chicago & C. R. Co. v. Lee, 29 Ind. App.

ARTICLE XI. MISCELLANEOUS QUESTIONS RELATING TO EMPLOYERS' LIABILITY.

SECTION

3868. Conflict of laws—Law of place governs.

3869. What law applies in case of interstate railroads.

SECTION

3870. Action over by master against his servant.

3871. Ratification by master of injury inflicted by one servant upon another.

§ 3868. **Conflict of Laws—Law of Place Governs.**—In actions against a master for negligent injuries to his servants, the law which applies in fixing and determining the *rights* of the parties is the law of the State, country, or place where the accident took place; but rules relating to the remedy are applied according to the law of the forum. Thus, where a brakeman injured on the defendant's railroad in Massachusetts brought an action against the railroad company in New Hampshire to recover damages for the injury, the liability of the defendant was to be determined according to the law of Massachusetts, so that whatever would be a defense to the action in Massachusetts would be a defense to it in New Hampshire.¹ A striking illustration of this principle is found in a case where a servant was injured, while working in a tunnel on the Canadian side of the St. Clair river, by reason of the high pressure of air maintained. The court instructed the jury that it was the master's duty to adopt the proper system for maintaining the air-pressure, and to use the proper locks, and proper valves on the locks, or to give the plaintiff warning of the danger. It was held that the instruction was improper, as the law of Canada governing the case was, that the defendant had performed the duty when it employed competent persons to control the work, and authorized them to purchase suitable material and machinery.² If the law of the State or country in which the accident

480; s. c. 64 N. E. Rep. 675; s. c. on former appeal, 17 Ind. App. 215 (action brought previously to Act of 1897, making contributory negligence an affirmative defense).

¹Leazotte v. Boston & C. R. Co., 70 N. H. 5; s. c. 45 Atl. Rep. 1084; citing Beacham v. Proprietors, 68 N. H. 382; s. c. 40 Atl. Rep. 1066.

²Turner v. St. Clair Tunnel Co., 121 Mich. 616; s. c. 80 N. W. Rep. 720; 47 L. R. A. 112 [citing McFarlane v. Gilmour, 5 Ont. 302 (mill proprietors not liable for negligence of competent foreman to whom they have left the construction of a tram-

way); Wilson v. Hume, 30 U. C. (C. P.) 542 (master not liable for negligence of competent person, to whom he has delegated the duty of selecting workmen, in hiring incompetent workmen—captain hiring incompetent sailors); Matthews v. Hamilton Powder Co., 14 Ont. App. 261; rev'g s. c. 12 Ont. 58 (master not liable for failure of competent superintendent to have defects repaired which had been pointed out to him, though pointed out to him by a director, where it was not shown that the director in any way assumed to direct the

took place is not proved, then, under a well-known rule, it will be presumed to be the same as the law of the State or country of the forum. Applying this rule, one court held that the degree of diligence due respectively between employer and employé under the laws of another State will be held to be only ordinary diligence, in the absence of evidence to the contrary.³

§ 3869. What Law Applies in Case of Interstate Railroads.—It has been held that the rule that defects in railroad apparatus shall be *prima facie* evidence of negligence on the part of the corporation in an action for injuries received by an employé, which is prescribed by a statute regulating railroads in the State of the forum, applies to all railroad companies, any part of whose line of railway extends into the State, whether the injury complained of was received within or without the State, being merely a rule of evidence.⁴

§ 3870. Action Over by Master against his Servant.—Where a master is not in fault, but has nevertheless been compelled to pay damages to a third person for the negligence of his servant, he may maintain an action over against his servant to recover what he has thus been compelled to pay. In such an action, the judgment against the master is *evidence* against the servant, provided the servant had notice of the pendency of the action, and this he has where he has been a witness in the case against the master. But such a judgment is not conclusive evidence of the negligence of the servant. It may be attacked for fraud or error.⁵

practical working of the mill, or that he had any special knowledge or ability qualifying him to do so.)]

³Richmond &c. R. Co. v. Mitchell, 92 Ga. 77; s. c. 18 S. E. Rep. 290.

⁴Pennsylvania Co. v. McCann, 54 Ohio St. 10; s. c. 31 L. R. A. 651; 35 Ohio L. J. 64; 42 N. E. Rep. 768. Under Ark. Const., art. 17, § 12, providing that all railroads which are now or may hereafter be built and operated, either in whole or in part, in Arkansas, shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the General Assembly, a railroad company whose road is operated in part in Arkansas is governed by the statutes of Arkansas, and is liable to an employé in tort for injuries received there, caused by failure to discharge any duties growing out of said statutes, though the con-

tract of service may have been made in another State. Thus, such a railroad company is liable to an employé for an injury received in Arkansas through the negligence of a coemployé who was not by the law of that State a fellow servant,—as, an injury to a locomotive-fireman engaged on the road, caused by the negligence of an engine-inspector engaged at a round-house, they not being engaged in the same department or service, nor “working together to a common purpose,” within the meaning of the Arkansas railway fellow-servant act: Kansas City R. Co. v. Becker, 67 Ark. 1; s. c. 53 S. W. Rep. 406; 46 L. R. A. 814; s. c. on former appeal, 63 Ark. 477.

⁵Costa v. Yochim, 104 La. 170; s. c. 28 South. Rep. 992 (servant tried to set up an estoppel, in that his employer had denied in the first

§ 3871. **Ratification by Master of Injury Inflicted by One Servant upon Another.**—It has been held that the fact that a master retains a servant in his employment after an injury to a coservant by the former's negligence is *not a ratification*. It is said that the doctrine of ratification, if applicable at all as between a master and servant, is applicable only when a *willful* injury is inflicted by the servant upon a coservant.⁶

suit that his servant was guilty of negligence).⁶ *Smith v. Sibley Man. Co.*, 85 Ga. 333; s. c. 11 S. E. Rep. 616.

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CHAPTER CVIII.

DUTY OF EMPLOYER TO PROVIDE HIS SERVANTS WITH A SAFE PLACE IN WHICH TO WORK.

- ART. I. General Principles and Illustrations, §§ 3873-3880.
 ART. II. Liability for Injuries from Falling Objects, §§ 3882-3886. .
 ART. III. Man-Traps, Trap-Doors, Unlighted Premises, Passageways, Hidden Dangers, §§ 3888-3892.
 ART. IV. Elevators in Buildings, §§ 3894-3909.
 ART. V. Excavations, Ditches, Construction of Sewers, etc., §§ 3912-3917.
 ART. VI. Explosions, §§ 3919-3936.
 ART. VII. Liability for Injuries to Servants Caused by Fires Other than Railway Fires, §§ 3939-3945.
 ART. VIII. Liability for Unsafe Scaffoldings, Stagings, Ladders, etc., §§ 3947-3963.
 ART. IX. Various Grounds of Liability, Alphabetically Arranged, §§ 3966-3983.

ARTICLE I. GENERAL PRINCIPLES AND ILLUSTRATIONS.

- | SECTION | SECTION |
|--|---|
| 3873. Duty of the master as to the safety of the place where he sends his servant to work. | 3877. Nor where the work consists in making a dangerous place safe. |
| 3874. This duty primary, absolute and non-assignable. | 3878. Other situations where the rule does not apply. |
| 3875. Evidence to take to the jury the question of the master's negligence in failing to provide a safe place of work. | 3879. Duty of servants to keep place of work in a safe condition. |
| 3876. Rule does not apply with respect to dangers arising in the progress of work. | 3880. Defects in premises leased by the master. |

§ 3873. Duty of the Master as to the Safety of the Place where he Sends his Servant to Work.—Subject to the qualifications elsewhere stated in this Title, it is the duty of the master to exercise reasonable

care and skill¹ to the end that the place where he requires his servant to perform labor shall be as reasonably safe as is compatible with its nature and surroundings.²

§ 3874. **This Duty Primary, Absolute and Non-assignable.**—As in other cases, the obligation of the master to see that the place where

¹The measure of the master's duty and obligation in this particular extends no further than the exercise of ordinary care and skill: *Chicago &c. R. Co. v. Lee*, 29 Ind. App. 480; s. c. 64 N. E. Rep. 675. Hence, an instruction that it was the master's duty to furnish the employé a safe place to work, and safe appliances, instead of "reasonably" safe place and appliances, was erroneous: *Bering Man. Co. v. Peterson*, 28 Tex. Civ. App. 194; s. c. 67 S. W. Rep. 133.

²*Ante*, §§ 3758, 3781; *Middle Georgia &c. R. Co. v. Barnett*, 104 Ga. 582; s. c. 4 Am. Neg. Rep. 611; 12 Am. & Eng. R. Cas. (N. S.) 532; 30 S. E. Rep. 771 (brakeman stepped into open drain under track in a yard and was run over and killed—recovery); *Preston v. Central R. &c. Co.*, 84 Ga. 588; s. c. 11 S. E. Rep. 143; *Rock Island Sash &c. Works v. Pohlman*, 99 Ill. App. 670; *Himrod Coal Co. v. Clark*, 99 Ill. App. 332; s. c. aff'd, 197 Ill. 514; 64 N. E. Rep. 282; *Western Screw Co. v. Johnson*, 86 Ill. App. 89 (duty to use ordinary and reasonable care); *Pioneer Fireproof Const. Co. v. Howell*, 189 Ill. 123; s. c. 59 N. E. Rep. 535; aff'g s. c. 90 Ill. App. 122; *Ross v. Shanley*, 86 Ill. App. 144; s. c. aff'd, 185 Ill. 390; 56 N. E. Rep. 1105; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; s. c. 43 N. E. Rep. 319; 44 N. E. Rep. 377; *Frye v. Bath Gas &c. Co.*, 94 Me. 17; s. c. 46 Atl. Rep. 804; *Smith v. Peninsular Car Works*, 60 Mich. 501; s. c. 27 N. W. Rep. 662; 1 Am. St. Rep. 542; *Pahlan v. Detroit &c. R. Co.*, 122 Mich. 232; s. c. 81 N. W. Rep. 103; *Harding v. Railway Transfer Co.*, 80 Minn. 504; s. c. 83 N. W. Rep. 395 (ice allowed to accumulate upon steps which a foreman of the defendant was required to stand upon while engaged in his duties, and he was thrown down and injured); *Kuhn v. Delaware &c. R. Co.*, 92 Hun (N. Y.) 74; s. c.

36 N. Y. Supp. 339; 71 N. Y. St. Rep. 233; s. c. aff'd, 153 N. Y. 683 (defective scaffold); *Nichols v. Brush &c. Man. Co.*, 53 Hun (N. Y.) 137; s. c. 25 N. Y. St. Rep. 717; 6 N. Y. Supp. 601; *Cullen v. Norton*, 56 Hun (N. Y.) 639; s. c. 29 N. Y. St. Rep. 700; 9 N. Y. Supp. 174; *Hogan v. Smith*, 56 Hun (N. Y.) 649; s. c. 31 N. Y. St. Rep. 798; 9 N. Y. Supp. 881; *Berry v. Atlantic Storage Co.*, 50 App. Div. (N. Y.) 590; s. c. 64 N. Y. Supp. 292; 98 N. Y. St. Rep. 292; *Roth v. Northern Pac. Lumbering Co.*, 18 Or. 205; s. c. 22 Pac. Rep. 842; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476; s. c. 48 S. W. Rep. 232 (allowing explosive mine-dust to accumulate in mine); *Nadau v. White River Lumber Co.*, 76 Wis. 120; s. c. 43 N. W. Rep. 1135. Where the covers of hopper-boxes located in a grain-elevator and adjusted to the tops of the boxes by cleats, were originally furnished for the sole purpose of covering the hopper-boxes, but are afterwards used as platforms upon which it is necessary for the workmen in the elevator to mount in order to gain access to temporary grain-bins, they constitute permanent structures; and where such a cover slides to one side while a workman is stepping on it for the purpose of looking into a bin, because the structure is inadequate to bear the strain placed on it, and he is carried down into the conveyor and injured, the master is liable: *Berry v. Atlantic Storage Co.*, 50 App. Div. (N. Y.) 590; s. c. 64 N. Y. Supp. 292; 98 N. Y. St. Rep. 292. This duty of the master extends not only to such unnecessary and unreasonable risks as are in fact known to the master, but also to such as he might reasonably be expected to know under the facts and circumstances connected with the service: *Doyle v. Missouri &c. Trust Co.*, 140 Mo. 1; s. c. 41 S. W. Rep. 255.

his servant is required to work is reasonably safe, is primary, absolute, and non-assignable, in the sense that the master is responsible for the negligence of any servant or agent, of whatever grade, to whom he delegates the performance of it.³ If a railroad company delegates this duty to a fellow servant of the servant who is injured, it becomes answerable for his negligence in the performance of it.⁴

§ 3875. **Evidence to Take to the Jury the Question of the Master's Negligence in Failing to Provide a Safe Place of Work.**—Evidence of negligence on the part of the master in failing to exercise reasonable care to the end of furnishing his servants with a safe place at which to perform their work, has been discovered in conditions of fact which are suggested by the following statements:—Where the servant was injured by falling over a dump-pile, the condition of which had been changed by removals of the materials of which it was composed, and such removals had changed the shape of the pile from a gentle slope to a sharp declivity, and were made in the daytime, and the servants who worked about the place at night were not informed of the danger;⁵ where the evidence adduced on behalf of the plaintiff tended to show that he was assisting in the digging of a large well; that it was his duty to go upon a large cross-piece which extended over the well; that he objected that the cross-piece was not secure; that the foreman thereupon made a showing of fixing the same, and told him that it was all right; that the plaintiff thereupon resumed work upon it, when it turned over and threw him into the well;⁶ where a servant of a coal company was engaged in its yard under the direction of its foreman in moving coal, and was injured by the falling of a beam; and it appeared that there had been a fire in the yard; that the top of the coal-pile and the beams and supports were coated with ice; that the cap and top of the upright post supporting a beam twenty feet above the place where the plaintiff was working were burned; that the defect could not be seen from the side where the plaintiff was working, owing to the ice, but that it was visible from the other side of the post; that another workman was sent to the top of the pile to break off the frozen surface, and broke off a piece weighing about seventy pounds, which slid down and struck the post, causing the beam to fall and strike the plaintiff; and that defendant's fore-

³ Chicago &c. R. Co. v. Eaton, 96 Ill. App. 570; s. c. aff'd, 194 Ill. 441; 62 N. E. Rep. 784.

⁴ Chicago &c. R. Co. v. Eaton, 96 Ill. App. 570; s. c. aff'd, 194 Ill. 441; 62 N. E. Rep. 784.

⁵ Iroquois Furnace Co. v. McCrea, 191 Ill. 340; aff'g s. c. 91 Ill. App. 337.

⁶ McCord v. Southern R. Co., 130 N. C. 491; s. c. 41 S. E. Rep. 886.

man had gone over the structure soon after the fire and had inspected this post a day or two before the accident,—the conclusion being that findings that the place was unsafe, that the defendant knew or ought in the exercise of reasonable care to have known it, and that the plaintiff was excusably ignorant, were supported by the evidence;⁷ where the evidence tended to show that the foreman of the defendant directed the plaintiff, a servant of the defendant, to work under a platform, against his express wish to move his place of work when the platform was erected over him, and that some of the workmen suggested to the foreman that the platform should be supported by stronger cross-pieces than those used, and the plaintiff was injured by the breaking of the platform.⁸

§ 3876. Rule does Not Apply with Respect to Dangers Arising in the Progress of Work.—It is elsewhere shown that where the master does all that is incumbent upon him in providing for the safety of the place in which his servants are to work, and then commits the safety of it to them, to be attended to by them as emergencies may arise during the progress of the work, then, if the place becomes unsafe by reason of changes incidental to the progress of the work, or by reason of the conduct of the fellow servants of any servant receiving injury,—the master will not be responsible.⁹ Upon an an-

⁷ *Nix v. C. Reiss Coal Co.*, 114 Wis. 493; s. c. 90 N. W. Rep. 437.

⁸ *Frost Man. Co. v. Smith*, 197 Ill. 253; s. c. 64 N. E. Rep. 305; aff'g s. c. 98 Ill. App. 308.

⁹ *Ante*, §§ 3760, 3761; *Clark v. Liston*, 54 Ill. App. 578 (demolition of building); *Oleson v. Maple Grove Coal &c. Co.*, 115 Iowa 74; s. c. 87 N. W. Rep. 736; *McCann v. Kennedy*, 167 Mass. 23; s. c. 44 N. E. Rep. 1055 (house being altered); *Beique v. Hosmer*, 169 Mass. 541; s. c. 48 N. E. Rep. 338 (building in course of erection); *O'Connell v. Clark*, 22 App. Div. (N. Y.) 466; s. c. 48 N. Y. Supp. 74 (longshoreman engaged in removing bales of jute from hold, injured by bale falling on him from a pile in the hold); *Carlson v. Oregon &c. R. Co.*, 21 Or. 450; s. c. 28 Pac. Rep. 497 (wreck of work-train running over dilapidated track which crew was engaged in repairing); *Walton v. Bryn Mawr Hotel Co.*, 160 Pa. St. 3; s. c. 28 Atl. Rep. 438 (building in course of erection); *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162; s. c. 33 Atl. Rep.

1102 (caving-in of excavation for buildings, master having furnished safeguards); *Weideman v. Tacoma R. Co.*, 7 Wash. 517; s. c. 35 Pac. Rep. 414 (demolition of building); *Porter v. Silver Creek &c. Coal Co.*, 84 Wis. 418; s. c. 54 N. W. Rep. 1019 (repair of coal-dock—injury from cable being adjusted on movable derrick); *Armour v. Hahn*, 111 U. S. 313; s. c. 28 L. ed. 440; 4 Sup. Ct. Rep. 433 (building in course of erection); *Gulf &c. R. Co. v. Jackson*, 12 C. C. A. 507; s. c. 27 U. S. App. 519; 65 Fed. Rep. 48 (section-gang repairing track which had been undermined; ground obstructed, causing injury to plaintiff on trying to escape when bank of nearby river caved in); *Finalyson v. Utica Min. &c. Co.*, 14 C. C. A. 492; s. c. 32 U. S. App. 143; 67 Fed. Rep. 507 (mine in which blasting is being done); *Cleveland &c. R. Co. v. Brown*, 73 Fed. Rep. 970; s. c. 34 U. S. App. 759; 20 C. C. A. 174 (plaintiff injured by falling of roof of shed which was being torn down, while, by foreman's orders, he was

alogous principle, the rule that the master must exercise reasonable care to provide for the safety of the place in which the servant is required to work, does not apply so as to require him to keep the place safe under the constantly changing conditions which the performance of the work renders necessary.¹⁰ It does not, for example, apply in the case where a servant employed to assist in the *demolition* of a structure is injured by backing off a platform in consequence of its railing being removed in the course of the work.¹¹ The application of the rule has therefore been denied in the case where a workman was injured in the *erection* of a building,—the reason being that the employment was necessarily attended with danger and that he assumed the risks.¹² So, where a servant was asked by the foreman to take a belt off a pulley, the foreman promising to slow down the engine for that purpose, and plaintiff threw the belt off and the machinery stopped entirely, and while engaged in tying the belt up out of the way of other moving parts of the machinery, the engine was suddenly started, and plaintiff was injured, the case did not come within the rule that the master must supply a reasonably safe place in which to work.¹³ So, the duty of a railroad company to provide its employes a reasonably safe place of work does not render it liable for injuries received by a brakeman in a collision between his train and an engine, resulting from the negligent disregard by the engineer of such engine, of his orders to proceed on a track other than that on which the train was running.¹⁴

chopping a post to weaken it, not knowing that posts and braces had already been chopped and weakened to a dangerous extent).

¹⁰ *Minneapolis v. Lundin*, 7 C. C. A. 344; s. c. 58 Fed. Rep. 525 (laborer injured through the failure of a foreman, not a vice-principal, but a fellow servant, to inform him when a dynamite-cartridge had had failed to explode).

¹¹ *Chicago Edison Co. v. Davis*, 195 Ill. 31; aff'g s. c. 93 Ill. App. 284.

¹² *Connolly v. Maurer*, 6 Misc. (N. Y.) 98; s. c. 56 N. Y. St. Rep. 838; 26 N. Y. Supp. 18. See also, *Stourbridge v. Brooklyn City R. Co.*, 9 App. Div. (N. Y.) 129; s. c. 41 N. Y. Supp. 128; 75 N. Y. St. Rep. 586.

¹³ *Dwyer v. Nixon*, 108 Fed. Rep. 751; s. c. 47 C. C. A. 666.

¹⁴ *Healey v. New York & C. R. Co.*, 20 R. I. 136; s. c. 3 Am. Neg. Rep. 98; 37 Atl. Rep. 676. So, the duty of a city to furnish its employes a

safe place to work in does not extend, in the construction of a sewer, to keeping it safe at every place and every moment of time in the progress of the work, but this is a duty that devolves upon the workmen themselves, and in directing the performance of which a foreman is their fellow servant; and if the place becomes unsafe through the omission of the foreman to inform a workman that a dynamite cartridge has failed to explode, the city is not liable for a resulting injury: *Minneapolis v. Lundin*, 58 Fed. Rep. 525; s. c. 19 U. S. App. 245; 7 C. C. A. 344. So, where an effort to preserve the master's property from fire may be regarded as a detail of the regular work, as distinguished from a new employment, the risks of which would be assumed, then, assuming that the foreman was negligent in not warning a servant who was killed thereby that a burning tree was danger-

§ 3877. **Nor where the Work Consists in Making a Dangerous Place Safe.**—Nor does the rule under consideration apply to cases in which the very work the servants are employed to do consist in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses.¹⁵

§ 3878. **Other Situations where the Rule does Not Apply.**—The rule under consideration has been held not to apply under the following circumstances:—Where the servant was injured at a place outside the field of his work, where he had unnecessarily gone for the purpose of hanging his coat;¹⁶ where the injury was caused by a red-hot rail carried along by machinery, the danger of which was perfectly obvious and known to the injured employé, who got in the way of it and was burned—a case of contributory negligence;¹⁷ where, in consequence of there being oil on the floor and of the place not being lighted, an operator in a mill, familiar with the machinery and its surroundings, slipped while passing between the machines, and threw out his hand to save himself from falling, and it was caught in the gearing of one of the machines;¹⁸ where a servant was directed to go upon a flat roof and replace a pane of glass in a window, and he at-

ous and about to fall, the defendants are not liable, as it was no part of their duty thus to protect the deceased, by notice of a peril that had developed during the progress of the conflagration and which was equally obvious to all. The negligence, if any, on the part of the foreman, was that of a fellow servant: *Maltbie v. Belden*, 167 N. Y. 307; rev'g s. c. *sub nom.*; *Maltby v. Belden*, 45 App. Div. (N. Y.) 384; 60 N. Y. Supp. 824. In another case it appeared that a master was building a shed over the sidewalk in front of a building in the city. Twenty-six foot posts were placed on the inside and on the outside of the sidewalk, on which were fastened wooden girders parallel with the street, and boards were nailed on such girders. The work was done at night, in consequence of the public use of the street in the daytime. Two derricks were used, which were secured by guy-lines, some of which ran across the street, where they were secured. About 5 A. M. a wagon struck against one of the guys, which threw plaintiff's servant from the top of the post on which he was standing, and to

which he was spiking a girder. It was held that the master could not escape liability under the rule that the duty of the master to provide a safe place does not apply where the place originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done; since it could not be said that the place originally furnished (the street) was safe unless it was protected by danger-signals or watchmen. *Grace & Co. v. Kennedy*, 99 Fed. Rep. 679; s. c. 40 C. C. A. 69.

¹⁵ *Finlayson v. Utica Min. & Co.*, 67 Fed. Rep. 507; *Litchfield v. Buffalo & R. Co.*, 73 App. Div. (N. Y.) 1; s. c. 76 N. Y. Supp. 80 (excavation); *post*, § 4705.

¹⁶ *Kennedy v. Chase*, 119 Cal. 637; s. c. 63 Am. St. Rep. 153; 52 Pac. Rep. 33.

¹⁷ *Illinois Steel Co. v. Paschke*, 51 Ill. App. 456.

¹⁸ *Dene v. Arnold Print Works*, 181 Mass. 560; s. c. 64 N. E. Rep. 203 (the mere presence of oil on the floor and the absence of light were insufficient to hold the mill company liable for negligence).

tempted to stand upon a mullion of the window and it broke and let him through,—the conclusion being that the rule under consideration does not oblige a master to furnish windows on flat roofs with mullions strong enough to bear the weight of a man;¹⁹ where an employé in a cotton-mill was injured in consequence of the sudden opening of a door in a card-machine, the fastenings of which were considered safe, such fastenings having been in use in the mill for a number of years without producing any injury,—the conclusion being that the owner of the mill was not negligent in failing to provide a better fastening for the door;²⁰ and in the cases referred to in the margin.²²

§ 3879. Duty of Servants to Keep Place of Work in a Safe Condition.—The same principle applies with respect to the question of a safe place for one's servants to work, where a master sets his servants at work in a reasonably safe place, and it becomes unsafe by reason of the manner in which they conduct the work; then, the view now to be considered is that any injury which proceeds from such condition of unsafety is to be ascribed to the negligence of the injured servant himself or to that of his fellow servant or servants. In a case where this principle was acted upon it appeared that the defendant operated, in connection with a quarry, a stone-crushing mill. Stones of all sizes were dumped over a cliff, rolled by the men from the dump to a level place at its foot, and thence carted to the mill. Plaintiff and others had been engaged in rolling small stones over the face of the dump, and were ordered by the superintendent to throw certain of the stones which had accumulated on the dump, into the road. Half-way down the dump, and opposite where the superintendent was standing, was a place where had been left an overhanging rock, and the plaintiff was directed to work several feet below it. Before he had time to pick up a stone, the rock dropped and injured him. It was held insufficient to justify a finding that the condition

¹⁹ *Saunders v. Eastern Hydraulic Pressed-Brick Co.*, 63 N. J. L. 554; s. c. 44 Atl. Rep. 630 (so held where the servant, in removing the old putty, placed himself in such a position that, when the mullion gave way under the pressure necessary to remove the putty, the roof afforded him no support and he fell).

²⁰ *Riverside Cotton Mills v. Green*, 98 Va. 58; s. c. 34 S. E. Rep. 963.

²² *McKenna Steel Working Co. v. Lewis*, 49 C. C. A. 369; s. c. 111 Fed. Rep. 320 (master not chargeable with negligence for allowing a shallow ditch to remain near the place

where railroad-rails were unloaded from a car to the charger-platform of a steel-furnace); *McCarthy v. Shoneman*, 198 Pa. St. 568; s. c. 48 Atl. Rep. 493 (not negligence because a passageway and steps therein in the basement of his store, where an employé falls, are cut out of the solid earth, instead of the walk being made from stone, wood, or cement); *Page v. Naughton*, 63 App. Div. (N. Y.) 377; s. c. 71 N. Y. St. Rep. 503 (the fact of a floor on which bags were piled, being out of level and shaky, not evidence of negligence).

of the dump was other than would naturally have arisen from the acts of the plaintiff and his fellow workmen in removing the stone, or that the superintendent knew that it involved a special hazard which the men on the dump could not meet more intelligently than he could, and therefore insufficient to show any reason for special and unusual supervision on the part of the superintendent, so that a verdict for the defendant was properly directed.²³

§ 3880. **Defects in Premises Leased by the Master.**—Where the premises occupied by employers were leased from a third person, and occupied in part by other tenants, and the employers failed to keep certain trap-doors leading to the basement of the building in proper repair, in consequence of which one of their servants received an injury,—it was held that as the employers furnished the premises as a place in which the plaintiff was to perform his work, they could not absolve themselves from liability for failure to keep them safe by showing that the premises were also occupied by other tenants, and that as to such other tenants it was the duty of the *owner* to keep the premises in repair.²⁴

ARTICLE II. LIABILITY FOR INJURIES FROM FALLING OBJECTS.

SECTION	SECTION
3882. Liability of master for injuries from objects falling from above.	3884. Conditions under which rule of <i>res ipsa loquitur</i> not applied in such cases.
3883. Application of the rule of <i>res ipsa loquitur</i> in such cases.	3885. Circumstances under which employer liable.
	3886. Circumstances under which employer not liable.

§ 3882. **Liability of Master for Injuries from Objects Falling from Above.**—The obligation to use ordinary care in providing safe machinery, appliances, places of work, etc.,¹ has been frequently enforced against the master, in the form of actions for damages, where he has so negligently constructed, inspected or repaired his machinery, appliances, premises, etc., that his servants have received injury by reason of objects falling upon them from above.²

²³ Roytio v. Litchfield, 113 Fed. Rep. 240; s. c. 51 C. C. A. 197 (under Massachusetts Employers' Liability Act).

²⁴ Dieters v. St. Paul Gaslight Co.,

86 Minn. 474; s. c. 91 N. W. Rep. 15.

¹ *Ante*, §§ 3758, 3767.

² Engstram v. Ashland Iron & Co., 87 Wis. 166; s. c. 58 N. W. Rep. 241.

§ 3883. **Application of the Rule of Res Ipsa Loquitur in such Cases.**—And here the rule of *res ipsa loquitur*³ has been applied against the master, so as to charge him with liability for damages, where some unknown object fell upon the servant while at work on the master's premises,—on the principle that negligence on the part of the master ought to be inferred in such a case, since where the master uses due care such accidents do not ordinarily happen.* The application of this principle—or rather the principle itself—was denied by the Supreme Court of Michigan, in a case where a steam-boiler fell over upon an employé who was working upon it in repairing it, and where the action proceeded on the ground that the defendant failed properly to secure and fasten it, and left it in an insecure and dangerous position.⁵ This principle has been applied so as to charge an ice company with liability for injuries received by its employé, while engaged in his duty of pushing ice along a slide to an ice-house, from a fall of the slide because of insufficiently-fastened braces and its poor construction;⁶ so as to charge a steamship company with liability for injuries received by an employé by the falling of a bale of cotton which he was helping to put in the hold of a vessel, because hooks by which it was lowered were defective, when it was the duty of others not engaged in handling the cotton to inspect the hooks, and he was ignorant of their condition and was obliged to use them when furnished;⁷ so as to charge an ice company with an injury received by its employé through the fall of an ice-house where he was working, occasioned either by the weakness of the structure, or by the pushing of ice against the house, while the house was being filled under the direct supervision of the employer; provided, in the latter

* As to this rule see Vol. I, § 15.

³ Ford v. Lyons, 41 Hun (N. Y.) 512.

⁵ Toomey v. Eureka Iron & Works, 89 Mich. 249; s. c. 50 N. W. Rep. 850. The court says in its opinion, that it is the settled rule in this State that the mere fact of the accident is not sufficient to impose a liability for negligence; that this rule is founded in reason and on common sense; that there is nothing in the circumstances of this case to take it out of this rule and to show negligence on the part of the defendant. To this proposition the court cites: Quincy Min. Co. v. Kitts, 42 Mich. 34; Grand Rapids & C. R. Co. v. Judson, 34 Mich. 506; Marquette & C. R. Co. v. Kirkwood, 45 Mich. 51; Brown v.

Congress & C. St. R. Co., 49 Mich. 153; Mitchell v. Chicago & C. R. Co., 51 Mich. 236; Stern v. Michigan Cent. R. Co., 76 Mich. 591. Certainly it cannot be affirmed as a proposition of law that the mere fact that an accident has happened is evidence of negligence; but nevertheless it is true that, where the accident happens under circumstances that such accidents do not usually happen under where the defendant does the duty imposed upon him by law, then the happening of the accident is *prima facie* evidence of negligence; and such, it is submitted, was the case stated in the text.

⁶ Fink v. Des Moines Ice Co., 84 Iowa 321; s. c. 51 N. W. Rep. 155.

⁷ Ocean S. S. Co. v. Matthews, 86 Ga. 418; s. c. 12 S. E. Rep. 632.

case, the employer was found to have been negligent in allowing the ice to be pushed against the side of the building;⁸ so as to charge an employer, where a servant was injured by the falling of a heavy iron beam which had been placed too near an open hole in the floor over the place where the employé was at work, and left there for two or three days in such a position that, on being pushed by a person desiring to pass, it toppled over and fell into the hole;⁹ so as to charge a company operating a saw-mill for maintaining a slab-burner ninety-five feet high and of a weak construction, and allowing the slabs to accumulate so as to form a mass thirty feet square and forty feet deep, causing the burner to fall by bulging out, in consequence of the excessive heat suddenly engendered,—the employer knowing from experience what the consequences would be.¹⁰

§ 3884. Conditions under which Rule of Res Ipsa Loquitur Not Applied in such Cases.—The maxim *res ipsa loquitur* does not apply so as to charge the owner of a building or the employer in control of it with liability to the injured employé from the mere fact that something falls from above, detached by some unknown person or in some unknown way, in the absence of evidence tending to show that anything was done by the direction of the employer which might reasonably cause such fall, or that the object which struck the employé fell out of any portion of the premises which the employer was bound to keep in a safe condition.¹¹

§ 3885. Circumstances under which Employer Liable.—On the principle above referred to, that an employer must exercise reasonable care and skill to prevent his servant from being injured by falling objects, employers have been held liable to their servants in the following cases:—Where a tiler at work on a building was struck by a hot rivet which fell from one of the upper stories by reason of the failure of one of the riveters to catch the same as it

⁸ *Meier v. Morgan*, 82 Wis. 289; s. c. 52 N. W. Rep. 174.

⁹ *McCauley v. Norcross*, 155 Mass. 584; s. c. 30 N. E. Rep. 464.

¹⁰ *Faerber v. T. B. Scott Lumber Co.*, 86 Wis. 226; s. c. 56 N. W. Rep. 745. Other circumstances under which the employer has been held liable for negligently constructing premises, etc., so as to permit objects to fall upon his workmen: *Texas Pac. R. Co. v. Crow*, 3 Tex. Civ. App. 266; s. c. 22 S. W. Rep. 928; *Williams v. New York & C. R.*

Co., 2 Misc. (N. Y.) 30; s. c. 49 N. Y. St. Rep. 568; 21 N. Y. Supp. 259 (defective jack used in raising a car); *Byrne v. Brooklyn City R. Co.*, 6 Misc. (N. Y.) 441; s. c. 58 N. Y. St. Rep. 577; 27 N. Y. Supp. 126, s. c. aff'd, 145 N. Y. 619; 40 N. E. Rep. 163 (protruding boulder falling from the side of a cellar in process of excavation).

¹¹ *Shields v. Robins*, 12 Misc. (N. Y.) 332; s. c. 33 N. Y. Supp. 639; s. c. aff'd, 3 App. Div. (N. Y.) 582; 38 N. Y. Supp. 214.

was thrown to him, and such riveter testified that he watched the rivet as it fell, and saw it hit the tiler;¹² where a shafting which had been attached to a ceiling of a building by a carpenter the day before fell, injuring an employé,—it not being a detail of the work, but a permanent arrangement, as to which the duty of the employer could not be delegated;¹³ where an employé in a brewery was injured by the fall of a beer-keg through a run in which the kegs were lowered into the cellar, in consequence of the rivet-holes in the rods and brackets of the run having become enlarged by use and rust, allowing the rods composing the run to break away from the brackets and spread, the defect being one which could have been discovered by a proper examination;¹⁴ where an employé was injured by reason of a block of wood falling from a conveyor, some of the lugs for holding the blocks being broken, and the evidence showing that broken lugs sometimes allowed the blocks of wood to fall, but that perfect lugs never allowed them to fall, and that the employé had placed a block upon a broken lug in the conveyor just before a block fell,—the evidence being deemed sufficient to show that the block dropped on account of the lug being broken, although no one saw it start to fall;¹⁵ where an employé just employed, was injured by a bank of earth below which he was placed to work falling upon him, where the bank had been undermined and wedges driven into the top of the bank the day before, in order to throw the earth down, and it had been left that way all night, during which time rain had fallen, and the condition of the bank was not discernible from where such employé was working, and he had been given no notice thereof;¹⁶ and in the case cited in the margin.¹⁷

§ 3886. **Circumstances under which Employer Not Liable.**—On the other hand, the employer has been held not liable where his employé was injured by the falling of a stack of zinc-spelter, in the absence of evidence that it was carelessly built or that the employer knew or ought to have known that it was dangerous;¹⁸ where the employé was injured by the falling of heavy iron castings, caused in consequence of

¹² *Pioneer Fireproof Const. Co. v. Howell*, 90 Ill. App. 122; s. c. aff'd, 189 Ill. 123; 59 N. E. Rep. 535.

¹³ *Copithorne v. Hardy*, 173 Mass. 400; s. c. 53 N. E. Rep. 915.

¹⁴ *Mayer v. Liebmann*, 16 App. Div. (N. Y.) 54; s. c. 44 N. Y. Supp. 1067.

¹⁵ *Shoemaker v. Bryant Lumber & Co.*, 27 Wash. 637; s. c. 68 Pac. Rep. 380.

¹⁶ *Thomas v. Ross*, 75 Fed. Rep.

552; s. c. 41 U. S. App. 574; 21 C. C. A. 444.

¹⁷ *Pioneer Fireproof Const. Co. v. Hansen*, 69 Ill. App. 659 (subcontractor had contracted with general contractor for the latter to raise tiles to be used in fireproofing a building, the subcontractor's employes unloading them—employé of general contractor injured by fall of tile—subcontractor liable).

¹⁸ *Lanyon Zinc Co. v. Bell*, 64 Kan. 739; s. c. 68 Pac. Rep. 609.

the dangerous position in which they were piled, presumably by fellow servants, where the employer did not know that they were in such a position, and a sufficient time had not elapsed to charge him with knowledge of it;¹⁹ where an employé of a warehouse was injured by the fall of a swinging stage while removing freight from a ship, caused by the breaking of the rope used to support one end of the platform, which rope was furnished, in accordance with the usual practice, by the master of the ship, who also controlled the use of the stage, although the master had made no inspection of the rope, there being nothing to indicate that an inspection was required;²⁰ where an employé was injured by the fall of a brick, presumably from the top of a tall chimney which was cased with iron and lined with fire-brick, the upper part of which had fallen over a few weeks before as the result of a fire, where no bricks were visible at the top of the chimney, and no one knew that any of the bricks were loose, and the employé had as much knowledge of any danger as any one else had;²¹ where the employé of contractors who were engaged in laying a slope retaining-wall upon the bank of a canal was injured by the fall, without any apparent cause, of a heavy stone from the bank above, although the contractors had told the teamster who hauled the stone to unload them as near the edge of the bank as he could without having them roll over;²² where an employé of a railway company was injured by the fall of a plank or iron plate, which was an ordinary appliance of sufficient length, width, and strength, and which was reasonably safe, extending between a station platform and a freight-car, while the employé was assisting to unload the car, although the plank was not supplied with hooks or fastenings in order to prevent it from slipping from its place, and although it was shown that it had fallen on other occasions;²³ where a quarry-man was employed with a large number of others, in getting out stone from a quarry on a hillside, and a rock which had been loosened, probably by some previous blast, fell on him, fatally injuring him;²⁴ where an employé of the owner of a building, engaged in putting wood in the cellar, was injured by the fall of ice and snow from the roof, although the eaves projected so

¹⁹ *Reed v. Boston & C. R. Co.*, 164 Mass. 129; s. c. 41 N. E. Rep. 64.

²⁰ *Moynihan v. King's Windsor Cement & C. Co.*, 168 Mass. 450; s. c. 47 N. E. Rep. 425.

²¹ *Pilucki v. Detroit Steel & C. Works*, 117 Mich. 111; s. c. 5 Det. Leg. N. 160; 75 N. W. Rep. 295 (court says nothing about defendant being under any duty to inspect

the chimney after part of it had fallen—case badly decided).

²² *Rhodes v. Lauer*, 32 App. Div. (N. Y.) 206; s. c. 53 N. Y. Supp. 162; 87 N. Y. St. Rep. 162.

²³ *D'Arcy v. Long Island R. Co.*, 34 App. Div. (N. Y.) 275; s. c. 54 N. Y. Supp. 553.

²⁴ *Trapasso v. Coleman*, 74 App. Div. (N. Y.) 33; s. c. 76 N. Y. Supp. 798.

that snow was more likely to accumulate on the roof in a large mass, than was the case with other buildings in the neighborhood;²⁵ where the employé, having the power to select the implement which he will use from a large number, some of which are perfect and some of which imperfect, selects an imperfect one;²⁶ where a workman was injured by the giving way of a rope used for hoisting, in consequence of its being worn, the unsoundness of the rope being apparent and the master having supplied new rope which the workman could have put into use at any time;²⁷ where, in using an apparatus for hoisting ice, the hand of an employé was drawn into a gin-wheel by reason, as he claimed, of its having been hung low and because the machinery was not stopped at the proper time, where it did not appear that it could have been hung higher, and where proper arrangements were made for stopping the rope;²⁸ where the defect which caused the object to fall was so recent as not to raise a reasonable inference that the employer knew of it, or would have discovered it in the exercise of a proper inspection, and there was no evidence that he knew of it;²⁹ where an employé at work upon a coal-dock was injured by coal emptied upon him from an unlatched bucket,—the court holding that no action could be maintained on the ground that the employer should have provided a covering for the workmen stationed or passing beneath the buckets, when it did not appear that such a covering was ever used upon similar docks and its practicability was not shown;³⁰ and in the cases cited in the margin.³¹

²⁵ *Dugal v. Peoples Bank*, 34 N. B. 581. The reasoning of the court was, that while the owner would be liable for negligently allowing snow and ice to accumulate on such roof, yet he can build his building in any style he pleases, so that it does not become a nuisance or a violation of a municipal ordinance. The style adopted is not negligence *per se*, but may impose a greater degree of care and watchfulness to prevent accidents.

²⁶ *Bemisch v. Roberts*, 143 Pa. St. 1; s. c. 28 W. N. C. (Pa.) 169; 21 Atl. Rep. 998; 48 Phila. Leg. Int. 305; *post*, § 4003.

²⁷ *Cregan v. Marston*, 126 N. Y. 568; s. c. 38 N. Y. St. Rep. 428; 27 N. E. Rep. 952; *post*, § 4003.

²⁸ *Carbury v. Downing*, 154 Mass. 248; s. c. 28 N. E. Rep. 162.

²⁹ *Oehme v. Cook*, 28 N. Y. St. Rep. 12; s. c. 7 N. Y. Supp. 764. Somewhat to the same effect, see *Mickey v. Walter A. Wood Mowing & Co.*,

77 Hun (N. Y.) 559; s. c. 60 N. Y. St. Rep. 282; 28 N. Y. Supp. 918.

³⁰ *Prybilski v. Northwestern Coal R. Co.*, 98 Wis. 413; s. c. 74 N. W. Rep. 117 (master's duty "was to furnish a place as safe and free from danger as other persons of ordinary care, prudence and caution, engaged in like business and in like circumstances, ordinarily furnish").

³¹ *Chapin v. Walsh*, 37 Ill. App. 526 (employé of ice company not allowed a recovery against the owner of premises at which he was delivering ice, for an injury caused by the falling of an appliance provided by the ice company, and attached by employé to an appliance in the wall for hoisting the ice, where the owner of the premises did not know that the wall or fastenings were unsafe, although he refused to allow the employé to use an elevator which he had used on a previous occasion); *Evans v. Vogt*

ARTICLE III. MAN-TRAPS, TRAP-DOORS, UNLIGHTED PREMISES, PASSAGEWAYS, HIDDEN DANGERS.

SECTION

3888. Duty of master to prevent or guard man-traps, trap-doors, and other hidden dangers on such premises.
3889. Passageways, walks, etc.
3890. Dangerous stairways.

SECTION

3891. Instances where the master was exonerated.
3892. Furnishing insufficient lights or negligently allowing them to become extinguished.

§ 3888. **Duty of Master to Prevent or Guard Man-Traps, Trap-Doors, and Other Hidden Dangers on such Premises.**—This duty of the master extends to preventing the premises whereupon he requires his servant to work, from containing dangerous pitfalls, obstructions or other man-traps into which his servant is liable, unguardedly, to fall while his mind is absorbed in the duties of his employment.¹ Under

&c. Man. Co., 5 Misc. (N. Y.) 330; s. c. 55 N. Y. St. Rep. 212; 25 N. Y. Supp. 509 (employé injured by the fall of something upon him as he was passing up a ladder at his work on an unfinished building); Reilly v. Parker, 11 Misc. (N. Y.) 68; s. c. 31 N. Y. Supp. 1014; 65 N. Y. St. Rep. 108 (employé at work on a temporary structure composed of wooden horses and planks, over which servants of another employer attempted to carry a heavy beam; the additional weight causing one of the legs of a "horse" to sink into the ground, thereby tilting it and throwing plaintiff down and causing the beam to fall upon him).

¹ Chicago &c. R. Co. v. McNamara, 94 Ill. App. 188 (servant injured at night in consequence of a part of a floor being taken up and an insufficient and unsafe one being left in its place); Armour v. Czischki, 59 Ill. App. 17 (servant slipped upon glue scattered on the floor and fell through an unguarded opening therein into a crushing-machine); Hess v. Rosenthal, 55 Ill. App. 324; s. c. aff'd, 160 Ill. 621; 43 N. E. Rep. 743 (employé set to work to rake out the contents of a cylindrical tank more than five feet in diameter and three feet high, through a door less than a foot wide, with a space two feet eleven inches wide on each side of the center of the door to stand upon, with a vat filled with boiling tallow immediately adjoining and

covered by a lid liable to be misplaced, or so constructed that a step of the laborer might precipitate him into the vat); Muncie Pulp Co. v. Jones, 11 Ind. App. 110; s. c. 38 N. E. Rep. 547 (employer negligent in having a large hole in a third-story floor where employés are set at work, covered with rotten canvas, without any guard around it, or any warning to the employés of its existence); Indiana Pipe-Line &c. Co. v. Neusbaum, 21 Ind. App. 361; s. c. 5 Am. Neg. Rep. 126; 1 Repr. (Ind.) 500; 52 N. E. Rep. 471 (employer left open and unguarded a well on his premises on a dark night within ninety-one feet of a tent within the same enclosure, in which fifty people were lodged and fed); Powers v. Calcasieu Sugar Co., 48 La. An. 483; s. c. 19 South. Rep. 455 (open ditch of scalding water, with no railing or guard to prevent accidents, maintained on master's premises); Musick v. Jacob Dold Packing Co., 58 Mo. App. 322 (hot-water tank under a floor of a pork establishment, left uncovered and unguarded, into which employé slipped); Irmer v. St. Louis Brew. Co., 69 Mo. App. 17 (the obligation which the general law imposes upon the owner of premises to guard persons lawfully there against pitfalls, applies between master and servant); Boyle v. Degnon-McLean Const. Co., 61 N. Y. Supp. 1043; leave to appeal de-

this rule, an employer, the owner of a vessel, has been held liable to the servant of a master stevedore for injuries received by falling through a small trimming-hole left unguarded in a dark place where such servants might be expected to go for the purpose of changing their clothes;² to an "oiler" on a ferry-boat, who, while assisting as ordered, in putting a freight-boat into commission, sustained injuries from falling into an open hatchway which was invisible because of the darkness, he being wholly unacquainted with the construction of a freight-boat, and with a custom to leave the hatchway open when a boat is out of commission;³ to a carpenter employed to work on the upper deck of a vessel, who hid his tools below at night, and when going to get them fell into a bunker-hole.⁴ And a master has been held liable for injuries to his servant caused by the falling of an elevated footway which he used in his work, the support of which had been forced out of place by a passing wagon, when it was so constructed that such an accident ought to have been anticipated;⁵ and for an injury to his servant from falling into a pit containing a dangerous shaft, caused by the absence of a barrier along the side of a plank-walk extended over it.⁶ Where a *trap-door* in premises in which the plaintiff was working was defective, in that the hinges thereon were insufficient, and an injury was caused thereby to the plaintiff, it was a question for the jury whether the failure to furnish proper hinges was negligence on the part of the master or not.⁷

nied, 63 N. Y. Supp. 1105 (uncovered hole on an elevated trestle within seven feet of the place where employes were working, seven feet long and four feet wide, through which a fall might prove fatal,—employer has no right to expose his employes to such a risk in the absence of light sufficient to disclose its presence); *Eastland v. Clarke*, 165 N. Y. 420; s. c. 59 N. E. Rep. 202; rev'g s. c. 51 N. Y. Supp. 1140 (servant not well acquainted with premises injured by stepping into an uncovered hole in a cellar—evidence as to whether the cellar was a reasonably safe place to work being conflicting, question held to be for the jury); *Rafferty v. Central Park & C. R. Co.*, 14 Misc. (N. Y.) 560; s. c. 35 N. Y. Supp. 1067; 70 N. Y. St. Rep. 693 (employé fell through a flooring formed partly of glass and partly of wood, the whole of which was covered by dust, and the nature thereof unknown to him, upon which he was directed to go

without warning by the employer's foreman).

² *The Protos*, 48 Fed. Rep. 919.

³ *Brown v. Ann Arbor R. Co.*, 118 Mich. 205; s. c. 76 N. W. Rep. 407; 5 Det. Leg. N. 484.

⁴ *Belford v. Canada Shipping Co.*, 35 Hun (N. Y.) 347.

⁵ *Sellick v. Langdon*, 59 Hun (N. Y.) 627; s. c. 37 N. Y. St. Rep. 511; 13 N. Y. Supp. 858.

⁶ *Bennett v. Standard Plate Glass Co.*, 158 Pa. St. 120; s. c. 27 Atl. Rep. 874.

⁷ *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474; s. c. 91 N. W. Rep. 15. The cover of a trap-door in defendant's offices was flush with the floor, when in position, and fitted so tightly that it could only be opened by prying. It contained no hinges, and rested firmly on joints. Plumbers in the regular employ of the company, who had done some work under the floor, failed properly to replace the trap-door, but left it raised a little on one side,

§ 3889. **Passageways, Walks, etc.**—In an action for an injury predicated upon a dangerous defect in a passageway, it was held not error to instruct that, if defendant unnecessarily and dangerously permitted shavings to accumulate in a passageway, between a moulding-machine and a rip-saw, and plaintiff, in obedience to orders, was compelled to pass near them, and they caused him to fall and injure himself, that would constitute negligence, because the employer owes to his employé the duty “to see that the place prepared for him in which he is to do his work, and the ways provided for getting to and from it, be reasonably safe.”⁸ In Missouri, a master was held not liable to his servant for injuries caused by a grain-door temporarily placed on the walk running alongside an elevated track which the servant was required to use in coupling cars on such track, by one with whom the master had contracted for the transferring of grain from cars on such track to cars on a parallel and lower track, unless the master had notice of the obstruction, or such obstruction of the walk was necessarily required by the performance of the work. The grain-door consisted of several boards fastened together, and was placed inside of the regular car-door when letting grain out of the car, so as to regulate the flow of the grain, which could not be done by means of the regular door. No necessity existed for its being left on the track, and it was a matter of conjecture who had left it there, the independent contractor not having the exclusive use of the track.⁹ In Pennsylvania, a railroad company owes no duty to its employés to maintain a safe footway along the road-bed. Hence, a brakeman injured by falling into a hole left between two ties by the ballast washing out, has no cause of action against the company; nor does the fact that the accident occurred on a side-track or in a yard change the rule. Mr. Justice Dean says that “in our State it has been consistently held, that the railroad company owes no duty to the public or its employés to maintain a safe footway the length of its road-bed; that it is reasonably safe without it.” He indulges in such sophistry as that if it were to be considered a footway for travellers or employés, ordinary care would require *planking on all the ties* the whole length of the road; and that no such duty is owed to its employés who at *rare inter-*

so that the plaintiff, who was engaged to clean the offices, was injured by it when she stepped on it. It was held insufficient to show that defendant was negligent in not providing a safe place for plaintiff to work, the negligence being that of fellow servants: *Bateman v. New York Cent. & R. Co.*, 67 App. Div.

(N. Y.) 241; s. c. 73 N. Y. Supp. 390.

⁸ *Myers v. Concord Lumber Co.*, 129 N. C. 252; s. c. 39 S. E. Rep. 960.

⁹ *Burnes v. Kansas City & R. Co.*, 129 Mo. 41; s. c. 31 S. W. Rep. 347 (judgment for plaintiff reversed).

vals must step or stand on the road-bed; and that tracks and ballast, whether on side-tracks or elsewhere, are for the running of trains and not for employés.¹⁰ Where a master provides several *ways of approach* to a building for the use of his servants, they may, unless forbidden to do so, leave by any one of them which may be most convenient; and if, in so doing, a servant without fault on his own part is injured in consequence of the neglect of the master to keep the way in a reasonably safe condition, the master will be liable to him in damages.¹¹

§ 3890. **Dangerous Stairways.**—It is the duty of factory-owners to keep in good condition for easy and safe passage a flight of stairs over which employés are required to go; and for the failure to do so they are liable for injuries sustained by an employé tripping and falling thereon, in the absence of contributory negligence.¹²

§ 3891. **Instances where the Master was Exonerated.**—But the rule is not so applied as to render a master liable for an injury to his servant resulting from a floor being wet and slippery, where its condition is caused by the dripping of oil from the machinery of a car, of the oiling of which the servant himself has charge;¹³ nor because small pieces of wood have been left piled against the back of a planing-machine in a passageway, over which an employé stumbles, and is hurt in consequence of his hand being caught in the machine;¹⁴ nor because a small hole in a floor, useful for the purposes for which the room was used, and not in the ordinary line of travel through it, was left partially unprotected for a few days while changes and repairs in the room were being made, and an employé, employed to assist in making such changes and repairs, fell into it and was injured;¹⁵ nor because an elevator-opening is left unguarded on the opposite

¹⁰ *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98; s. c. 44 Atl. Rep. 1069 (side-track in city of Pittsburgh—some testimony that hole had existed for three or four months—judgment for plaintiff reversed).

¹¹ *Rinake v. Victor Man. Co.*, 58 S. C. 360; s. c. 36 S. E. Rep. 700. For a condition of facts on which an injury inflicted upon a servant by a twig projecting from certain debris loaded upon a truck standing in a dark hall, which the servants were forbidden to light, afforded evidence of negligence on the part of the master,—see *Dorney v. O'Neill*, 60 App. Div. (N. Y.) 79; s. c. 69 N. Y. St. Rep. 729.

¹² *Ferris v. Hershheim*, 51 La. An.

178; s. c. 24 South. Rep. 771 (broken and upturned zinc, tripping an employé descending stairs with armful of material). The fact that the plaintiff and others, on numerous occasions previous to the accident complained of, had passed safely down the stairway, will not relieve the employer in whose service she was, from liability for the injury: *Ferris v. Hershheim*, *supra*.

¹³ *Murphy v. American Rubber Co.*, 159 Mass. 266; s. c. 34 N. E. Rep. 268.

¹⁴ *May v. Whittier Mach. Co.*, 154 Mass. 29; s. c. 27 N. E. Rep. 768.

¹⁵ *Wannamaker v. Burke*, 111 Pa. St. 423.

side of a well-lighted passageway, twelve feet in width, through which workmen are expected to pass, so that one of them falls into the opening while turning out of his way to look at repairs in progress on the elevator;¹⁶ nor because of maintaining in a mill-yard, not on or near the passageway leading to and from the mill, a cistern or reservoir used in the business, protected by a coping extending entirely around the cistern and by a chain fence extending partly around it, a gap being necessary for its proper use,—into which an employé fell on a dark night while searching for a pail of water to get a drink;¹⁷ nor because of the failure of the employer to detect a hidden defect in a passageway over which his employés are required to travel in carrying heavy bundles of paper, the same not being apparent until the happening of the accident.¹⁸ In this relation, as in other cases, the evidence must ascribe the defect in the premises to the negligence of the master. When, therefore, in an action for personal injuries sustained by an employé falling into a well-hole, there was no evidence that the lid of the latter was left in an unsafe condition, at the time of the accident, by the defendant, or by any one for such a length of time before the accident that the defendant ought to have known its condition, it was held that the verdict should be in the defendant's favor.¹⁹

§ 3892. Furnishing Insufficient Lights or Negligently Allowing them to Become Extinguished.—Where sufficient lights are necessary to the safety of the servant, if the master negligently fails to furnish them, or negligently allows them to become extinguished, by some act or omission not attributable to the injured servant or to a fellow servant, he will be liable in damages to the servant thereby injured. Accordingly, the failure of an employer to properly light a place in a sawmill where the employés are required to work, in close proximity to strong and dangerous machinery from which they are liable to suffer sudden and unexpected injury, is actionable negligence.²⁰ So, evidence that the lights furnished by a master were insufficient to enable the work to be done successfully and safely, and that the injury would

¹⁶ *Headford v. McClary Man. Co.*, 21 Ont. App. 164 (under a statute).

¹⁷ *McCann v. Atlantic Mills*, 20 R. I. 566; s. c. 40 Atl. Rep. 500.

¹⁸ *Nelson v. Allen Paper Car-Wheel Co.*, 29 Fed. Rep. 840.

¹⁹ *Clough v. Hoffman*, 132 Pa. St. 626; s. c. 19 Atl. Rep. 299; 25 W. N. C. (Pa.) 444; 47 Phila. Leg. Int. 310. State of evidence in which a servant fell through a trap-door in a planing-mill, when it was tem-

porarily open, and it was held that the evidence did not disclose negligence on the part of the defendant: *Kupp v. Rummell*, 199 Pa. St. 90; s. c. 48 Atl. Rep. 679.

²⁰ *Jensen v. Hudson Sawmill Co.*, 98 Wis. 73; s. c. 73 N. W. Rep. 434 (plaintiff's arm caught in unguarded endless chain on a conveyor, and drawn between chain and sprockets).

not have happened had there been sufficient light, is sufficient to support a judgment against him for an injury to an employé.²¹ So, negligence may be imputed to the proprietor of a paper-mill, who keeps it running all night, in failing to have other available lights for use, where the means of lighting by electricity is defective, so that the light frequently goes out, and the work of removing broken paper from the presses, which are kept in motion while the lights are out, is much more dangerous in the dark, and the paper is just as likely to break and require removal while the lights are out as while they are lit.²² It is not enough that the employer makes the place of work reasonably safe, with respect to its being lighted, but he is under the duty of adopting an *adequate system* for the protection of his servants against dangers easily to be anticipated,—such as the failure of lights, or the absence of a watchman to prevent the wagon of a third person from running against a guy-rope, causing an injury to his servant.²³ It has been held that if an employé, after complaining of insufficient light, continues to work on the promise of the foreman to furnish more light, which is not done, and is injured while performing *special work*, not a part of his regular duties, which he has been ordered to do by the foreman, the employer is not guilty of actionable negligence; since a promise by the master to repair relieves the servant from assumption of the risk only while engaged within the scope of his employment with reference to which the promise was made; if he undertakes *other duties*, under the special order of the foreman, and with knowledge of the want of light, he assumes the risk.²⁴

²¹ *Harrison v. Denver &c. R. Co.*, 7 Utah 523; s. c. 27 Pac. Rep. 728 (employé injured, while taking down a shafting at night, by reason of tackle slipping from end of shafting, a witness testifying that the accident would probably not have happened had there been sufficient light).

²² *Sawyer v. Rumford Falls Paper Co.*, 90 Me. 354; s. c. 38 Atl. Rep. 318.

²³ *Grace &c. Co. v. Kennedy*, 99 Fed. Rep. 679; s. c. 40 C. C. A. 69.

²⁴ *Hilje v. Hettich*, 95 Tex. 321; s. c. 67 S. W. Rep. 90; rev'g s. c. *sub nom.* *Hilje v. Hettich* (Tex. Civ. App.), 65 S. W. Rep. 491 (no off. rep.). It has been held that an employer is not liable to an employé for injuries sustained by the latter in encountering an obstruction (a basket on wheels, or a

"wheeler"), while necessarily passing through an unlighted passageway on leaving his work, where the employer supplied a sufficient number of electric lamps for lighting the passageway, some of which were not to be extinguished until after the employés had left the building, and one to be kept burning day and night, in the absence of any showing as to the cause of the extinguishment of the lights at the time of the accident; and where the employé is familiar with the custom of storing such "wheelers" in the passageway. The passageway was always lighted, but, unknown to the employer, the lights, from some unknown cause, were suddenly extinguished: *Dorney v. O'Neill*, 34 App. Div. (N. Y.) 497; s. c. 54 N. Y. Supp. 235; 5 Am. Neg. Rep. 229. On a second appeal in the same

ARTICLE IV. ELEVATORS IN BUILDINGS.

SECTION	SECTION
3894. Negligence of master with respect to elevators in buildings, hoisting-apparatus, etc.	3902. Master under what duty of inspection.
3895. With respect to his own servants bound only to ordinary or reasonable care and skill.	3903. Care required in the construction, repair, and operation of freight-elevators.
3896. Which is a care proportionate to the risk.	3904. Negligence in permitting elevator-shafts to remain open and unguarded.
3897. Master not excused because negligence was that of an independent contractor.	3905. Negligence in operating elevators.
3898. Nor because the defect was due to the negligence of his lessor.	3906. Violation of statutes and municipal ordinances respecting elevators.
3899. Injuries from elevators where master was held liable.	3907. Injuries to volunteers, to intermeddlers, to licensees, etc.
3900. Instances where the master was held not liable.	3908. Notice to what servant of a defect in an elevator binds the master.
3901. Failure to equip elevator with safety-clutches or automatic brakes.	3909. Whether the fall of an elevator is <i>prima facie</i> evidence under the rule of <i>res ipsa loquitur</i> .

§ 3894. Negligence of Master with Respect to Elevators in Buildings, Hoisting-Apparatus, etc.—That modern device, called in Amer-

case, it appeared that plaintiff was injured, while passing through a dark hall in a building in which he had been employed but a short while, by a twig, which projected from some debris loaded on a "wheeler" (a basket on wheels) stored in the hall, being driven into his eye. Plaintiff knew that wheelers were stored in some parts of the hall, but had never seen them at the place he was hurt, nor had any information that they were ever loaded with debris. Employés were prohibited from bringing matches into the building, as well as from leaving before the dismissal-bell rang, and it was shown that *every evening when the dismissal-bell rang, the lights were turned out* in that part of the building through which plaintiff had to pass in going out. It was held to require a submission to the jury of the question whether the master had furnished the employé with a rea-

sonably safe means of egress from the premises, as was his duty: Dorney v. O'Neill, 49 App. Div. (N. Y.) 8; s. c. 63 N. Y. Supp. 107; s. c. on third appeal, 60 App. Div. (N. Y.) 19. A longshoreman engaged in unloading one of defendant's ships in port, was directed to go below deck by the steerage-way, which led through a dark passage, and while going through such passage he fell through a trap-door that had been left open, and was injured; the steerage being outside the usual place of employment for longshoremen, and only used because the ladder usually used was out of repair. It was held that it was the duty of the steamship company to furnish the longshoreman with a safe place to work, and the passage referred to did not meet that requirement: Sansol v. Compagnie Générale Transatlantique, 101 Fed. Rep. 390.

ica an *elevator*, in England a *lift*, and in France an *ascenseur*, employed for transporting persons and freight from one floor to another in high buildings, is from its nature a very dangerous contrivance when not properly constructed and operated. Where it is employed to carry persons other than servants of the owner of the building, he is regarded by some courts, but not by others, as sustaining substantially the relation toward the persons whom he thus carries, of a common carrier of passengers; and, consequently, in favor of such persons, he may or may not, according to the theory which prevails in the particular jurisdiction, stand responsible for the same strict degree of care which the law puts upon railway and other passenger carriers.¹

§ 3895. With Respect to his Own Servants Bound Only to Ordinary or Reasonable Care and Skill.—In favor of his own servants, however, the rules and analogies of the law require no more than what is called ordinary or reasonable care and skill.²

§ 3896. Which is a Care Proportionate to the Risk.—But here, as elsewhere,³ this reasonable care is a care proportionate to the risk which is run; and as the risk to life is enormous—almost absolute—from the falling of one of these machines, it must follow that, even under the rule of reasonable care, the owner of the building will be held to a very exact diligence in the construction and inspection of it.⁴

§ 3897. Master Not Excused because Negligence was that of an Independent Contractor.—Here, as in other cases, the duty of the master to exercise this ordinary or reasonable care is primary and absolute in the sense that he cannot devolve it upon another.⁵ The owner of the building is not absolved from the exercise of this care by entrusting the care of the elevator to an independent contractor, through whose negligence an injury happens to the servant of the owner.⁶

¹ Vol. I, § 1078, *et seq.*

² *Sievers v. Peters Box & Co.*, 151 Ind. 642; s. c. 8 Am. & Eng. Corp. Cas. (N. S.) 629; 50 N. E. Rep. 877; rehearing denied, 151 Ind. 662; 1 Rep. (Ind.) 420; 52 N. E. Rep. 399 (freight-elevator); *Wilson v. Williams*, 22 Ky. L. Rep. 567; s. c. 58 S. W. Rep. 444 (no off. rep.) (duty to exercise ordinary care both in construction and operation); *Larkin v. Washington Mills Co.*, 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6 (knowledge of servant that the automatic gate in front of an elevator was out of order for three

weeks before he was injured did not relieve his master from the obligation of using reasonable care to keep it safe).

³ Vol. I, § 25; *ante*, § 3772.

⁴ See, as supporting the text in substance, *Wise v. Ackerman*, 76 Md. 375; s. c. 25 Atl. Rep. 424. See also, *McGregor v. Reid & Co.*, 178 Ill. 464; s. c. 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323; rev'g s. c. 76 Ill. App. 610; 3 Chic. L. J. Wkly. 299.

⁵ *Ante*, § 3874.

⁶ *Bartley v. Trorlicht*, 49 Mo. App. 214.

§ 3898. **Nor because the Defect was Due to the Negligence of his Lessor.**—Nor will it be any defense that the master was the lessee of the building, and received the elevator from his lessor, where an injury received by its falling is traceable to the master's want of care in inspecting it and keeping it in repair.⁷

§ 3899. **Injuries from Elevators where Master was held Liable.**—Under the operation of these principles, a master has been held liable in damages to his servant for an injury caused by the failure of the master to replace a cable in use on an elevator by which his servants were required to ascend an electric-light tower, or to make an examination of it after a notification that it had become broken and ragged;⁸ for an injury to a servant in consequence of the rotten condition of the beams upon which rested the axles or journals of the main wheel or pulley over which the elevator-cable ran;⁹ for an injury happening to a servant-girl in a hotel, who was obliged, in her work, to use a freight-elevator, which was a marble platform with iron guards on the sides which did not reach to the floor, but left space enough for a foot to pass under them, where at the time of the accident it had swayed to one side and tilted over, and she was thrown down and her foot passed under the guard, injuring it,—such an elevator being, in the opinion of the court, unfitted for the safe transportation of human beings;¹⁰ for an injury produced by the stopping of an elevator from causes with respect to which the evidence was conflicting, the plaintiff's evidence tending to show that it worked loosely and had stopped before the accident, which took place with the plaintiff aboard, when moving downward, when it came to a stop

⁷ *Bartley v. Trorlicht*, 49 Mo. App. 214; *Oberfelder v. Doran*, 26 Neb. 118; s. c. 41 N. W. Rep. 1094. But in one case the lessee was exonerated from damages to his employes for injuries caused by the falling of a freight-elevator having no safety-clutch, where the premises had been in his possession for a short time only, and he did not know there was no clutch, and the lack was not so obvious as to be readily seen on examination: *Hansen v. Schneider*, 58 Hun (N. Y.) 60; s. c. 33 N. Y. St. Rep. 811. An employer who is the lessee of the *third floor* of a building cannot avoid his duty and responsibility as such to his employes, and refuse to inspect or neglect to make examination of the condition of the machinery of an

elevator of which he has the use, and which he requires or permits employes to use, by the claim that he did not lease the elevator, and did not control that portion of the building where the propelling power was located: *Frolich v. Cranker*, 21 Ohio C. C. 615; s. c. 11 Ohio C. D. 592.

⁸ *Weiden v. Brush Electric Light Co.*, 73 Mich. 268; s. c. 41 N. W. Rep. 269.

⁹ *Oberfelder v. Doran*, 26 Neb. 118; s. c. 41 N. W. Rep. 1094.

¹⁰ *Makinnie v. Kilgallon* (Pa.), 11 Atl. Rep. 614 (no off. rep.). Compare *Montgomery v. Bloomingdale*, 34 App. Div. (N. Y.) 375; s. c. 54 N. Y. Supp. 329 (where, under a similar state of facts, a recovery was denied).

of its own accord, while the drum and the machinery continued to work, causing the rope to uncoil, soon after which the elevator fell, injuring the plaintiff;¹¹ for an injury to a servant due to the fact that a spring intended automatically to lower a gate in front of the shaft of an elevator which was used by a servant while acting as porter had been left out of repair by the defendant for three weeks after being notified of it and prior to the accident;¹² for an injury to an elevator-boy caused by the elevator suddenly falling from an upper floor and crushing him, while he was engaged in cleaning out the elevator-shaft, as he was required to do by a rule of the defendant,—the evidence showing that the elevator had long been out of repair and that the defendant had knowledge of its condition, and knew that it had fallen before;¹³ for an injury to a servant who was injured by the falling of an elevator which had been in use eleven years, did not work well, had no counter-weights, and parts of the machinery containing old breaks which could be discovered only by taking it apart;¹⁴ for an injury to an employé produced through a fall of a freight-elevator, although it had been repaired by an expert, where it was of a class of poor elevators, and the manager knew of defects in it which were not repaired at all;¹⁵ and for injuries disclosed by the cases further cited in the margin.¹⁶

§ 3900. **Instances where the Master was held Not Liable.**—On the other hand, the master was held not liable for injuries to the servant under the circumstances disclosed by the following cases:—Where an elevator-boy fifteen years of age, who “knew all there was to do with the elevator,” was injured by a sudden starting of it when

¹¹ Here it was held that, even if the stopping of the elevator, and not its falling, was the proximate cause of the injury, there was still sufficient evidence to show negligence in the defendant: *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363; s. c. 62 N. E. Rep. 371.

¹² *Larkin v. Washington Mills Co.*, 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6.

¹³ *Leland v. Hearn*, 63 N. Y. Supp. 204; s. c. 29 App. Div. (N. Y.) 111.

¹⁴ *Bartley v. Trorlicht*, 49 Mo. App. 214.

¹⁵ *Goggin v. Osborne*, 115 Cal. 437; s. c. 47 Pac. Rep. 248.

¹⁶ *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; s. c. aff'd, 175 Ill. 325; 51 N. E. Rep. 709 (master knew that the elevator was ob-

viously defective, although not apparently dangerous, but took no steps to ascertain whether it was in fact safe); *Necker v. Harvey*, 49 Mich. 517 (action by the servant of B. against A., the maker of an elevator, for an injury sustained in loading an elevator under the direction of a servant of A.'s in order to make it work); *Boyd v. Blumenthal*, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330; *Delaney v. Hilton*, 50 N. Y. Super. 341; *Skelley v. Crutchfield*, 17 Pa. Super. 198 (elevator known to be dangerous and ordered to be used by employés only for carrying freight—destitute of safety-appliances, etc.—fell and carried an employé, who was using it as directed, to the cellar below).

he was leaning against a beam of it tying his shoe,—it having been started by an employé whom the injured elevator-boy had previously instructed as to the manner of starting and stopping it;¹⁷ where it appeared that, for some unexplained reason, the boy in charge of an elevator failed to stop it at the right floor, and it passed without diminishing its speed to the basement floor, but did not fall; and it further appeared that it was inspected a few hours before the accident and found to be in good condition, and was in good condition immediately after the accident; that, a year before, it had failed to stop, whereupon the boy in charge of it at the time was cautioned, and there had been no further difficulty in its management until the accident in question; and that, after the accident, the automatic device intended to operate in case of excessive speed, but not at the usual speed, which was the speed at the time of the accident, was adjusted to act at a less degree of speed;¹⁸ and in the other cases cited in the margin.¹⁹

§ 3901. Failure to Equip Elevator with Safety-Clutches or Automatic Brakes.—The device of safety-clutches or automatic brakes which will catch and hold an elevator in case of a fall or rapid descent caused by the breaking of the rope, is a precaution of such obvious necessity that its omission ought to be held *prima facie* evidence of negligence in every case, and conclusive evidence unless the master excuses the omission to the satisfaction of the jury. In any action grounded upon this defect it ought, however, to appear to the reasonable satisfaction of the jury that if the clutches or automatic brake had been on the elevator and had worked, the disaster would have been thereby prevented.²⁰

¹⁷ *Sullivan v. Lally*, 166 Mass. 265; s. c. 44 N. E. Rep. 221.

¹⁸ *Spees v. Boggs*, 198 Pa. St. 112; s. c. 47 Atl. Rep. 875.

¹⁹ *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705; s. c. 68 Pac. Rep. 378 (no evidence to support allegations in the petition); *Duffy v. Williams*, 71 App. Div. (N. Y.) 110; s. c. 75 N. Y. Supp. 600 (state of cause in which a workman was injured by a *hod-hoister*, which failed to stop at a designated floor, but flew up to the top of the shaft; and it was held that his employers were not liable for the accident, being responsible neither for the negligence of the engineer employed by the owner of the *hod-hoister* nor for the construction of the hoister, which was not shown to be defective, and

which had all appliances except an unusual automatic stop,—the use of the hoister having been rented by the plaintiff's masters, who were contractors for the marble-work of the building, from another contractor).

²⁰ Where the evidence showed that the safety-clutch on the rear side of the elevator was off at the time of the accident; and that the shaft carrying the clutch on the front side was at one time broken down at one end, and that subsequently, though a bolt was put in to hold up the end of such shaft, it still remained disconnected with the spring by which it was operated; that the spring and clutches were rusty and not in working order; and that if the clutches had worked

§ 3902. **Master under What Duty of Inspection.**—Considering the very dangerous character of the machine under consideration, and the dreadful consequences which usually result from an accident, it is obvious that the rule of reasonable care already considered,²¹ which is satisfied with nothing less than a measure of care proportionate to the risk or the danger to be avoided, puts upon the master an exact and continuing duty of inspection.²² The fact that an elevator used by an employer in the conduct of his business is inspected at stated intervals by city officers and by the agent of an indemnity company, does not release the employer from his duty of making frequent examinations and applying frequent tests to the elevator to see that it is in working order and in a safe condition.²³ If in any case an accident happens from the fall of an elevator which could have been avoided if a reasonable inspection of the elevator had been made, the master will be liable.²⁴

the elevator would not have fallen, —it was held that this presented evidence of negligence on the part of the employer: *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363; s. c. 62 N. E. Rep. 371. But it has been held that an elevator *intended as a freight-elevator only*, for use in a storehouse, which is the kind ordinarily used in such places, and which is safe when used with ordinary and reasonable care, was not defective in failing to have safety-clutches or automatic appliances to guard against its fall if the rope should break, so as to make the owner liable for injuries received by its fall, which was caused by the engineer's carelessness in starting it in the wrong direction when at the top, whereby the whole force of the engine drew it against a solid beam and broke the rope: *Stringhan v. Stewart*, 111 N. Y. 188; s. c. 1 L. R. A. 483; 19 N. Y. St. Rep. 621; 18 N. E. Rep. 870.

²¹ *Ante*, §§ 3772, 3895, 3896.

²² *Ante*, § 3786.

²³ *McGregor v. Reid & Co.*, 178 Ill. 464; s. c. 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323; rev'g s. c. 76 Ill. App. 610; 3 Chic. L. J. Wkly. 299.

²⁴ *Baltimore Boot & Co. Man. Co. v. Jamar*, 93 Md. 404; s. c. 49 Atl. Rep. 847; *Frolich v. Cranker*, 21 Ohio C. C. 615; s. c. 11 Ohio C. D. 592. In one State judicial complacency seems to be satisfied with a month to month inspection. Therefore, it has been held that an elevator pro-

prietor is not liable for the death of an employé caused by the fall of an elevator, where it was of a construction in common use, the safety-appliances were such as ordinarily obtained in such structures, it was carefully overhauled within a month prior to the accident, and the safety-clutch examined, oiled, and tried by dropping the elevator, and found to be in good order: *Biddiscomb v. Cameron*, 35 App. Div. (N. Y.) 561; s. c. 55 N. Y. Supp. 127. Another court in the same State was satisfied with an inspection "from time to time,"—holding that where an employer, on receiving possession of leased premises, had the elevator inspected by competent experts, who pronounced it safe, and such inspection was continued from time to time up to the occurrence of the accident, he is not liable for the death of an employé, while using such elevator, caused by unknown defects: *Sullivan v. Poor*, 66 N. Y. Supp. 409; s. c. 32 Misc. (N. Y.) 575. State of evidence in which the question whether the failure of an employé to act with promptness in closing the door of an elevator was the negligence of a fellow servant of the person injured or of the defendant, in consequence of an erroneous command given by the foreman, was not a question of law but a question for the jury: *H. Channon Co. v. Hahn*, 189 Ill. 28; s. c. 59 N. E. Rep. 522; aff'g s. c. 90 Ill. App. 256. That con-

§ 3903. **Care Required in the Construction, Repair, and Operation of Freight-Elevators.**—Obviously, an employer operating an elevator in his establishment for the carriage of freight only is not required to exercise the extreme, exacting degree of care which the law, on grounds of public policy, puts upon carriers of passengers;²⁵ but is liable only for the failure to use what passes under the designation of reasonable care or ordinary care. If his employé is permitted or required to ride upon such elevator in the performance of their duties, then the master is required to exercise this measure of care to the end that it shall be reasonably safe as a means of transit in the performance of their duty.²⁶ If such an elevator is constructed to carry freight only, this measure of care on the part of the master with respect to it is not increased by the fact that his servants may, without his knowledge and consent, ride upon it for their own convenience.²⁷

tractors for the construction of a building who furnish an elevator for the transportation of workmen in their employ, are not liable for the death of a workman caused by the fall of the elevator in consequence of planks having been placed across the elevator-hole, unless the contractors had actual or constructive notice of the presence of the planks,—see *White v. Eidlitz*, 19 App. Div. (N. Y.) 256; s. c. 46 N. Y. Supp. 184.

²⁵ Vol. III, § 2722, *et seq.*

²⁶ Vol. I, § 1081; *McGregor v. Reid & Co.*, 178 Ill. 464; s. c. 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323; rev'g s. c. 76 Ill. App. 610; 3 Chic. L. J. Wkly. 299; *McDonough v. Lanpher*, 55 Minn. 501; s. c. 57 N. W. Rep. 152.

²⁷ *Sievers v. Peters Box & Co.*, 151 Ind. 642; s. c. 50 N. E. Rep. 877; 8 Am. & Eng. Corp. Cas. (N. S.) 629; rehearing denied, 151 Ind. 662; 1 Repr. (Ind.) 420; 52 N. E. Rep. 399 (citing *Hoehmann v. Moss Engraving Co.*, 4 Misc. (N. Y.) 160). One court has held that the owner of an elevator performs his duty to an employé placed in charge of it, by equipping the elevator with safety-appliances such as are in common use in such elevators, and would work in case of an ordinary accident: *Boess v. Clausen & Co. Brew. Co.*, 12 App. Div. (N. Y.) 366; s. c. 42 N. Y. Supp. 848. But it is submitted that he does not perform his

duty to his employé by providing unsafe appliances for them to use, though they may be in common use, provided that safe appliances can be obtained at reasonable cost. A decision of the kind just stated operates to condone the negligence of operating such an elevator with a hook that is not capable of supporting the weight of the operating-cable, in consequence of which the hook straightens out through weakness and the cable falls, provided it has been inspected a week before the accident: *Bucher v. Pryibil*, 19 App. Div. (N. Y.) 126; s. c. 45 N. Y. Supp. 972. An employer was held not liable for an injury to his employé while riding on a freight-elevator, used by employé, caused by its eccentric motion, an incline in its floor which caused her foot to slip, and an opening under the gate which allowed her foot to come in contact with the casing of the elevator, where the elevator had been in use for several years, was periodically inspected, was in good repair, and considered safe for passengers: *Montgomery v. Bloomingdale*, 34 App. Div. (N. Y.) 375; s. c. 54 N. Y. Supp. 329. Compare *Mackinnie v. Kilgallon* (Pa.), 11 Atl. Rep. 614 (no off. rep.) (where an elevator in much the same condition was characterized by the court as unfitted for the safe transportation of human beings).

§ 3904. **Negligence in Permitting Elevator-Shafts to Remain Open and Unguarded.**—The following defects in elevators have afforded sufficient evidence of negligence, in actions for injuries to employes, to take the case to the jury:—A spring intended automatically to lower a gate in front of an elevator-shaft being left out of repair for three weeks after the master had been notified of its defective condition;²⁸ where the entire front of the elevator was open, and at the floor where the employé fell, the doors were open and a wooden bar was placed across the doors about three and a half feet above the floor, and the horizontal edge of the wooden lining of the shaft projected downward from above, and the operating-cable was only a foot from the opening.²⁹ On the other hand, it was badly decided that the owner of a chair factory was not guilty of negligence in leaving an opening into an elevator-shaft unguarded at night, where he had no knowledge that any one would go into the room opening into such shaft.³⁰

§ 3905. **Negligence in Operating Elevators.**—The liability of the master for injuries caused by negligence in operating an elevator may, as in other cases, be qualified by the rule which exonerates the master where the negligence is that of a fellow servant,³¹ where it is

²⁸ *Larkin v. Washington Mills Co.*, 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6.

²⁹ *Dallemand v. Saalfeldt*, 175 Ill. 310; s. c. 51 N. E. Rep. 645; 17 Nat. Corp. Rep. 439; aff'g s. c. 73 Ill. App. 151; 15 Nat. Corp. Rep. 698. So, evidence that an employé in a factory was told to come there in the evening; that on his arrival the factory was dark; that he was told to go to a certain place for the things which he required; that he took a route customarily travelled by him, which was usually the safest and best; that while so doing he fell into an open elevator-hole, the railing of which had been taken off during the day without his knowledge and not put back, although the attention of the foreman had been specially called to it; and that the railing was fastened permanently with nails, and was only taken off in case of necessity,—is sufficient to support a finding of negligence on the part of the employer: *National Syrup Co. v. Carlson*, 47 Ill. App. 178.

³⁰ *Jorgenson v. Johnson Chair Co.*, 67 Ill. App. 80. With equal impro-

priety, as it seems, it was held that a master was not negligent toward his servant in allowing the end of a bar designed for a barrier across the opening of an elevator-shaft, which was fastened to the side of the shaft, to become so loose as to permit the other end to pass outside of the hasp designed for it when the employé attempted to lower the bar across the opening, where the condition was obvious and the employé understood its use: *Tisch v. Hirsch*, 32 App. Div. (N. Y.) 635; s. c. 52 N. Y. Supp. 1076; s. c. on reargument, 34 App. Div. (N. Y.) 623; 53 N. Y. Supp. 926. An employé assumes the risk of injury from the falling of a mallet in the hands of another employé, through an open trap-door in an elevator-shaft upon an uncovered elevator in which he is riding, by continuing in his employment with knowledge of the defects, even though the employer is required by statute to have the elevator covered: *Shields v. Robins*, 3 App. Div. (N. Y.) 582; s. c. 38 N. Y. Supp. 214; 73 N. Y. St. Rep. 708; aff'g s. c. 33 N. Y. Supp. 639.

³¹ *Post*, § 4846.

that of the injured servant himself,³² or where the circumstances are such that the injured servant is deemed to accept the risk, under principles hereafter considered.^{32a} The doctrine of accepting the risk does not, however, in general, apply to injuries which are the result of negligence in operation, unless the negligence is of a permanent and continuing character. It is often an important question in this case, where the injury proceeds from the negligence of another servant, whether such servant is a fellow servant of the servant who is injured, or a vice-principal of the master. This question is taken entirely out of these cases by statutes which have been enacted in some of the States abolishing some of the so-called "fellow-servant doctrine"; and it has received an important qualification in other cases under the operation of the so-called Employers' Liability Acts, like that of Massachusetts, making the employer responsible for an injury to one servant happening through the negligence of another, when the latter is "engaged in superintendence." In this aspect of the question it was decided in Massachusetts that the failure of the superintendent of a factory to countermand an order given by him for the lowering of an elevator, upon seeing that an employé, in ignorance of such order, was about to place himself in a position of peril, was a negligence which pertained to his duties as superintendent, so that, under the statute, the employer was liable to the injured employé in damages.³³ Outside of this fellow-servant question, evidence of negligence on the part of the employer has been discovered in the act of leaving unguarded a constantly-moving elevator-chain and also a carrying-chain at a point where the two meet on the surface of the floor and run over a sprocket-wheel projecting just above the surface of the floor, beside which an inexperienced employé seventeen years old is required to work.³⁴

³² Vol. V, CONTRIBUTORY NEGLIGENCE OF THE SERVANT.

^{32a} *Post*, § 4608, *et seq.*

³³ *Cavagnaro v. Clark*, 171 Mass. 357; s. c. 50 N. E. Rep. 542. For a case in which the contrary conclusion was reached, the negligence being that of a "second hand" in the spinning-room of a mill appointed to look after the employés, —see *Sullivan v. Thorndike Co.*, 175 Mass. 41; s. c. 55 N. E. Rep. 472.

³⁴ *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641; s. c. 73 N. W. Rep. 563. In like manner the question of the master's negligence was for the jury where he, being the owner of a building in which his servant was set at work, maintained a platform elevator there-

in, where two sides of it were uninclosed, and between two of the floors an iron girder extended into the elevator-shaft very near the elevator-platform when it was on a level with the girder; where the elevator-shaft was dark, so that the protruding girder could not be readily seen; and the servant, in the course of his employment, while taking a truck-load of goods up on the elevator, came in contact with the iron girder and was injured; and the master did not warn the servant of the existence of the girder or of the danger therefrom, and he did not know of the fact: *Olson v. Hanford Produce Co.*, 111 Iowa 347; s. c. '82 N. W. Rep. 903. For another case, where a painter

§ 3906. Violation of Statutes and Municipal Ordinances Respecting Elevators.—On a principle already considered,³⁵ the violation of a statute or valid municipal ordinance enacted to promote the safety of those using elevators in buildings, is either negligence *per se*,³⁶ or *prima facie* evidence of negligence taking the question to the jury.³⁷

employed by a contractor was engaged in painting the windows on an upper floor in an elevator-shaft of the defendant's building, which shaft contained two elevators, and it was agreed that the defendant's servant in charge of the elevator, who had been employed but two days, should shout a warning before moving it, but the elevator was moved, and the painter was struck by the counterweight, and the evidence was conflicting whether the warning had been shouted, and the conclusion was that the question of negligence of the defendant and of the contributory negligence of the plaintiff was for the jury,—see *Bower v. Cushman*, 66 N. Y. Supp. 1103; s. c. 55 App. Div. (N. Y.) 45. A contrary conclusion was reached, and the owner of the building was exonerated, where some workmen, after their foreman had informed the superintendent of the building that they were about to commence work at a certain point, and requested him not to lower the elevator, built their scaffold through the loop of a rope suspended to the bottom of the car and attached to the side of the shaft; so that, the elevator having been raised, it overturned the scaffolding which they had thus built: *Simpson v. Gerken*, 19 App. Div. (N. Y.) 68; s. c. 45 N. Y. Supp. 1100. For a case where a messenger-boy was hurt in trying to operate an elevator himself, and it was held that no negligence on the part of the defendant was shown,—see *Young v. Eugene Dietzgen Co.*, 72 App. Div. (N. Y.) 618; s. c. 76 N. Y. St. Rep. 123.

³⁵ Vol. I, § 10, *et seq.*

³⁶ *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; s. c. 65 S. W. Rep. 737 (failure of an employer to provide barriers for an elevator-shaft as required by ordinance, or, where he has provided

them, his failure to keep them closed when the shaft is unused, is negligence).

³⁷ *H. Channon Co. v. Hahn*, 189 Ill. 28; s. c. 59 N. E. Rep. 522 (violation of a city ordinance providing that every person owning or operating any freight-elevator in any building within the city shall employ a competent person to take charge of and operate the same). A depression in the floor of a mill of the depth of the floor, made by an opening in the same at a place where the elevator passed up and down, the opening being closed by an automatic slide, was not a violation of a statute declaring that all hoistways and elevators on every floor of a factory shall be protected by sufficient trap-doors or self-closing hatches: *Hoard v. Blackstone Man. Co.*, 177 Mass. 69; s. c. 58 N. E. Rep. 180. Where a city ordinance requiring elevator-shafts to be guarded provided that parties maintaining such shafts should be notified to furnish barriers, and should not be in default on failure to provide them until thirty days after notice, no notification was required to a party who had provided such barriers, but failed to keep them closed when the shaft was not in use: *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; s. c. 65 S. W. Rep. 737. A city ordinance providing that users of all power elevators should employ competent persons to operate the same, did not apply to a case where one using an elevator in his place of business employed no particular person to operate it, and a servant, while attempting, without being requested, to raise the elevator from one floor to another, was killed by being caught between the ascending automatic safety-gate and the ceiling: *Stagg v. Edward Westen Tea &c. Co.*, 169 Mo. 489; s. c. 69 S. W. Rep. 391.

§ 3907. Injuries to Volunteers, to Intermeddlers, to Licensees, etc.—

The doctrine that the master is not liable to his servant for an injury received from an elevator in the master's building with respect to which the servant has stepped outside the line of his duty and assumed the position of a trespasser, volunteer, intermeddler, or bare licensee, seems to be the same as that applied in other relations.³⁸ The master is not bound to take special precautions for the safety of such persons, but if they improperly thrust themselves into this species of danger they take things as they find them, and if they are hurt the master will not, in the absence of special circumstances, be liable. It was so held where a boy fifteen years old was killed while attempting to operate an elevator, which was no part of his business, and he was warned by a sign posted in plain sight, and he had been specially warned;³⁹ where a boy under fifteen years of age employed as an errand-boy, instead of placing a package on the lift to be raised to the level of the street and signalling to the engineer to start the lift, got upon it without any suggestion from any one and started it, and sustained injuries in trying to stop it,—the master not being liable under a statute providing that no child under fifteen years of age should be permitted to have the care or management of an elevator; nor was he guilty of any negligence;⁴⁰ where a person was employed by a contractor to paint the elevator-shaft of the defendant's elevator, which work was to be done after business hours, and while standing on the elevator-cage, which was to be gradually lowered as the work progressed; and when about to commence work the elevator-boy was going to supper, and, the plaintiff objecting to waiting until his return, the boy told him that he might operate the cage himself by pulling the ropes while on top of it; and he attempted to do so and got hurt.⁴¹ Where an employer allows his employes to use an elevator as a means of transportation, then they do not stand toward him in the relation of trespassers or intermeddlers, but the law requires him to exercise reasonable care and caution in their behalf, both in the construction and in the operation of the machine.⁴² But the exercise of the care a master ordinarily owes his servant, and not that extreme care which is required of a common carrier of passengers, is the limit of his obligation to his employes who are permitted, but are not required,

³⁸ Vol. I, §§ 945, *et seq.*, 1075; Vol. II, § 1705, *et seq.*; *ante*, § 3748, *et seq.*; *post*, § 4677, *et seq.*

³⁹ Hyde v. Mendel, 75 Conn. 140; s. c. 52 Atl. Rep. 744.

⁴⁰ Young v. Eugene Dietzgen Co., 72 App. Div. (N. Y.) 618; s. c. 76 N. Y. Supp. 123.

⁴¹ Arzt v. Lit, 198 Pa. St. 519; s. c. 48 Atl. Rep. 297 (here, as the boy had no authority to transfer the running of the elevator to the plaintiff, the defendants were not liable).

⁴² Frolich v. Cranker, 21 Ohio C. C. 615; s. c. 11 Ohio C. D. 592.

in going up to or down from the different stories of the building in which they respectively work, to use a freight-elevator.⁴³

§ 3908. **Notice to What Servant of a Defect in an Elevator Binds the Master.**—Where a *shipping-clerk* had charge of the employés of a milling company, and the plaintiff was employed as a porter, and the clerk directed the plaintiff in the use of an elevator, notice to the clerk of a defect in the elevator in consequence of which the plaintiff was injured, was notice to the defendant.⁴⁴

§ 3909. **Whether the Fall of an Elevator is Prima Facie Evidence of Negligence under the Rule of Res Ipsa Loquitur.**—By an analogy to the rule which obtains with respect to carriers of passengers,⁴⁵ the falling of an elevator in a building would, under the rule of *res ipsa loquitur*, afford *prima facie* evidence of negligence which would put upon the master the burden of explaining the accident so as to exonerate himself. But it will not escape attention that this rule of evidence is to some extent a rule of public policy when applied in the case of injuries to the passengers of common carriers. It may or may not apply in the case where a servant receives an injury from the fall of his master's elevator, since many obscure causes involving no negligence imputable to the master might operate to produce such a catastrophe; and hence the servant is generally required to go further and prove some negligent act or omission on the part of his master or on the part of some one for whose conduct his master is responsible, acting as a sufficient cause of the accident.⁴⁶ Decisions of the tendency here indicated

⁴³ *McDonough v. Lanpher*, 55 Minn. 501; s. c. 57 N. W. Rep. 152. That a conductor of a *freight-elevator* is not, as a matter of law, negligent in allowing other employés engaged with him in handling freight to go upon the elevator, notwithstanding a notice that riding on the elevator without permission is strictly forbidden, where employés had frequently ridden with the knowledge and consent of the employer,—was held in *Boess v. Clausen & Co. Brew. Co.*, 12 App. Div. (N. Y.) 366; s. c. 42 N. Y. Supp. 848.

⁴⁴ *Larkin v. Washington Mills Co.*, 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6 (distinguishing *McCarthy v. Washburn*, 58 N. Y. Supp. 1125; s. c. 42 App. Div. (N. Y.) 252).

⁴⁵ Vol. III, § 2754.

⁴⁶ Read, as an example of the

statement of the text, a case where a servant was killed by the unhooking of a rope that was holding a mass of timber up against a pulley-block, and there was no evidence as to what caused the hook to loosen its hold around the rope, and consequently no ground on which blame could be imputed to the master: *Pioneer Fire Proof Const. Co. v. Sandberg*, 98 Ill. App. 36. Where a hoisting-cage had been used for several years with a guard-rail on three sides of it only, and had formerly had no guard-rails at all, proof of the death of an employé by falling from it was deemed not sufficient to take to the jury the question of the negligence of his employer: *Conlin v. Rodgers*, 39 N. Y. St. Rep. 51; s. c. 14 N. Y. Supp. 782; 44 Alb. L. J. 153. See also, *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705; s. c. 69 Pac.

have even gone to the extent of affirming the proposition that an employé suing for injuries from a defective elevator is bound, in addition to showing that the elevator was out of repair, to prove that the employer negligently suffered it to be so; since it might have been out of repair under circumstances which did not impute negligence to the employer.⁴⁷

ARTICLE V. EXCAVATIONS, DITCHES, CONSTRUCTION OF SEWERS, ETC.

SECTION

3912. Liability of masters to servants for injuries from the caving in of embankments in excavating.

3913. Further of this liability.

3914. Cases of injuries in excavating where the employer was exonerated.

SECTION

3915. Criminal negligence of a gang-boss in excavating.

3916. Injuries to servants in the construction of sewers.

3917. Unguarded and unsafe excavations, ditches, etc.

§ 3912. **Liability of Masters to Servants for Injuries from the Caving In of Embankments in Excavating.**—A master who puts his servant at work in a trench or other excavation, stands under the obligation of exercising reasonable care to the end that the place is kept safe. This obligation refers itself to the general duty of a master to exercise reasonable care to the end of furnishing his servant with a safe place in which to work.¹ As already seen,² this duty is primary,

Rep. 378. Nor, in the view of another court, could the employé recover where no cause of the accident was shown except the breaking of the clamp holding the hoisting-cable, which was not shown to be insufficient or defective: *Lawson v. Merrill*, 69 Hun (N. Y.) 278; s. c. 53 N. Y. St. Rep. 424; 23 N. Y. Supp. 560.

⁴⁷ *Moran v. Racine Wagon Co.*, 74 Hun (N. Y.) 454; s. c. 57 N. Y. St. Rep. 198; 26 N. Y. Supp. 852 (but evidence of its falling, in the absence of evidence that anyone had negligently left it without throwing off the power, will warrant a finding by the jury that it was *out of repair*; but they could not infer negligence from such a state of facts). A servant was killed, owing to the fall of an elevator, and, in an action for the death, plaintiff claimed that the master had been negligent in not inspecting the elevator. The evidence showed that at the time of

the accident the elevator was in good repair, and, while there was evidence justifying an inference that the fall might have been occasioned by the breaking of a bolt, there was no evidence that an inspection of the bolt could have led to the discovery of any defect. It was held that the evidence did not show negligence on the part of defendant contributing to the injury: *Stackpole v. Wray*, 74 App. Div. (N. Y.) 310; s. c. 77 N. Y. Supp. 633.

¹ *Schmit v. Gillen*, 41 App. Div. (N. Y.) 302; s. c. 58 N. Y. Supp. 458 (failure to sheathe sides of trench over six feet deep, the only supports being braces, which were insufficient on account of the character of the soil); *Ross v. Shanley*, 158 Ill. 390; s. c. 56 N. E. Rep. 1105; aff'g s. c. 86 Ill. App. 144 (clay came from a point between the end of the tunnel and the end of the shoring, which was sprung down).

² *Ante*, § 3874.

absolute, and unassignable; it is personal to the master, and the master is therefore responsible for the negligence of whatsoever person to whom he commits the performance of it. A master who employs a servant in the construction of a cistern cannot, therefore, avoid liability for the death of the servant caused by the collapse of the cistern by reason of the insufficiency of its walls, on the ground that he acted, in adopting the plans of the excavation, on the advice of an architect whom he believed to be competent. The reason is that he is responsible for any negligent error on the part of the architect.³ The doctrine under consideration is well illustrated by a holding to the effect that a city engaged through its engineer in building a sewer, is liable for injuries sustained by a day-laborer by the fall of the arch while he was taking down the supports at the order of the engineer, which the engineer negligently ordered to be done before the cement had hardened sufficiently, unless the danger was so obvious that a prudent person, though acting in the capacity of a servant, would not have obeyed the order.⁴

§ 3913. **Further of this Liability.**—It is the duty of an employer who is making an excavation, to provide reasonable means for *shoring up* the walls of the excavation, to the end of securing the safety of his servants there employed; and if he fails to provide such adequate means he will be liable in damages to a servant injured by such fail-

³ *Snedo v. Libera*, 65 Minn. 337; s. c. 68 N. W. Rep. 36.

⁴ *Shortel v. St. Joseph*, 104 Mo. 114; s. c. 16 S. W. Rep. 397. In another illustrative case it appeared that an excavation for the foundation of a building was made at the side of a high chimney, and cuts were made under the foundation of it, and filled with masonry, to support it. The evidence tended to show that the cuts did not extend up to the bottom of the foundation of the chimney, by about a foot, which interval was filled with hardpan, which had become insecure from the action of water, to the master's knowledge, and which fell on a servant working in the cuts, which were not shored up. It was held that the question whether the master had provided a reasonably safe place for the servant to work was properly submitted to the jury: *Finn v. Cassidy*, 165 N. Y. 584; s. c. 59 N. E. Rep. 311; aff'g s. c. 39 App. Div.

(N. Y.) 640; 57 N. Y. Supp. 1138. In another case, the plaintiff, while in defendant's employ as a common laborer, was injured by the caving in of a trench in which he was laying water-pipes, the sides of which were unshored and unsupported; the evidence tending to show that the defendant had not furnished any material for such purpose. There was evidence tending to show that the nature of the soil, the depth of the trench, and the manner in which it was dug, were such as to render the sides of the trench dangerous, and that the defendant was on the spot, and had an opportunity to observe its condition. It was held to warrant a finding that the plaintiff was injured by the negligence of the defendant in failing to see that the place was reasonably safe, or to furnish materials to make it so: *Bartolomeo v. McKnight*, 178 Mass. 242; s. c. 59 N. E. Rep. 804.

ure.⁵ But upon the question of the extent to which the servant himself assumes the risk of the falling of the embankment, there is a division of opinion,—one court holding that the servant may recover damages, although he was experienced and regarded the bank as safe, and gave no notice to the master of its dangerous condition;⁶ while another court holds, and with better reason, that if the danger is so obvious as to be perceived by an ordinarily observant man, and the servant continues to work without any assurance from his master, he takes the chances of injury, and in case it happens the master is exonerated;⁷ and clearly this is so where the servant is better acquainted with the nature and extent of the danger incurred than the master is.⁸ If the bank caves in through the existence of a defect unknown to the employer, and not discoverable by any inspection within his means, he will not be liable,—as where it is produced by the bursting of a water-pipe running parallel with and within two feet of the wall of the excavation.⁹ But in Massachusetts, the employer is not liable if he furnishes his employ  s with suitable materials and means for sheathing or shoring up the sides, and the materials are not used for that purpose by the person employed by him to superintend the digging of the trench.¹⁰ This decision does not, however, express the general law; but the majority of American courts would hold that the negligence of such superintendent was the negligence of the employer.¹¹ Under the Employers' Liability Act of the same

⁵ Texas &c. R. Co. v. French (Tex. Civ. App.), 22 S. W. Rep. 866.

⁶ O'Driscoll v. Faxon, 156 Mass. 527; s. c. 31 N. E. Rep. 685.

⁷ Aldridge v. Midland Blast Furnace Co., 20 S. C. 559.

⁸ Fairmount Cemetery Assn. v. Davis, 4 Colo. App. 570; s. c. 36 Pac. Rep. 911. See further as to this question, *post*, § 4822, *et seq.* Circumstances under which a contractor, who personally superintended the work of excavating for a sewer, became liable for the death of an employ   by the caving in of the bank, due to the accumulation of excavated dirt on the edge. the danger on account of which the employ   was unable to see or appreciate because of the depth of the sewer in which he was working: Koosorowska v. Glasser, 8 N. Y. Supp. 197. Circumstances under which it was held that the contractor for the construction of a sewer is under the duty to the employ  s of a subcontractor for the

brick-work, to prepare the trench so as to make it reasonably safe: Johnston v. Ott, 155 Pa. St. 17; s. c. 25 Atl. Rep. 751.

⁹ Hoskins v. Stewart, 57 Hun (N. Y.) 380; s. c. 32 N. Y. St. Rep. 962; 10 N. Y. Supp. 833.

¹⁰ Floyd v. Sugden, 134 Mass. 563.

¹¹ *Ante*, § 3874, 3912. Whether the foreman of a gang of laborers employed in shovelling earth into cars in a cut is negligent in directing such laborers to proceed with the work of loading, without first throwing down an overhanging bank, where the foreman had tried to throw the bank down with a crowbar the day before the accident, and where plaintiff, on being ordered to work under it, called the foreman's attention to it, and the foreman, going on the bank, replied that it was safe, and repeated the order,—was held a question for the jury: Haas v. Balch, 56 Fed. Rep. 984; s. c. 48 Alb. L. J. 327; 6 C. C. A. 201.

State,¹² the failure of an employer properly to shore up an excavation is not a defect in "his ways, works, or machinery," such as will make him liable for an injury to his employé.¹³

§ 3914. Cases of Injuries in Excavating where the Employer was Exonerated.—Where the only evidence of a master's negligence in failing to provide a reasonably safe place for a servant to work was the testimony of a workman that, after blasting, nothing was done in the way of inspection, while the foreman of the blasting-gang testified that, after the blasting in question, everything loose or dangerous had been barred down and was safe when he left, and the foreman of the cleaning-gang to which the servant belonged, testified that an unsuccessful effort had been made with bars and derrick to turn or pull over the rock which fell and caused the injury, it was held not error to dismiss the complaint at the close of the case.¹⁴

§ 3915. Criminal Negligence of a Gang-Boss in Excavating.—A gang-boss having no discretion in fulfilling his employer's orders as to the construction of a ditch, and who has in no respect failed to comply with the orders received, is not guilty of criminal negligence resulting in the death of a workman upon the ditch by the careening of a railway structure at the side of the ditch, owing to the length of the sections in which the ditch was dug, and the lack of sufficient braces.¹⁵

§ 3916. Injuries to Servants in the Construction of Sewers.—An employer engaged in constructing sewers is liable to an employé for

¹² Mass. Stat. 1887, ch. 270, § 1, cl. 1.

¹³ *Lynch v. Allyn*, 160 Mass. 248; s. c. 35 N. E. Rep. 550; *post*, §4559, *et seq.*

¹⁴ *Capasso v. Woolfolk*, 163 N. Y. 472; s. c. 57 N. E. Rep. 760; *rev'g* s. c. 25 App. Div. (N. Y.) 234; 49 N. Y. Supp. 409. This case obviously ought to have been submitted to the jury. The court evidently decided the case by weighing the conflicting evidence, as courts of that State often do, ignoring the dividing line between the province of court and jury. In another decision in the same State of somewhat the same nature, where it appeared that an employé of a city, injured by the caving in of a trench in which he was working, had been engaged in that work for three or four years, and that neither he, nor his coemployés, nor the city

engineer, nor the foreman in charge of the work, saw any necessity of sheathing where the accident occurred, and the only evidence of such necessity being apparent was that of an alderman, by trade a hatter, who told the foreman prior to the accident that the trench needed sheathing,—it was held that negligence was not imputable to the city, though sheathing might have prevented the accident: *Farrell v. Middletown*, 56 App. Div. (N. Y.) 525; s. c. 67 N. Y. Supp. 483. For another case where the court held there was no evidence to go to the jury on the question of defendant's negligence,—see *Quinn v. Baird*, 49 App. Div. (N. Y.) 270; s. c. 63 N. Y. Supp. 235.

¹⁵ *Thomas v. People*, 2 Colo. App. 513; s. c. 31 Pac. Rep. 349.

injuries sustained because of his failure to use means known to the art to remove carbonic-acid gas, which would necessarily accumulate at the bottom of the trench; and this although the employé and his companions undertook to finish the excavation in a certain time at a fixed daily sum.¹⁶ The construction by a *city* of a sewer is a ministerial work, and it will be liable for an injury to one employed by it in such construction, caused by the careless or unskillful manner of performing the work.¹⁷ A *city* cannot escape liability for injuries to one of its employés engaged in constructing a sewer, caused by the unskillful manner of performing the work, on the ground that the city itself, through its superintendent of streets, constructed the sewer, instead of letting out the contract to the lowest bidder as required by its charter; since, as it was given power to *establish* and regulate sewers, it was acting within the general scope of its power in *constructing* the sewer, and was doing an act lawful in its nature, although done in an unlawful manner.¹⁸

§ 3917. **Unguarded and Unsafe Excavations, Ditches, etc.**—Where a railway company, knowing that an employé would have occasion in the performance of his duty to go past a ditch at night, the presence of which was not known to him, placed no covering or guard at the ditch, relying on the presence of an electric street-light near the place to excuse it from such precautions, it was not entitled to an instruction that, though the lights near the excavation were not sufficient to make it obvious, it was not negligent if an ordinarily prudent person would have left the ditch without guards; since the evidence shows conclusively that the company was negligent.¹⁹

¹⁶ *Dagenais v. Houle*, Rap. Jud. Que. 11 C. S. 225 (in French).

¹⁷ *Donahoe v. Kansas City*, 136 Mo. 657; s. c. 38 S. W. Rep. 571.

¹⁸ *Donahoe v. Kansas City*, 136 Mo. 657; s. c. 38 S. W. Rep. 571; citing *Norton v. New Bedford*, 166 Mass. 48; s. c. 43 N. E. Rep. 1034 (where it was held that irregularity in the proceedings was no defense to such an action, as making the construction of the sewer unlawful).

¹⁹ *Missouri & C. R. Co. v. Johnson* (Tex. Civ. App.), 67 S. W. Rep. 769 (no off. rep.); s. c. aff'd, 95 Tex. 409; 67 S. W. Rep. 768. That the employés who dug the ditch acted as ordinarily prudent persons in leaving it unguarded, except by the street-light, cannot relieve the company from liability for its negli-

gence; since the duty it owed such employé cannot be determined from the point of view of the servants who dug the ditch: *Missouri & C. R. Co. v. Johnson*, *supra*. The plaintiff's testator was engaged with other stonemasons in building a retaining-wall some distance from where a ditch was being dug in which a conduit of masonwork was to be constructed. Testator had never worked on the conduit, and had no knowledge as to the condition of the excavation. Defendant's superintendent ordered the foreman of the stonemasons to direct them to go to work in the conduit, which the foreman refused to do on the ground that the bank was unsafe, whereupon the superintendent himself ordered the masons to go into the ditch, and

ARTICLE VI. EXPLOSIONS.

SECTION

- 3919. Care of dynamite.
- 3920. Explosion of powder mills.
- 3921. Furnishing employ  with iron instead of wooden rod for tamping.
- 3922. Drilling holes containing unexploded charges.
- 3923. Subsequent explosion of unexploded blast.
- 3924. Failing to provide adequate means of escape from a blast about to be fired.
- 3925. Fall of stone from the side of a quarry caused by blasting.
- 3926. Explosions of steam-boilers and their connections.
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SECTION

- 3929. What inspections and tests in the case of steam-boilers.
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- 3934. Relevancy of evidence in such actions.
- 3935. Explosions of gas.
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  3919. **Care of Dynamite.**—The fact that dynamite is a highly dangerous material which is liable to explode from obscure causes, does not operate to impose upon an employer who uses it in his work a higher theoretical degree or standard of care than that which is described as reasonable or ordinary. But here, as elsewhere,¹ this is a care proportionate to the danger to be apprehended and avoided; and it has been described as that ordinary care which reasonable and prudent men would and do exercise under like circumstances.² A Cana-

plaintiff's testator was injured by the falling of the bank. It was held that such facts justified a finding that defendant did not provide a safe place for plaintiff's testator to work, to the knowledge of the superintendent: *Eichholz v. Niagara Falls &c. Co.*, 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842. An employer was not liable for injury to employ  caused by the fall of ensilage ten feet deep resulting from the latter's undermining the same, although the former *directed* the work to be done by undermining instead of by taking from the top: *Welch v. Brainard*, 108 Mich.

38; s. c. 2 Det. Leg. N. 805; 65 N. W. Rep. 667 (danger obvious—risk assumed).

¹ Vol. I,   25; *ante*,   3772.

² *Schwartz v. Shull*, 45 W. Va. 405; s. c. 5 Am. Neg. Rep. 496; 31 S. E. Rep. 914. According to a decision of the Court of Appeals of Virginia, the reasonable care required of an employer in providing appliances, methods of work, and means of safety for its employ s in thawing dynamite, is not such care in adopting reasonably safe appliances, methods, etc., as is commensurate with the danger to be reasonably apprehended there-

dian court has taken the sound view that an employer whose failure to provide a building especially for the thawing out of dynamite causes the death of an employé by the explosion of dynamite while being thawed, is not relieved from liability on the ground that it would have been difficult and costly to provide a building especially for the purpose.³ The propriety and necessity of protecting dynamite under a roof is emphasized by an American decision which holds that the exposure of dynamite to the weather for two months, thereby rendering its explosive character extra-hazardous, within a few feet of the entrance to defendant's mine, where plaintiff and other employés were daily required to pass, constituted evidence of negligence justifying the trial court in refusing to grant a nonsuit.⁴

§ 3920. **Explosion of Powder Mills.**—The care which the proprietor of a powder mill owes to his employés at work therein to the end of avoiding explosions, while theoretically described as ordinary care or reasonable care, is, as in other cases,⁵ a care proportionate to the danger to be avoided, which in this situation is necessarily a very high and exact degree of caution and attention. Nevertheless, as such explosions generally kill all persons in the vicinity, thereby destroying all evidence of the cause or causes which produced them, it is diffi-

from, but only such ordinary care as reasonable and prudent persons will use under like circumstances in thawing dynamite: *Bertha Zinc Co. v. Martin*, 93 Va. 791; s. c. 22 S. E. Rep. 869; 2 Va. Law Reg. 938. But this cannot possibly be sound; since reasonable care must necessarily be a care commensurate with the danger to be apprehended from such work as thawing dynamite.

³ *Durand v. Asbestos & Co. Co.*, Rap. Jud. Que. 19 C. S. 39.

⁴ *Myrberg v. Baltimore & C. Reduction Co.*, 25 Wash. 364; s. c. 65 Pac. Rep. 539 (exposure to the weather causes the nitroglycerin to condense and collect, instead of remaining diffused through the absorbent material in which the explosive material is contained). Where a servant was entrusted by his master with the use and care of powder and dynamite used in blasting, and placed them without permission in a blacksmith-shop, to *preserve them from rain*, the master was held liable to a person working in such shop, employed by

the owner thereof, and injured by their explosion, caused by sparks from an anvil; such servant's act, if done with the intention of preserving the explosives, being in furtherance of his master's business; but the master would not be liable if the servant so disposed of the explosives for some purpose of his own: *Birmingham Water-Works Co. v. Hubbard*, 85 Ala. 179; s. c. 4 South. Rep. 607; 7 Am. St. Rep. 35. Where, in an action by a servant against a master to recover for an injury caused by the explosion of nitroglycerin, manufactured by defendant, it was an undisputed fact that the nitroglycerin exploded spontaneously, and there was evidence tending to show that if pure and properly made it would not so explode, but that it would if impure, it was held not error to charge that, if the jury found such to be the fact, then a presumption of impurity arose from the fact of the explosion: *Bradford Glycerine Co. v. Kizer*, 113 Fed. Rep. 894; s. c. 51 C. C. A. 524.

⁵ Vol. I, § 25; *ante*, § 3772.

cult in many, perhaps in most cases, to determine whether to ascribe them to the negligence of the employer or of his vice-principal, or to that of the servant for whose death the action is brought, or to that of a fellow servant, or to inevitable accident attendant upon so dangerous an employment. On principles elsewhere considered,⁶ a person accepting employment in such a dangerous business *assumes the risk* of the dangers incident to the employment, but not the risk of those dangers which spring from the special negligence of the employer or of those for whose conduct he is responsible.⁷

§ 3921. Furnishing Employé with Iron instead of Wooden Rod for Tamping.—An employer is guilty of negligence in furnishing the employés engaged in blasting rock with dynamite an iron rod for tamping, where he knows the great danger attending the use of such a rod, and that the danger is greatly diminished by tamping with a wooden rod; and the employé injured is ignorant of the danger.⁸

§ 3922. Drilling Holes Containing Unexploded Charges.—In an action for personal injuries received from the explosion of powder in a hole drilled in a stone quarry, it is a question of fact for the jury whether the indications that the charge had exploded were such as to justify the superintendent in deciding to drill the hole as he did, by striking a drill held upright in the hole, instead of removing the tamping in some other way.⁹

⁶ *Post*, § 4615.

⁷ *Post*, § 4618. The observations in the text are illustrated by a decision where the plaintiff's intestate was killed by an explosion at defendant's powder factory, where he was employed as engineer. There were two explosions, in one or the other of which the mixing-house, the adjoining assembly-room, a well where nitroglycerin was kept, and the two gun-cotton dry-houses were destroyed. It was not shown what was included in either explosion, except that the origin was in the mixing-house, nor was it shown in which explosion, or by what direct means, the deceased was killed. It was conceded that, if the deceased was killed as a result of the explosion of the mixing-house, there could be no recovery, he having assumed that risk. Assuming that the defendant was negligent in storing the nitroglycerin and gun-cotton so near the other buildings,

still a verdict for plaintiff could not be sustained; since, where there was nothing to show whether deceased was killed by an accident for which defendant was liable, or by one for which it was not, there could be no recovery: *Craig v. Laffin & Co. Powder Co.*, 55 App. Div. (N. Y.) 49; s. c. 67 N. Y. Supp. 74.

⁸ *Ohio Valley R. Co. v. McKinley*, 17 Ky. L. Rep. 1028; s. c. 33 S. W. Rep. 186 (no off. rep.).

⁹ *Malcolm v. Fuller*, 152 Mass. 160; s. c. 25 N. E. Rep. 83. There seems to have been no indication at all that the charge had exploded. A charge near by did explode, but the tamping in the hole in question was not disturbed. The superintendent *assumed* that the charge had exploded and passed off through a crevice in the rock, which was seen to connect the two holes. — — — Evidence that the proprietor of a quarry, to whom an experienced employé had applied for instructions as to what to do

§ 3923. **Subsequent Explosion of Unexploded Blast.**—It has been held that, the danger from “missed shots” being incident to the work of drilling and blasting in mines, it is not the duty of the master to make inspections for missed shots after the firing of each blast, but that it is a duty resting upon the miners themselves.¹⁰ The shift-boss of a mine was not deemed negligent in failing to notify a miner, ordered to go to blasting in a particular place where there were unexploded blasts, that there was an unexploded hole, with no wire protruding therefrom, where he believed that there was a wire from all unexploded holes, and had no reason to believe otherwise, and the wire was there when he last saw the hole.¹¹ Where, in an action for injuries caused by an explosion of dynamite, there was evidence on which the jury would be warranted in finding that defendant’s superintendent instructed an employé to unload a hole, in which was an unexploded charge of dynamite, with an iron spoon; that such method of unloading the hole was negligent; that the explosion which caused the injury occurred while the hole was being so unloaded; and that the superintendent did not instruct plaintiff, who was working near

with an unexploded and frozen charge of dynamite, referred him to another workman of large experience in such matters, who told him to thaw the dynamite with hot water, and let it thaw out gradually, and that after doing so the employé, without any further directions, but apparently relying on his own experience, attempted to remove the charge with an iron spoon, when it exploded and he was killed,—is insufficient to show negligence on the part of the employer; there being no evidence that the directions given were improper or that he asked for or needed or received any further directions: *Welch v. Grace*, 167 Mass. 590; s. c. 46 N. E. Rep. 387. A master is not guilty of personal negligence rendering him liable for injuries to an employé from an explosion of a blast which he was justified in believing had been before exploded, because he sent the employé to work about the hole, from which the tamping was being removed, and sent another employé who had supervision of the work to another place, although the latter was apparently reluctant to leave the hole, where it did not appear that his reluctance to leave was owing to any fear that there was danger in drill-

ing out the hole, but rather that he wished to remain in order to finish the work quickly: *O’Neil v. O’Leary*, 164 Mass. 387; s. c. 41 N. E. Rep. 662. A servant, injured while blasting, alleged that he attempted to clean out an old blasting-hole with an iron scraper, and, being unable to do so, inserted a steel tamping-bar, and struck a concealed and unexploded charge which caused the injury. Defendant had worked in the quarry for twenty-five years, and no unexploded charge had ever been found before, and one of the defendant’s positive requirements was to leave no unexploded charge in the rocks. The hole in question had been charged three times; the last one about the week before, and the charge entirely blown out. It was shown that when a hole was charged for blasting it was filled to the top, or nearly so, with sand. It was held to show, as matter of law, that defendant was not guilty of negligence: *Lanza v. Legrand Quarry Co.*, 115 Iowa 299; s. c. 88 N. W. Rep. 805.

¹⁰ *Browne v. King*, 100 Fed. Rep. 561; s. c. 40 C. C. A. 545.

¹¹ *McMahon v. Ida Min. Co.*, 101 Wis. 102; s. c. 76 N. W. Rep. 1098.

by, and who had nothing to do with the use of dynamite, to go away while the hole was being unloaded, but that the superintendent stood by for a few minutes while the work was being done, and then left,—a verdict that defendant was negligent was justified, as such acts of the superintendent were negligent, and the injury was not solely due to the negligence of the employé who was emptying the hole.¹² In another case it appeared that a series of holes had been drilled in rock, charged with dynamite, and exploded by a battery. The plaintiff was injured by the charge in one hole, which had failed to explode, being set off when his companion struck it with his pick. The defendant had told plaintiff to work in the excavation, and that everything was all right. The jury might have found that it was defendant's duty to inspect the place after a blast, and there was evidence to warrant a finding that no inspection was made. It was held that the question as to whether the defendant was negligent was properly submitted to the jury.¹³ The death of an employé caused by the subsequent explosion of a blast which failed to explode in the first instance, is not caused by a defect in the "ways, works, or machinery" of the employer, within the meaning of a statute making an employer liable for the death of an employé caused by such defects; the presence of the unexploded blast being merely a condition of the material upon which the employé was at work, caused by his work, and necessarily incident to the business.¹⁴

§ 3924. Failing to Provide Adequate Means of Escape from a Blast About to be Fired.—In a case speaking upon this question it appeared that the plaintiff's intestate and another were employed in defendant's mine at the bottom of a shaft. There was an elevator in the shaft, and when about to blast they gave a certain signal to the engineer, who signified that he understood by raising the bucket a few feet and then lowering it. They then ignited the fuse, and signalled the engineer to hoist, and were raised a short distance, and then lowered, and the engineer shouted down the shaft that the compressed

¹² *Grimaldi v. Lane*, 177 Mass. 565; s. c. 59 N. E. Rep. 451.

¹³ *Hopkins v. O'Leary*, 176 Mass. 258; s. c. 57 N. E. Rep. 342.

¹⁴ *Welch v. Grace*, 167 Mass. 590; s. c. 46 N. E. Rep. 387. It has been held that an employer is not liable for injuries sustained by an employé engaged in clearing and grading the surface of the bottom of a canal after blasting, from the carelessness and negligence of a coemployé in striking an unexploded dy-

namite cartridge with his pick, where the injured employé knew it was not uncommon for cartridges to remain unexploded after the use of an electric battery in their discharge, and was aware of the necessity of caution in approaching the unexploded holes; since he assumed the risk, though he was free from contributory negligence: *Hutchinson v. Parker*, 39 App. Div. (N. Y.) 133; s. c. 57 N. Y. Supp. 168.

air by which the elevator was operated was cut off. Deceased's companion climbed up the elevator-rope and escaped, but deceased could not do so, and was killed by the explosion. The air was cut off by the foreman, who had full charge of the operation of the time. There had been an iron ladder in the shaft, which was removed some weeks before the accident to be replaced by a new chain-ladder, which was on the ground, and was to be placed in the shaft that day. It was held that defendant was negligent in failing to provide adequate means of escape for the men engaged in the blasting.¹⁵

§ 3925. Fall of Stone from the Side of a Quarry Caused by Blasting.—An employer has been held liable for injuries to a laborer, engaged in clearing away the fragments of a rock thrown down by blasting from a cliff, by the fall of a stone from the side of the hill, where a careful and prudent examination by the employer would have revealed the danger.¹⁶

§ 3926. Explosions of Steam-Boilers and their Connections.—The subject of the explosion of steam-boilers does not necessarily refer itself to the duty of the master to provide his servant with a safe place to work. It also involves his duty to provide reasonably safe machinery and appliances; and this last statement is especially applicable to the subject of railway-locomotive boilers. Nevertheless, for the sake of getting all the cases relating to this species of injury into one grouping, they will be treated here without reference to any refinement of analysis. The standard of care which the law demands of the proprietors of steam-boilers is, in theory, ordinary or reasonable care;¹⁷ though, as in other cases,¹⁸ this care varies according to the danger to be avoided.¹⁹ An employer who keeps a boiler in a building (a car-horse stable) in which employes are engaged, is in duty bound as to them to use reasonable care to see that it is kept in a reasonably safe condition, although such employes are not called upon to work at the boiler or to do any work connected with it.²⁰ The practical statement of this measure of care as applied to locomotive-boilers is, that a rail-

¹⁵ Alaska United Gold Min. Co. v. Muset, 114 Fed. Rep. 66; s. c. 52 C. C. A. 14.

¹⁶ Perry v. Rogers, 91 Hun (N. Y.) 243; s. c. 36 N. Y. Supp. 208; 71 N. Y. St. Rep. 105.

¹⁷ Texas &c. R. Co. v. Barrett, 166 U. S. 617; s. c. 41 L. ed. 1136; 17 Sup. Ct. Rep. 707 (ordinary care).

¹⁸ Vol. I, § 25; *ante*, § 3772.

¹⁹ It has been said that the care

and attention necessary on an employer's part in furnishing a steam-boiler is relative to the work to be done by the boiler and its capacity for harm as well as good: Johnson v. Boston &c. Min. Co., 16 Mont. 164; s. c. 40 Pac. Rep. 298.

²⁰ Egan v. Dry Dock &c. R. Co., 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188.

road company is not required to adopt extraordinary tests for discovering defects in locomotive-boilers or any of its machinery, which are not approved, practicable, and customary; but it fulfills its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances.²¹ A railroad company which requires a competent and experienced workman and assistant to subject the stay-bolts in a boiler to the best test known, to discover if they are whole and sound, is not liable for the death of an engineer from an explosion of the boiler due to broken stay-bolts, eight days after such inspection, made with due care, where a monthly inspection is considered sufficient by experts and experienced men, and examinations at such periods are a general rule and custom.²² A railroad company is not liable for the death of an engineer from the explosion of a locomotive-boiler because of an error of judgment in the selection of steel for such boiler by competent, experienced, skilled, and careful workmen in its employ.²³ The defendant, a manufacturing company, having discovered that two boilers purchased by it were defective, notified the seller to repair them. A. was sent with others to make the repairs, with instructions to fire them up and test them afterwards. After the repairs were made the defendant's engineer built a fire under the boilers, one of which exploded and A. was killed. On the trial of an action brought by A.'s administrator, it did not appear at whose request the fire was started, or why the boiler exploded, nor was any carelessness shown. It was held that carelessness was not to be inferred, and that the action could not be maintained, even assuming that in building the fire the engineer acted as defendant's servant; but the court held that it would be presumed the engineer acted either at A.'s request or voluntarily, and not as defendant's agent.²⁴

²¹ Texas &c. R. Co. v. Barrett, 166 U. S. 617; s. c. 41 L. ed. 1136; 17 Sup. Ct. Rep. 707; aff'g s. c. 30 U. S. App. 196.

²² Chicago &c. R. Co. v. DuBois, 56 Ill. 181; s. c. on second appeal, 65 Ill. App. 142.

²³ Chicago &c. R. Co. v. DuBois, 65 Ill. App. 142. A railroad company which gives its employes (section-hands) half an hour for rest and refreshment at noon, and has allowed them for several years during inclement weather to eat their dinner in a *pump-house* on its line of railway belonging to the company, is not liable for an injury to an employé while so eat-

ing, caused by the blowing out of a plug from a steam-boiler, due to its negligently being allowed to be in an unsafe condition, unless an express or implied invitation to eat in the *pump-house* in the line of his duty be shown. The fact that they were given but thirty minutes established an implied invitation to eat on the *premises*,—i. e., on the track, where their work lay,—but not to eat in the *pump-house*; nor would mere passive permission establish the latter: Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485; s. c. 41 N. E. Rep. 1051.

²⁴ Olive v. Whitney Marble Co., 103 N. Y. 292.

§ 3927. **Further of this Subject.**—Steam, when confined for the purpose of furnishing motive-power, being highly dangerous, there is considerable reason for imposing upon those having the care of steam-boilers a high degree of diligence, akin to that imposed upon railway companies. This is, indeed, nothing more than ordinary care, measured by the perils of the particular situation; but, for fear of misleading juries, courts frequently express the rule in stronger language than is usually implied by the words “ordinary care.”²⁵ Tested by this rule, if a proprietor or employer employs a well-known and reputable machinist to construct a steam-engine, and, after receiving it, subjects it to reasonable tests, and while using it subjects it to a reasonable and continuing inspection, and it nevertheless blows up, in consequence of bad materials or unskillful work, which was not discoverable by such inspection, the proprietor will not be responsible for any resulting injury, whether to his servant or to a third person.²⁶

§ 3928. **Rule where Proprietor Directs the Construction of the Boiler According to His Own Plan.**—But the rule is different if a machine is made according to his own plan, or if he interferes and gives directions as to the manner of its construction; the machinist then becomes his servant, and *respondet superior* is the rule.²⁷ More-

²⁵ Jones v. Yeager, 2 Dill. (U. S.) 64. A well-drawn charge to a jury, stating the obligation of a railway company to have the boilers of its locomotives subjected to the usual available tests, by competent and skillful machinists, will be found in Nashville &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27. In Jones v. Yeager, 2 Dill. (U. S.) 64, the reader will find a lucid charge to a jury, drawn by a very able judge, in an action of this nature. In an action for the death of an engineer by the explosion of a steam-boiler in a mill, the Appellate Court of Illinois applied the language used by the Supreme Court of the same State in a railway case (Columbus &c. R. Co. v. Troesch, 68 Ill. 545), and said that the rule was “diligence,—perhaps high, or the highest, diligence”; Morris v. Gleason, 1 Ill. App. 510. Compare Allerton Packing Co. v. Egan, 86 Ill. 253, 255; s. c. 18 Alb. L. J. 295; 10 Chic. Leg. N. 169, where, in a case of this kind, the court say: “There can be no question that when a person provides machinery to be used by his employés, he cannot be held liable

for injury received by the imperfection thereof, if such employer has used a very high degree of care in its manufacture or selection, both as to the material and construction. This certainly fills all the requirements of the law, in the use of diligence as to his employés, in providing such machinery. We will not stop to inquire whether in such cases ordinary prudence or care in making such selection or construction is all the diligence required, as the evidence abundantly shows that the company, in providing the machinery in this case, used a very high, if not the highest, degree of diligence, and has absolved defendants from all liability in providing the machinery.”

²⁶ Losee v. Buchanan, 51 N. Y. 476; s. c. in full, 1 Thomp. Neg. (1st ed.), p. 47. See also, *ante*, § 3785; Louisville &c. R. Co. v. Allen, 78 Ala. 494; Richmond &c. R. Co. v. Elliott, 149 U. S. 266; s. c. 37 L. ed. 728; 48 Alb. L. J. 309; 13 Sup. Ct. Rep. 837.

²⁷ Sharswood, J., in Ardesco Oil Co. v. Gilson, 63 Pa. St. 146, 150.

over, in the view of some courts, it is a necessary part of this doctrine, that, if the master has been careful in selecting his master machinist, he will not be answerable to the fireman or engineer for an explosion which may result from a neglect of duty on the part of such master machinist;²⁸ and one court has gone farther, and held that where a railway company had been diligent in this regard, it would not have been responsible for an explosion causing the death of the fireman, although *the directors* had been notified that the particular engine was unfit for use.²⁹ Other courts have held precisely the reverse on similar facts,³⁰ conformably to a view elsewhere more fully presented, that the servant who has charge of the master's machinery and appliances is to be deemed the vice-principal of the master, and not a fellow servant with those who may be engaged at labor on the premises, or in connection with the machinery.³¹

§ 3929. What Inspections and Tests in the Case of Steam-Boilers.—

Applying the doctrine already referred to, relating to inspections, to the case of steam-boilers, it has been reasoned that whether or not the duty of a master properly to inspect a boiler kept in a building in which servants are engaged is performed by the application of any given test, is a question to be determined by the condition of the boiler and the situation and location, and by considering whether the particular test will give indications as to the safety of the boiler.³² If a boiler gives evidence of weakness in a particular place by the leakage of steam at that place, and, notwithstanding the admonition, no test or repair is made, and it subsequently explodes, killing a servant of the owner, he will be liable in damages therefor, on the ground of having failed to exercise reasonable care to make it safe by proper inspection and proper repairs.³³ So, the fact that the employer, a railroad company, was admonished of the weakness of a locomotive-boiler by the fact that the engine was frequently taken to the repair-shop for repairs and would not sustain a full head of steam,—made a question for the jury with respect to its negligence, the boiler having exploded and killed the fireman.³⁴ But a railroad company which

²⁸ *Hard v. Vermont &c. R. Co.*, 32 Vt. 473.

²⁹ *Columbus &c. R. Co. v. Arnold*, 31 Ind. 174, 187.

³⁰ *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Cumberland &c. R. Co. v. State*, 44 Md. 283; *Cumberland &c. R. Co. v. State*, 45 Md. 229; *Nashville &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Pennsylvania &c. R. Co. v. Mason*, 109 Pa. St.

296; s. c. 58 Am. Rep. 722; *Fuller v. Jewett*, 80 N. Y. 46; s. c. 36 Am. Rep. 575.

³¹ *Post*, § 4926.

³² *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188.

³³ *Re California Nav. &c. Co.*, 110 Fed. Rep. 670.

³⁴ *Kirkpatrick v. New York &c. R. Co.*, 79 N. Y. 240.

has caused a test of the stay-bolts in a boiler, by having a competent and expert workman and assistant subject them to the best known tests to discover whether they are whole and sound, is not liable for the death of an engineer caused by the explosion of the boiler, due to the broken stay-bolts, shortly after such inspection.³⁵

§ 3930. Right of Employer to Rely upon Certificate of Public Inspector.—There is another doctrine to the effect that an employer who has no knowledge fitting him to inspect a boiler may rely on the certificate of the official boiler-inspector.³⁶

§ 3931. Failing to Use a Fusible Safety-Plug.—Failing to use on his boiler a *fusible safety-plug*, as required by statute, has been held evidence of negligence in a case of this kind; and, in the face of such a statute, it is incompetent to introduce evidence of a general custom among engineers not to use such a safety-plug.³⁷

§ 3932. Evidence on which Employers have been Held Liable in the Case of Explosions of Steam-Boilers.—An employer was held liable to a coal-passer, subject to the orders of the engineer, for injuries caused by the explosion of a boiler in his factory because of the failure of his engineer to require the extinguishment of the fire and disconnection of the boiler, on which a local distention or “bag” had formed, to which the engineer’s attention was called, where the explosion would not have taken place if the boiler had been immediately disconnected and relieved of steam, and the explosion happened three hours after notice to the engineer.³⁸ Where the evidence tended to show that the defendant bought a steam-boiler at second-hand and used it about eighteen months without having it inspected, and that, to his knowledge, it had leaked for some time before the accident; and that, two days before the accident, he declined to fix it, saying that he had no time,—it was held that the questions of his negligence

³⁵ Chicago &c. R. Co. v. Du Bois, 56 Ill. App. 181. On a second trial of this case it was made to appear that the inspector was partly deaf in one ear, but it appeared that his hearing was good enough to determine whether a bolt struck with a hammer was sound or broken, and the court adhered to its decision in the face of the strong physical circumstances pointing to the conclusion of negligence: Chicago &c. R. Co. v. DuBois, 65 Ill. App. 142.

³⁶ Service v. Shoneman, 196 Pa.

St. 63; s. c. 46 Atl. Rep. 292 (inspector had certified that the boiler would stand a working-pressure of 90 pounds, while at the time of the accident it was carrying 45 pounds; but the evidence showed conclusively that the accident was not due to weakness of the boiler). But compare *ante*, § 3789.

³⁷ Cayzer v. Taylor, 10 Gray (Mass.) 274.

³⁸ Mattise v. Consumers’ Ice Man. Co., 46 La. An. 1535; s. c. 16 South. Rep. 400.

in failing to have it properly inspected, and whether its explosion was due to an excessive pressure of steam or to its defective condition, were for the jury.³⁹ It has been quite well held that a mining company which puts into service, where it must be connected with the same steam-pipe that other larger and stronger boilers are connected with, an old boiler that had been repaired eleven months before with the express purpose of using it for about six months for a special purpose which did not require its connection with other boilers or the use of high pressure, the company knowing that the boiler would stand only a low pressure,—is liable for an injury to an employé caused by its explosion the first day after such connection.⁴⁰ Whether the superintendent of a fruit-canning factory in which a barrel is used for heating water with steam is guilty of negligence towards an employé in the factory injured by the explosion of the barrel, in failing to observe, while turning on the steam, that a plug has been inserted by some one in the pipe in the top of the barrel from which the steam escapes, where such plug is in plain view, and the superintendent knows that the barrel has not been used for several weeks, and the duty of inspection rests upon the superintendent,—is a question for a jury.⁴¹ In a leading case of this nature, in New York, the

³⁹ *Glossen v. Gehman*, 147 Pa. St. 619; s. c. 30 W. N. C. (Pa.) 40; 23 Atl. Rep. 843.

⁴⁰ *Johnson v. Boston & C. Min. Co.*, 16 Mont. 164; s. c. 40 Pac. Rep. 298.

⁴¹ *Crowell v. Thomas*, 18 App. Div. (N. Y.) 520; s. c. 46 N. Y. Supp. 137. In another case defendant constructed an addition to its paper-mill, and placed steam-pipes therein, which were connected with the boiler and pipes in the old mill, and a new engine in the new mill. No valve was supplied to shut off the steam from the new pipes, and at the time of the accident no pipe had been attached to draw off the water from condensed steam in the new pipes, though such drip-pipe was contemplated. A short time before the accident a considerable quantity of water was leaking from a "T" in the pipes, and defendant's overseer opened a small valve to drain the pipes, when "pounding" or "water-hammer" followed, and soon thereafter the "T" burst, scalding plaintiff's intestate so that he died. The evidence tended to show that just such a result was likely, and that it could have been avoided by reasonable care. It was held

that a verdict finding that defendant was negligent in turning the steam into the new pipes, before they were in proper condition, was justified, and authorized a judgment for plaintiff; since defendant omitted the degree of diligence which the law requires every master to exercise in order to furnish his servants with a reasonably safe place in which to perform the duties required of them: *Meeker v. C. R. Remington & C. Co.*, 62 App. Div. (N. Y.) 472; s. c. 70 N. Y. St. Rep. 1070; s. c. former appeal, 53 App. Div. (N. Y.) 592. A complaint in an action to recover for intestate's death from the explosion of a steam-chest alleged that it was caused by the omission to provide such a safety-valve and steam-gauge as were usually attached to pipes passing the steam from a high to a low-pressure engine, as in the case at issue. The evidence showed the absence of such appliances. There was also evidence that the steam was conveyed by a steam-pipe from the high-pressure cylinder to the steam-chest of the low-pressure cylinder, from which it was admitted into the cylinder by

referee to whom the case was referred found that the boiler of the locomotive which exploded "was defective and dangerous; that its condition in this respect was known to the defendants, and to the persons in the defendants' service whose duty it was to select the engines which were to be used on the defendants' road, for some weeks before the explosion; and that the defendants had been frequently notified thereof." He did not find that the plaintiff knew of the dangerous condition of the boiler, and the court said that this could not be presumed. It was held that the defendant was liable.⁴²

§ 3933. **Pleading in Actions for Injuries in Explosions of Steam-Boilers.**—A declaration in such a case, which alleges that the master carelessly and wrongfully furnished an insufficient engine; that the

two admission-valves, controlled by a hook-rod; that if the hook-rod jumped from its place the valves would close automatically, and the steam could not escape from the steam-chest, but would continue to enter from the high-pressure cylinder at such a rate as to raise the pressure 'enormously almost instantaneously, so that an explosion would be inevitable; that to prevent such an accident the hook-rod was supplied with safety-latches, but that they had been left unfastened at the time of the accident, and the hook-rod jumped from its place and the explosion followed. There was no evidence that such a safety-valve as was usually supplied in such a place would have been large enough to relieve the great pressure following such an accident, and it was agreed that a steam-gauge could not have been read quickly enough to prevent the accident. It was held that, in the absence of such evidence, the negligence of defendant in failing to provide a safety-valve and steam-gauge, as charged, was not shown to be the cause of the accident: *Green v. Lawrence Cement Co.*, 57 App. Div. (N. Y.) 284; s. c. 68 N. Y. Supp. 7. Evidence of negligence on the part of the defendant was also discovered in the following cases: *Decatur Cereal Mill Co. v. Boland*, 95 Ill. App. 601 (mill erected for secret experimental purposes—plaintiff, a tinner, set to work making repairs without knowledge or warning of danger and was injured by an explosion of carbon-bisul-

phide gas which probably came in contact with the heat from his furnace—defendant liable); *Empson Packing Co. v. Vaughn*, 27 Colo. 66; s. c. 59 Pac. Rep. 749 (explosion of steam cooker in a canning factory—evidence held to warrant an inference that it was caused by undue steam-pressure and by a negligent failure to have the cooker equipped with a "safety-valve").

⁴²*Keegan v. Western R. Corp.*, 8 N. Y. 175; s. c. Seld. Notes 44. But if a servant engages to work in the construction of a ditch with the distinct understanding that a certain boat, with its engines and boiler, is to be used in the excavation, and that a certain engineer is to have charge and control of it, and it blows up and injures the servant—no recovery: *Lebkeucher v. Bolansen*, 69 Ill. App. 297 (*per curiam* opinion). It has been held, and seemingly on clear grounds, that a railroad company is *not liable* for the death of an employé killed by the explosion of the crown-sheet of a boiler on a locomotive-engine, which had been examined a week before on suspicion of having been burned, but pronounced sound, and thereafter used in hauling freight and passenger-trains under a pressure of from 140 to 145 pounds, and which at last exploded under a pressure of 110 pounds, while running alone at a moderate rate of speed: *Racine v. New York & C. R. Co.*, 70 Hun (N. Y.) 453; s. c. 53 N. Y. St. Rep. 680; 24 N. Y. Supp. 388.

insufficiency was unknown to the servant, and "but for want of all proper care and diligence would have been known to the master; and that while the servant was in the careful and prudent use of the engine, it exploded on account of such insufficiency, and injured the servant," etc., discloses a good cause of action.⁴³ A complaint was likewise held good on demurrer which contained the following allegations: That the decedent had been in the employment of the defendant, as fireman on a freight-engine, for about two months, when, on a day mentioned, he was ordered by the defendant to serve as fireman on a particular engine attached to an express passenger-train, then running on said road between certain points named; that said engine "was old, rickety, with a weak, defective, patched-up, and leaky boiler," which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that its use on an express-train in its weak and unsound condition involved great peril to the lives of passengers and employes; that the deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed on it as fireman; that the defendant, with full knowledge of the defective and unsafe condition thereof, carelessly and negligently caused the same to be used in drawing said express-train; that on the same day the boiler exploded, by reason of its defective and unsound condition, and caused the death of the decedent, without any negligence on his part.⁴⁴

§ 3934. **Relevancy of Evidence in Such Actions.**—In such an action, the testimony of employes of the company, who had used the engine, that, among them, the engine had always been considered unsafe, has been held competent for the purpose of showing that the person having care of the machinery of the road knew, or might have known by reasonable diligence, that it was not safe.⁴⁵

⁴³ *Noyes v. Smith*, 28 Vt. 59.

⁴⁴ *Columbus &c. R. Co. v. Arnold*, 31 Ind. 177. The court, in giving its judgment, says: "The master is not responsible to the employé for an injury occasioned by the carelessness or negligence of a coemployé, or fellow servant. But here it is alleged that the appellant, the master, was notified of the unsafe condition of the engine, and negligently caused it to be used, whereby the fatal injury occurred. The negligent acts complained of are imputed to the master, and not to an

employé; and if the allegations are true, the appellant is clearly responsible." The sound law here laid down is contradicted and reduced to nonsense by subsequent portions of the opinion, which declare that the master machinist is a fellow servant with the fireman, and that notice to the directors of the corporation that the engine was defective would not be notice to the corporation: *Columbus &c. R. Co. v. Arnold*, *supra*, at pp. 184, 187.

⁴⁵ *Chicago &c. R. Co. v. Shannon*, 43 Ill. 338.

§ 3935. **Explosions of Gas.**—In an action for the death of a boy caused by the explosion of gas in a mine, a verdict for the plaintiff will be sustained where the evidence tended to show the presence of explosive gas in the mine in dangerous quantities for at least four days prior to the accident; that this gas had accumulated in a room within about thirty feet of the entry where the deceased was killed, and where naked or open lights were used by the miners without objection by the superintendent; and that a person who was not a certified fire-boss had been employed as fire-boss by the mine-foreman with the knowledge of the superintendent.⁴⁶ It has been reasoned that the superintendent of gas-works, in making an experiment to increase the pressure for the purpose of overcoming some difficulty in the supply of gas, acts upon the suggestions of persons who have no authority to direct him, at his peril; and for injuries received by him from an explosion during such experiment, in consequence of his own carelessness or lack of skill, his employer is not liable.⁴⁷

§ 3936. **Injuries to Employés in Other Explosions.**—Where a servant, ordered by his master to paint the inside of a large water-tank with a well-known brand of varnish containing a large quantity of benzine, used in large quantities by the master for twelve years, and in the use of which he had never had an accident, entered the tank with a railroad-lamp, covered with glass, and shortly afterwards an

⁴⁶*Kless v. Youghiogheny Min. Co.*, 18 Pa. Super. Ct. 551. Where an employé of a gas company in the discharge of his duty opened the door of a furnace, and an explosion ensued, and a grate-bar was propelled through his body, causing instant death; and in an action for the death it was claimed that the master's negligence was shown, in that the grate-bars were filled with clay, which was wet when they were placed in the furnace, but it was not shown that the use of clay, wet or dry, was improper or dangerous, nor shown how such construction caused the accident, and no defect was shown in the construction of the bars,—a verdict was properly directed for defendant; more especially as the evidence produced by the defendant tended strongly to show that the accident was caused by the negligence of the deceased in opening the door without first opening certain valves: *Broadway v. San Antonio Gas Co.*, 24 Tex. Civ. App. 603; s. c. 60 S. W. Rep. 270.

In the opinion of the Court of Appeals of Kentucky, a tar roof, instead of a slate or iron one, upon a gas-house, and the lack of a vent in it for the escape of leaking gas, and the location of the gas-tanks or reservoirs too near the fire under the gas-retorts, when they are nine and a half feet outside of the gas-building, do not show such a reckless indifference or intentional failure to perform a manifest duty as will constitute "willful neglect" which will sustain an action in Kentucky for the death of an employé by an explosion of a gas-tank: *Collins v. Cincinnati & C. R. Co.*, 13 Ky. L. Rep. 670; s. c. 18 S. W. Rep. 11 (no off. rep.).

⁴⁷*Taylor v. Baldwin*, 78 Cal. 517; s. c. 21 Pac. Rep. 124 (plaintiff removed counter-weights from one side of gas-receiver, which allowed it to tilt and gas to escape, an explosion following—experiment suggested by contractor who had erected works).

explosion occurred resulting in his death, there was no such negligence on the part of his master as rendered him liable, the accident being outside the range of ordinary experience.⁴⁸ Where the engine by which a mill was operated was run by an inexperienced engineer, and, on starting it, the "governor" refused to move until he pushed it around with his hands (though there was testimony that this was not an unusual happening with properly constructed engines), and the engineer subsequently went into the mill and let corn into the hopper while the burrs were revolving very rapidly, in order to reduce their speed, and then went to slow down the engine, and while on his way to do so the burrs exploded, and on reaching the engine-room he found the engine running very rapidly and the governor standing still,—it was held that there was evidence of negligence to go to the jury.⁴⁹ A railway fireman was denied a recovery of damages from the company for injuries caused by the explosion of a glass lubricator which was not protected by a shield, although such lubricators were made and sold to the company with shields, where the shields have been discarded by almost all firemen and engineers, no explosion had previously occurred, and the fireman was experienced and had opportunities for seeing and appreciating the danger equal to those of his employer.⁵⁰

ARTICLE VII. LIABILITY FOR INJURIES TO SERVANTS CAUSED BY FIRES OTHER THAN RAILWAY FIRES.

SECTION

3939. Liability for negligently creating fires.

3940. Failure to provide means to prevent fires.

3941. Liability of master for failure to equip buildings with fire-escapes.

3942. Statutes enjoining this duty.

3943. Failing to notify or alarm employés on the breaking out of a fire.

SECTION

3944. Giving erroneous directions whereby employés are detained in the burning building.

3945. Other decisions with respect to the liability of employers for injuries to their servants from fires.

⁴⁸ Allison Man. Co. McCormick, 118 Pa. St. 519; s. c. 11 Cent. Rep. 396; 12 Atl. Rep. 273; 20 W. N. C. (Pa.) 571.

⁴⁹ Ford v. Knipe, 180 Pa. St. 210; s. c. 36 Atl. Rep. 729.

⁵⁰ Texas &c. R. Co. v. McKee, 9 Tex. Civ. App. 100; s. c. 29 S. W. Rep. 544. See also, Purdy v. Westinghouse Electric &c. Co., 197 Pa.

St. 257; s. c. 47 Atl. Rep. 237; 51 L. R. A. 881 (explosion of a barrel containing castings which a fellow employé was inspecting with a lighted match though it had originally contained several explosive substances); Scanlan v. Kahn, 40 App. Div. (N. Y.) 62; s. c. 57 N. Y. Supp. 554 (explosion of a wire-making machine having a slightly con-

§ 3939. **Liability for Negligently Creating Fires.**—Clearly, if an employer, through his negligent failure to perform any of the primary, absolute, and unalienable duties resting upon him, or through the negligent failure of duty on the part of any servant for whose negligence he is responsible, creates or induces a fire in his establishment whereby any of his servants are killed or injured, he will be responsible for the resulting damages. Thus, a railroad company is liable for personal injuries to an inexperienced fireman caused by the flames bursting out upon his opening the door of the fire-box and catching his clothes and causing him to fall from the engine, owing to the use of fine and dirty coal, where the company knew, or ought to have known, of its use and dangerous character and that it rendered the risk extra-hazardous, and the servant was not warned and did not know the danger.¹

§ 3940. **Failure to Provide Means to Prevent Fires.**—In a decision illustrating this species of negligence it was held that the failure on the part of a master to provide a stopcock in the pipe connecting an oil-tank with burners used for firing a brick-kiln, which stopcock had always previously been supplied, may be found by the jury to be negligence, notwithstanding there is a shut-off at each of the burners and one on the tank, where the tube adjacent to each burner is made of rubber, and by reason of the heat and oil is liable to crack and allow the oil to escape, which in such case would ignite and render approach to the burner impossible because of the heat, as had fre-

vex metal die); *Wiedeman v. Everard*, 56 App. Div. (N. Y.) 358; s. c. 67 N. Y. Supp. 738 (explosion of fine dust in a mill); *Kiras v. Nichols Chemical Co.*, 59 App. Div. (N. Y.) 79; s. c. 69 N. Y. St. Rep. 44 (explosion of hot semi-liquid slag from smelting-works when brought in contact with water at the dumping-ground—employer liable).

¹*Missouri & C. R. Co. v. Walker* (Tex. Civ. App.), 26 S. W. Rep. 513 (no off. rep.). In a suit for injuries received by a servant in jumping from a third-story window of a manufacturing establishment when it suddenly caught fire, the plaintiff contended that the fire was caused by the negligent maintenance by the master of a vat containing inflammable material in proximity to a trip-hammer, and that the material was ignited by sparks from the hammer. It appeared that the hammer was situ-

ated thirty feet from the vat, and there was evidence that the sparks from the trip-hammer would not contain sufficient heat to cause any substance to ignite at a distance greater than twenty feet; that the fire was first discovered on a rack beside the vat, the rack being used to drain articles that had been dipped into the vat; that the vat was covered at the time, but that in endeavoring to put out the fire the cover was knocked off, and fire thereupon appeared in the vat. The same conditions had existed many years without developing danger. It was held that the evidence was insufficient to support a verdict that the defendant was negligent in locating the vat and rack the distance they were from the hammer: *Dunlavey v. Racine Malleable & Iron Co.*, 110 Wis. 391; s. c. 85 N. W. Rep. 1025.

quently happened, and the valve on the tank could not be turned without a mechanical appliance (a wrench or a pair of tongs), while in case the flow of the oil was not stopped a conflagration and explosion of the tank would be probable.²

§ 3941. **Liability of Master for Failure to Equip Buildings with Fire-Escapes.**³—The danger of fire in large manufacturing establishments, where steam-power is used and where combustible material accumulates, is known to be great; and, owing to the large number of persons frequently employed in such establishments, many of them women and children, added to the panic which always attends an alarm of fire, the danger to human life from accidental fires is very great. These facts alone imperatively suggest the duty on the part of owners of such establishments, to take those reasonable precautions to prevent the breaking out of fires therein, to furnish their servants with suitable escapes from the building, in case of fire so breaking out, and to give them a speedy alarm as soon as a fire is discovered. Judicial authority would not be wanting in support of this conclusion if the question had been often presented to the courts; and it is to be regretted that one court has placed itself in the attitude of denying any such obligation 'on the part of the master *at common law*. In a case where a manufacturing establishment, five stories in height, with an attic, took fire through heat produced by the friction of the machinery, and burned to the ground, destroying many lives, it appeared that there were no fire-escapes, except a single stairway, that there were no means for alarming the inmates as soon as a fire should break out, and that the apparatus which had been provided for extinguishing fires for some reason or other did not work. The court held that these facts exhibited no ground of liability against the owners of the establishment in favor of one of its servants, who had been compelled to leap from a window to the ground to escape being burned to death in the fire, and who had thereby sustained injuries. In the view of the court, the mere fact that the water did not run was not evidence of negligence against the defendant, since the defendant, in any aspect of the case, had done its whole duty when it supplied the proper appliances, the care and use of which must necessarily be entrusted to its servants. In the view of the court, which seems to have done all its thinking

² Pullman Palace Car Co. v. Laack, 143 Ill. 242; s. c. 18 L. R. A. 215; 32 N. E. Rep. 285; aff'g s. c. 41 Ill. App. 34 (one of the men attempted to shut off the valve on the tank with his hands, but finding this impossible, he went to get a

wrench. Plaintiff, in the meanwhile, having been assured that the valve was shut off, disconnected the supply-pipe, in order to have the tank moved away, and the oil spurted over him and ignited).

³ See also, *post*, § 4702.

on the side of the proprietor, "the failure of the water to run must, therefore, be attributed to the negligence of fellow servants, either in keeping the apparatus in order, or in negligently putting it in operation."⁴ It is true, that if the failure of the water to run were attributable to the negligence of fellow servants in putting the apparatus in operation, the plaintiff would not be entitled to recover on the ground that the water did not run and that the fire was not extinguished or checked. But it is not the law, even in Massachusetts, that a master is exonerated from liability for injuries caused by reason of failing to keep his machinery, appliances, etc., in proper order, where he commits this duty to a servant of the grade of a mere fellow servant of the servant who is injured, and where this servant is negligent in the performance of the duty. On the contrary, as we have already seen, the doctrine, even in Massachusetts, is that this is one of the *absolute duties* of the master, and that in the performance of it he is responsible for the negligence of any one to whom he commits its performance, and, if to a servant, no matter to what grade of servant.⁵ But the Massachusetts case proceeds to use the following language: "The narrow question is presented, whether a master is required by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principle of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. If such a liability could exist, it would be difficult, if not impossible, to fix any limit to it. And we are therefore of opinion, that it is no part of the duty of the master to his servant, employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statute requirement, to provide means of escape from it, or to have remedial agencies at hand to alleviate the results, or to insure the safety of the servant from the consequences of a casualty, to which his [the master's] negligence does not directly contribute. The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arises upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences. The master is

⁴ Jones v. Granite Mills, 126 Mass. 84, 88.

⁵ *Ante*, § 3781.

not liable to the servant unless he has been negligent in something which he has contracted or undertaken with his servants to do, and he has not undertaken to protect him from the results of casualties not caused by him or beyond his control.”⁶ In another case growing out of the same fire, it is said in the opinion of the court: “It is no part of the master’s duty to his servants to provide special means of notifying them of a fire or other casualty occurring on his premises.”⁷ It is submitted to the profession that, upon ordinary experience, the danger of fires breaking out in extensive manufacturing establishments is so great, and the consequences of such fires so dreadful to those employed therein, that on the most obvious principles of justice and humanity, the master should be required to take those steps which may be reasonably taken to provide suitable and speedy means of egress from the building in case of fire, to provide suitable means of extinguishing fires therein, and to subject such apparatus to a continual inspection to the end that it shall be kept in order, and to provide—what can be done at slight expense—the means of creating an alarm on every floor in case a fire breaks out in any part of the building. Such decisions do not express the principles of the common law. It is no principle of the common law that, from the mere fact that the master does not create a catastrophe, he is not bound to make a reasonable provision against its consequences where it is at any time liable to occur. Such decisions are simply brutal. Judges who are so callous to justice and humanity are unfit for the seats which they occupy. They ought to be driven from them and put to work in factories and subjected to the dangers for the presence of which they are able to make such excuses.

§ 3942. **Statutes Enjoining this Duty.**—The violation of a statute which has been enacted to change this infamous rule is, on a principle elsewhere considered,⁸ negligence *per se*. And if such violation leads to the injury or death of an employé, an action therefor will lie, in case of death, under a statute giving a right of action for an injury resulting in death.⁹ Evidence that a fire-escape attached to a factory terminated above an open chute extending into the basement of the building, so that an employé attempting to descend landed in such chute, justifies a finding that the owners failed to provide a proper fire-escape as required by a statute providing that factories shall be provided with suitable and proper fire-escapes connecting with

⁶ Jones v. Granite Mills, 126 Mass. 84, 89.

⁸ Vol. I, § 10.

⁷ Keith v. Granite Mills, 126 Mass. 90, 93.

⁹ Arms v. Ayer, 192 Ill. 601; s. c. 61 N. E. Rep. 851.

each floor; since a *safe landing-place* is an essential part of the fire-escape. Nor could the factory inspector's approval of the fire-escape exonerate the master, since his certificate could not operate to convert an obviously unsafe landing into a safe one.¹⁰

§ 3943. Failing to Notify or Alarm Employés on the Breaking Out of a Fire.—It is obviously a part of the duty of the master to provide means for alarming his servants upon the breaking out of a fire in his building,—especially where the building is extensive and contains several floors upon which different servants are at work. A decision of the Court of Civil Appeals of Texas which has some possible bearing on this question ¹¹ may be here referred to, the facts being set out in the marginal note.¹²

§ 3944. Giving Erroneous Directions Whereby Employés are Detained in the Burning Building.—In a Canadian case, reported in the French language, it appeared that, a fire having broken out in a tobacco factory in which children were employed, the foreman on the highest floor of the building ordered the work-people, who had commenced to descend, to return to their places, crying out that there was no danger,—in which he was mistaken. The smoke from the fire afterwards reaching this floor, the children there at work became alarmed and ran to the window. The respondent's daughter, one of these children, whether through fright, or being pushed by her companions, threw herself out of the window and was killed. Those who remained easily escaped by the stairs or the lifts. It was held that the primary cause of the child's death was the fact of the foreman's hindering the work-people from descending, which they could easily have done, and that, although the foreman had acted in good faith, he

¹⁰ Johnson v. Steam Gauge & Co., 72 Hun (N. Y.) 535; s. c. 55 N. Y. St. Rep. 133; 25 N. Y. Supp. 689; s. c. aff'd, 146 N. Y. 152.

¹¹ Hernischel v. Texas Drug Co., 26 Tex. Civ. App. 1; s. c. 61 S. W. Rep. 419.

¹² The case was that the plaintiff's son was employed by a drug company, and a fire, not claimed to have resulted from negligence, occurred in the building at noon, when it was the custom of most of the employés, including the plaintiff's son, to be absent; but he had been requested by the chemist to remain, and his presence in the building was known only to such chemist, who was not present when

the fire broke out. The first and third floors were connected by a speaking-tube, so that the boy, who was on the latter floor, could have been notified of the fire, had his presence been known. The fire spread with such rapidity that the employés on the first floor had little time to escape, and plaintiff's son jumped from a window to a roof fifteen feet below and was injured. It was held that no issue of liability of defendant on the theory of discovered peril, and subsequent negligence, was presented by the evidence: *Hernischel v. Texas Drug Co.*, *supra*. See also, *Keith v. Granite Mills*, *ante*, § 3941.

had committed an imprudence for which the appellant and master was liable; that, the foreman having thus placed the child in a perilous position, in which fright took away from her the use of her reason, or at least made her believe that she could save herself only by throwing herself out of the window, the appellant was liable; also, that the judgment of the judge of first instance, fixing the amount of damages, could not be set aside except for reasons which would justify the setting aside of the verdict of the jury.¹³

§ 3945. Other Decisions with Respect to the Liability of Employers for Injuries to their Servants from Fires.—A court in New York has held a corporation engaged in distilling and refining petroleum responsible for the death of a servant sent to repair a still in which escaping gas became ignited, on the ground that the master had ordered the servant into an unsafe place contrary to its duty in that regard.¹⁴ Where, on the other hand, a servant perfectly familiar with the premises and with the business, went to a tank of paraffine which was being heated, with a lantern in his hand, and raised the lid of it, whereby his lantern caused an explosion, injuring him, he was denied a recovery of damages on the ground of his own negligence; nor was it an excuse, for carrying the lantern, that the place was not properly lighted by the defendant.¹⁵

ARTICLE VIII. LIABILITY FOR UNSAFE SCAFFOLDINGS, STAGINGS, LADDERS, ETC.¹

SECTION

3947. Obligation of the master to make reasonable inspections.

3948. Duty to apply what tests.

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3952. Master not liable for giving way of such structure unless he might have known by a reasonable inspection that it was defective.

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3954. Master providing safe and suitable appliances, materials, etc., but servant selecting unsuitable ones

¹³ MacDonal v. Thibaudeau, Q. R. 8 Q. B. 449.

¹⁴ Nichols v. Brush & Co. Man. Co., 53 Hun (N. Y.) 137; s. c. 25 N. Y. St. Rep. 717; 6 N. Y. Supp. 601.

¹⁵ Benfield v. Vacuum Oil Co., 75 Hun (N. Y.) 209; s. c. 27 N. Y. Supp. 16; 58 N. Y. St. Rep. 663.

¹ Upon this subject see, with an extensive review of the authorities,

SECTION

- with which to build the structure.
3955. Effect of custom of workmen to build their own stagings.
3956. What defects in stagings, scaffolds, etc., are not defects in "ways, works, or machinery."
3957. Personal liability for ordering servant to use a defective ladder or scaffold.
3958. Evidence to show that the defective ladder or other appliance was one furnished by the master.
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- tion of New York statute imposing upon employers the duty of furnishing safe scaffolds for their workmen.
3960. Evidence of negligence to charge employer for failing to provide safe scaffolds, ladders, etc.
3961. Liability for injuries from defective scaffolds in ship-building.
3962. Injuries from falling objects through failure to erect scaffolds.
3963. A question of pleading in an action grounded on this liability.

§ 3947. **Obligation of the Master to Make Reasonable Inspections.**—Upon this subject the following propositions may be stated, based upon the authorities cited and upon the principles which have preceded:—(1) The master is under an affirmative duty to his servant to make a reasonable, diligent and skillful inspection and to resort to reasonable tests to see that any scaffold, ladder, etc., upon which he requires his servant to work, shall bear the weight to which he subjects it.² If he furnishes planks which are knotty, it has been said to be his duty to subject them to a strain of weight, equal, if not superior, to the weight which they are designed to bear.³ If he manufactures and supplies a ladder for the use of his employes, he is chargeable with such knowledge of its character, and consequently of its defects, as the exercise of ordinary care during its manufacture would have discovered.⁴ In the case of a ladder on the side of a freight-car, the rule requiring frequent inspections has been applied so severely that, although it was inspected on the 13th, 14th, 16th, and 17th of the month, and the defect was not discovered, yet it appearing that a proper inspection on the 18th, the day of the accident, would have disclosed the defect and avoided the injury,—it was held

—Beesley v. Wheeler, 103 Mich. 196; s. c. 27 L. R. A. 266.

² Davies v. Griffith, 27 Wkly. L. Bull. (Ohio) 180; Standard Oil Co. v. Bowker, 141 Ind. 12; s. c. 40 N. E. Rep. 128; Missouri &c. R. Co. v.

Miller, 25 Tex. Civ. App. 460; s. c. 61 S. W. Rep. 978 (ladder on freight-car).

³ Flynn v. Union Bridge Co., 42 Mo. App. 529.

⁴ Standard Oil Co. v. Bowker, 141 Ind. 12; s. c. 40 N. E. Rep. 128.

that, by reason of negligence in not repeating the inspection on that day, the company was liable.⁵ Other judicial decisions relax this duty, dangerous as the consequences may be of not exacting strict compliance with it; one decision, for example, holding that a contractor does not owe to masons employed by him the duty of testing the strength of every timber in a scaffold, where an external examination shows no defect.⁶ In cases where the risk of injury in the use of tools is small, the requirement of the master to use ordinary care in furnishing implements may be satisfied by furnishing *very primitive and inefficient instruments*. It was so held, and a recovery denied, where the master had furnished a *ladder* for use by domestics several times a year in reaching a pigeon-loft, and the plaintiff, while using it by direction of the master's wife, his implied agent, fell from it because it was too short, and was injured.⁷ So, it was held that a master was not guilty of negligence, as matter of law, in failing to set spikes at the bottom of a ladder used about a factory to prevent it from slipping on the floor while in use, where the servant injured by its slipping was an experienced mechanic, and the ladder was one of a kind which is in ordinary use, and was selected by the plaintiff himself.⁸

§ 3948. **Duty to Apply What Tests.**—In inspecting the side-ladder of a railway-car, it has been held that the inspectors of a railway company, when inspecting the ladder on the side of a car, need not apply any physical force to the grab-irons to discover latent defects, unless a careful inspection by the eye discloses some defect or probable weakness; but, if such careful observation would have disclosed that a grab-iron was out of place, the inspectors would be negligent if they failed to discover such condition and apply all reasonable physical tests to determine the cause of such condition, and whether such condition was a safe one.⁹

⁵ *Missouri &c. R. Co. v. Miller*, 25 Tex. Civ. App. 460; s. c. 61 S. W. Rep. 978.

⁶ *Bannon v. Sanden*, 68 Ill. App. 164 (invisible knot in 4x4 timber, which had been used several times before in scaffoldings without breaking).

⁷ *Steinhauser v. Spraul*, 127 Mo. 541; s. c. 30 S. W. Rep. 102.

⁸ *Borden v. Daisy Roller-Mill Co.*, 98 Wis. 407; s. c. 74 N. W. Rep. 91. Further as to the failure to spike the bottom of a ladder to prevent it from slipping,—see *Marsh v. Chickering*, 101 N. Y. 396 (held to be an ordinary tool, not requiring

great skill or care in its use; servant having full knowledge and comprehension of defects; no recovery, ever after failure to spike as promised).

⁹ *Thompson v. Great Northern R. Co.*, 79 Minn. 291; s. c. 82 N. W. Rep. 637 (evidence held to sustain a finding that the defect was apparent enough to have been discovered by a reasonably careful inspection, there being evidence that a bolt holding the grab-iron was so loose as to allow the latter to hang one-fourth of an inch away from the side of the car).

§ 3949. **Liability of Master for Want of Ordinary or Reasonable Care in Performing this Duty.**—(2) Whether the master undertakes to perform this duty himself, or through the agency of another, he is liable for its negligent non-performance.¹⁰ For example, a company which undertakes to make and to furnish ladders for the use of its workmen, is bound to use reasonable care, to the end that the ladders shall be safe, and is responsible for the negligence of those whom it employs to construct them.¹¹

§ 3950. **This Duty Absolute and Unassignable.**—(3) This brings us to the next proposition, which is, that as this is one of those duties of the master which has been variously designated as a personal and unalienable, or unassignable duty,¹²—though not in the sense of his being an *insurer* of its performance,—it is immaterial to whom or to what grade of servant he delegates its performance; and, accordingly, a servant may recover damages of the master for his negligence in failing to perform this duty, although the negligence is that of a fellow servant to whom the master has committed the performance of the duty.¹³

¹⁰ *Flynn v. Harlow*, 46 N. Y. St. Rep. 872; s. c. 19 N. Y. Supp. 705; *Steinhauser v. Spraul*, 114 Mo. 551; s. c. 21 S. W. Rep. 515; s. c. aff'd on rehearing, 21 S. W. Rep. 859 [but compare s. c. on second appeal, 127 Mo. 541; 30 S. W. Rep. 102].

¹¹ *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647; s. c. 44 Atl. Rep. 762.

¹² *Ante*, § 3874; *Chicago &c. R. Co. v. Scanlan*, 170 Ill. 106 (duty to provide safe scaffolding a positive duty of master; notice to foreman of carpenters erecting it for bricklayers is notice to master of its defective condition); *Chicago &c. R. Co. v. Maroney*, 170 Ill. 520; aff'g s. c. 67 Ill. App. 618 (same point—same accident); *Kuss v. Freid*, 32 Misc. (N. Y.) 628; s. c. 66 N. Y. Supp. 487 (duty imposed by New York Labor Law held to be a duty of this nature, so that the servant who builds the scaffolding represents the master).

¹³ *Green v. Banta*, 48 N. Y. Super. 156; s. c. aff'd, 97 N. Y. 527; *Davies v. Griffith*, 27 Wkly. L. Bull. (Ohio) 185. Contrary to the text, the author has met with two untenable decisions, one of which

holds that the master is not liable where he commits this duty to an independent contractor of competent skill and good reputation, although the master accepts the structure without examination and puts his servant to work upon it: *Devlin v. Smith*, 89 N. Y. 470; s. c. 42 Am. Rep. 311; 11 Abb. N. Cas. (N. Y.) 322; rev'g s. c. 25 Hun (N. Y.) 206. The other holds that the master will not be liable where the scaffold is erected by a fellow servant of the servant receiving the injury, the master not being present, and there being no evidence that he was negligent in the employment of the fellow servant in question, and it appearing that he provided suitable material for the purpose: *Benn v. Null*, 65 Iowa 407. Both of these decisions are opposed to the general doctrine of the text, which has been more extensively considered in another place: *Ante*, § 3874. The New York case is "distinguished" in *Vosburgh v. Lake Shore &c. R. Co.*, 94 N. Y. 378, and it is to be hoped that it will continue to be distinguished until it is extinguished.

§ 3951. Right of Servant to Rely upon the Performance of this Duty by Master.—(4) It is the duty of the master, and not the duty of the servant, to make the tests of such an appliance as above spoken of, and the servant is ordinarily entitled to rely upon the assumption that the master has done so; and the servant will not be liable on the ground of contributory negligence for failing to make such tests himself, or for using the scaffold, ladder, etc., unless the danger was so apparent that a person of ordinary prudence would not undertake the risk.¹⁴ Especially is it true that the servant may rely upon the *promise* of the master or his representative to perform this duty, and may hence remain a reasonable time in the service expecting its performance.¹⁵

§ 3952. Master Not Liable for Giving Way of such Structure unless he might have Known by a Reasonable Inspection that it was Defective.—(5) On the other hand, on principles already considered,¹⁶ the master is not liable for an injury to his servant from the giving way of such a structure on which the servant is required to work, unless the master knew, or by the exercise of reasonable inspection might have known, of the defect therein; and this is especially true where the means and opportunity of inspection are equally open to the servant.¹⁷

§ 3953. Master Not Liable for Injuries which may Happen through the Negligent Use of the Structure.—(6) The master is liable for the failure to exercise reasonable care and skill in the making or building of the structure; but he is not liable for any injury which may happen in its *use*, where he has committed its management and use wholly to a gang of servants. If, in such a case, an injury happens from its negligent adjustment by one of such servants, this will be ascribed, if the injury falls on the servant making such adjustment, to his own negligence, and if it falls on another servant, it will be ascribed to the negligence of a fellow servant, for which, under

¹⁴ *Ante*, § 3765; *Reber v. Tower*, 11 Mo. App. 199; *Steinhauser v. Spraul*, 114 Mo. 551; s. c. 21 S. W. Rep. 515; s. c. aff'd on rehearing, 21 S. W. Rep. 859 [compare s. c. on second appeal, 127 Mo. 541; 30 S. W. Rep. 1021].

¹⁵ *Post*, § 4667. Where a servant employed to do painting called the attention of his master's superintendent to a defective ladder, and was told by the superintendent that it was all right, and safe, and af-

terwards the servant found the ladder at a place where certain work was to be done, and saw that it had been repaired and was apparently safe, and attempted to mount it, and a step gave way where it had been repaired, and he was injured, the master was held liable: *Ritt v. True Tag Paint Co.*, 108 Tenn. 646; s. c. 69 S. W. Rep. 324.

¹⁶ *Ante*, § 3785.

¹⁷ *McCarthy v. Muir*, 50 Ill. App. 510.

principles hereafter considered,¹⁸ the master is not liable. In other words, the master will not be liable where the *manner of use*, and not the *faulty construction* of the appliance, causes the injury.¹⁹ Thus, if a ladder, which has been furnished by the master to be used by his servants, is safe and sufficient in itself, the master will not be liable for an injury to one of them sustained by the fact of its having been insecurely fastened by a co-servant;²⁰ nor for its being subjected, by the servants using it, to a strain which was not contemplated when it was built, where it was safe and adequate for the use for which it was originally intended.²¹ In many such cases the liability of the master will be excluded on the ground of the contributory negligence of the particular servant who sustained the injury, in making a negligent use of the appliance.²²

§ 3954. Master Providing Safe and Suitable Appliances, Materials, etc., but Servant Selecting Unsuitable Ones with which to Build the Structure.—(7) On a principle elsewhere considered, if the master has furnished a safe and suitable appliance, he will not be liable because, instead of using this appliance, the servant who sustains the injury, or a fellow servant working with him, selects another one which is dangerous or unsuitable.²³ If the substituted appliance is

¹⁸ *Post*, § 4846, *et seq.*

¹⁹ *Young v. Burlington Wire Mattress Co.*, 79 Iowa 415; s. c. 44 N. W. Rep. 693; *Jennings v. Iron Bay Co.*, 47 Minn. 111; s. c. 49 N. W. Rep. 685.

²⁰ *Quinn v. Fish*, 6 Misc. (N. Y.) 105; s. c. 55 N. Y. St. Rep. 401; 26 N. Y. Supp. 10.

²¹ *Chicago Architectural Iron Works v. Nagel*, 80 Ill. App. 492 (workmen lifting heavy balcony into place, and standing on scaffolding to get a "purchase" on it).

²² *Crebarry v. National Transit Co.*, 77 Hun (N. Y.) 74; s. c. 59 N. Y. St. Rep. 836; 28 N. Y. Supp. 291. A complaint alleging that a corporation manufacturing lumber caused a pile to be constructed, and provided a means of ascent in the form of steps or stairs, by means of boards allowed to project from the pile, and carelessly and negligently used a weak and defective board for one of the steps, and that plaintiff, in attempting to ascend in order to measure the lumber, stepped upon such board, which broke, and he fell and suffered in-

juries,—was held sufficient to raise an issue on the question of defendant's negligence, and *prima facie* sufficient to show defendant's responsibility,—the court holding that the case falls within the rule applying to defective ladders or scaffolds: *Fraser v. Red River Lumber Co.*, 42 Minn. 520; s. c. 44 N. W. Rep. 878. But on a subsequent appeal of the same case, the court held that plaintiff and those who piled the lumber were fellow servants, and that the making of the piles, including steps, was but a part of the work they were employed to perform: *Fraser v. Red River Lumber Co.*, 45 Minn. 235.

²³ *Ante*, § 3760; *post*, §§ 3999, *et seq.*, 4852; *Mauer v. Ferguson*, 44 N. Y. St. Rep. 372; s. c. 17 N. Y. Supp. 349; *Mulcahy v. New York &c. Dry Dock Co.*, 8 Daly (N. Y.) 93 (lessor of dry-dock not liable to servant of lessee, who built a staging with planks furnished by lessor, one of which was defective, the lessor having exercised no supervision or direction

selected by the servant sustaining the injury, then the injury will be ascribed to his own negligence.²⁴ If it is selected by his fellow servant, then the master will not be liable, on the ground that, while he himself has been without fault, the injury has been caused by the negligence of a fellow servant in the same general employment.²⁵

§ 3955. Effect of Custom of Workmen to Build Their Own Stagings.—Where a brickmason was killed by the falling of a scaffold on which he was at work, owing to its defective construction, the fact that there was a custom in the city whereby it was the duty of the persons in charge of the brickwork to construct scaffolds to be used by both the brickmasons and the stone-setters, of which custom the servant was aware, did not relieve the master from liability, in the absence of anything to show that the servant's contract of employment was made with reference to such custom, or that he waived his right to expect the master to furnish him a safe place to work.²⁶

§ 3956. What Defects in Staging, Scaffolds, etc., Are Not Defects in "Ways, Works, or Machinery."²⁷—Interpreting an Employers' Liability Act, making employers liable for injuries to their employes from defects in their "ways, works, or machinery," it has been held

over the work of constructing the staging); *Manning v. Manchester Mills*, 70 N. H. 582; s. c. 49 Atl. Rep. 91 (ladder slipped on roof for alleged reason that nails supporting it at the bottom were too short—no evidence that longer nails were not at hand—master not liable on theory of not having furnished proper appliances). Where stagings necessary for the erection of a building were erected by the workmen from suitable materials furnished by the owner of the building, by whom the workmen were employed, the owner was held not liable for injuries sustained by one of the workmen by the breaking of the staging from faulty construction, on the theory that such a scaffolding was not a "place to work," but merely an appliance for carrying on the work, provided by the workmen themselves: *Garrow v. Miller*, 72 Vt. 284; s. c. 47 Atl. Rep. 1087. To the same effect, see *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278; s. c. 47 Atl. Rep. 1085. The fact that a staging was erected before plaintiff's employment com-

menced did not render the owner liable for plaintiff's injuries caused by its breaking down, since it did not alter the owner's relation to the staging, but only tended to free plaintiff from contributory negligence: *Lambert v. Missisquoi Pulp Co.*, *supra*.

²⁴ *Oellerich v. Hayes*, 8 Misc. (N. Y.) 211; s. c. 59 N. Y. St. Rep. 221; 28 N. Y. Supp. 579. Accordingly, an employer who furnishes a good ladder is not liable for an injury to an employé falling from a defective ladder manufactured by himself or another employé, without the knowledge or direction of the employer: *Bolton v. Georgia & C. R. Co.*, 82 Ga. 659; s. c. 10 S. E. Rep. 352.

²⁵ *Ante*, § 3760; *post*, §§ 3999, *et seq.*, 4852; *Banzhaf v. Ludwig*, 28 Misc. (N. Y.) 496; s. c. 59 N. Y. Supp. 535; *rev'g* s. c. 27 Misc. (N. Y.) 821; 57 N. Y. Supp. 828 (prior to New York Laws 1897, ch. 415).

²⁶ *McBeath v. Rawle*, 192 Ill. 626; s. c. 61 N. E. Rep. 847; *aff'g* s. c. 93 Ill. App. 212.

²⁷ See *post*, §§ 4563, 4564.

that the presence of a ledge-stone upon the edge of a staging used in constructing a building, is not such a defect, although an employé working under it is injured by its falling.²⁸ Nor is a temporary staging, put up and used by painters in painting the walls of a building, a defect in "ways, works, or machinery," within the meaning of such a statute.²⁹

§ 3957. Personal Liability for Ordering Servant to Use a Defective Ladder or Scaffold.—It has been held that an employer who fails to furnish safe and suitable lumber for the construction of a staging by the employés for use in their work, and who, through his secretary, specially directs the use of a certain stringer in a specified place, is liable for an injury to an employé caused by the breaking of such stringer.³⁰ It has been held that a *wife* who, as implied agent and servant of her *husband*, orders another servant in her control and direction to use a ladder, furnished for the purpose by her husband, which she knows is unsafe, by reason of which such other servant is injured without fault on his part, is not guilty of a *misfeasance* rendering her personally liable for such injuries, such negligent order being given in the discharge of her duties to her husband.³¹

§ 3958. Evidence to Show that the Defective Ladder or Other Appliance was One Furnished by the Master.—Where a laborer employed in unloading a vessel, on arriving at his place of work in the morning, finds that a ladder, necessary to be used in the work, has been placed in position, and is being used by his fellow workmen under direction of the superintendent of the company which employs him, such circumstances are *prima facie* evidence that the ladder had been provided by his employer; and it is error to nonsuit him for lack of direct proof of such fact, in an action for an injury received while using it.³²

§ 3959. Interpretation and Application of New York Statute Imposing upon Employers the Duty of Furnishing Safe Scaffolds for their Workmen.—Under a recent statute of New York,³³ making employers primarily liable to their employés for failing to furnish safe scaffoldings to be used in the erection or repair of any house, building,

²⁸ Carroll v. Willcutt, 163 Mass. 541; s. c. 30 S. W. Rep. 102; overruling on this point s. c. 114 Mo. 221; s. c. 39 N. E. Rep. 1016.

²⁹ Adasken v. Gilbert, 165 Mass. 551; 21 S. W. Rep. 515, 859. 443; s. c. 43 N. E. Rep. 199.

³⁰ Stanwick v. Butler-Ryan Co., 93 Wis. 430; s. c. 67 N. W. Rep. 723.

³¹ Steinhauser v. Spraul, 127 Mo.

³² Mills v. Maine Ice Co., 51 N. J. L. 342; s. c. 17 Atl. Rep. 695.

³³ N. Y. Laws 1897, ch. 415, § 18.

or structure, the employer is not only bound to *furnish* a safe scaffold for the erection of a building, but he is bound to *maintain* it in a safe condition during the progress of the work.³⁴ The statute, however, refers to a *completed* scaffold, and not to one which is in the process of construction.³⁵ A vessel in the course of construction in a dry-dock, is a "structure" within the meaning of the statute.³⁶ Applying the statute, it has been held that a master was liable for injuries sustained by the fall of a scaffold negligently erected by his servant for the use of another servant, who did not know of the defect, and had nothing to do with its erection.³⁷ Under the operation of this statute, which provides that a scaffold shall be constructed to bear four times the maximum weight required to be put on it when in use, it has been held that the collapse of a scaffold having thereon only the material necessary for the purpose for which it was constructed, was *prima facie* evidence of negligence.³⁸

§ 3960. Evidence of Negligence to Charge Employer for Failing to Provide Safe Scaffolds, Ladders, etc.—Evidence that the defendant's foreman directed the plaintiff to go on the scaffold and go to work; that a plank on which the plaintiff and another were standing broke, precipitating them to the floor; and that the plank was cross-grained, and unfit for the purpose for which it was used,—is sufficient to require the submission of the case to the jury.³⁹ Evidence that the injury was caused by the breaking of a piece of cross-grained hemlock board seven-eighths of an inch thick on which a staging was placed, and that hemlock boards of such thickness are not suitable material for such purpose, particularly in cold weather, when they become brittle, and that no other kind was furnished, has been held sufficient to sustain a finding that the defendant had not used due care in furnish-

³⁴ *Healy v. Burke*, 35 Misc. (N. Y.) 384; s. c. 71 N. Y. Supp. 1027; s. c. aff'd, 36 Misc. (N. Y.) 792; 74 N. Y. Supp. 1131.

³⁵ *Pursley v. Edge Moor Bridge Works*, 56 App. Div. (N. Y.) 71; s. c. 67 N. Y. Supp. 719; s. c. aff'd, 168 N. Y. 589 (*mem.*); 60 N. E. Rep. 1119 (so that the fact that the scaffold which fell was uncompleted will stand in the way of a verdict finding the owner of the building guilty of negligence).

³⁶ *Chaffee v. Union Dry Dock Co.*, 68 App. Div. (N. Y.) 578; s. c. *sub nom.* *Chaffee v. Erie R. Co.*, 73 N. Y. Supp. 908.

³⁷ *Kuss v. Freid*, 32 Misc. (N. Y.) 628; s. c. 66 N. Y. Supp. 487.

³⁸ *Stewart v. Ferguson*, 164 N. Y. 553; aff'g s. c. 52 App. Div. (N. Y.) 317; 65 N. Y. Supp. 149 (the plaintiff was ordered to work on the scaffold *before it was completed*, but it did not appear that he knew it was uncompleted). But see, to the effect that the rule of *res ipsa loquitur* does not apply in the case of the collapse of an uncompleted scaffold, even under the New York statute, —*Pursley v. Edge Moor Bridge Works*, 56 App. Div. (N. Y.) 71; s. c. 67 N. Y. Supp. 719; s. c. aff'd, 168 N. Y. 589 (*mem.*); 60 N. E. Rep. 1119.

³⁹ *Hober v. W. P. Nelson Co.*, 101 Ill. App. 336.

ing suitable material.⁴⁰ In another case it appeared that an employer instructed his employ  s to build horses for a scaffold, to be used by the workmen in the house he was constructing, from certain particular material, of which there was *just enough for that purpose*. An employ   was injured by the breaking of a horse made of defective material, the defect not being apparent to an ordinary observer. The employ   took no part in selecting the material or putting it together. It was held that the employer's negligence in failing to afford the employ   a safe place to work was the cause of the injury.⁴² An employer was held liable for injuries sustained by an employ   from the fall of a defective scaffold which it was the employer's duty to provide, where the defect was not latent, but arose from the negligent failure of the employer or his servants to place in position foot-locks or braces which were necessary to strengthen the structure, whether the employer had actual notice of the defect or not; since the duty to furnish a safe scaffold was an absolute duty.⁴³ It was held that there was evidence of negligence, justifying a submission of the question to the jury, in an action by an employ   for injuries received while erecting a scaffold, the timbers of which were supported by iron rods from the slanting girders of an arch above, by reason of the slipping of the supporting rods upon the girders, although the employer furnished the foreman under whom this workman was employed with clamps to be placed on the girders, to prevent slipping of the supporting rods, which the foreman decided not to use, when the absence of such clamps was not a manifest, but was a hidden danger of the employment, the evidence tending to show that it required mechanical knowledge and skill to determine whether clamps were necessary.⁴⁴ A bridge contractor was held responsible to his employ  s for the safety of a scaffold which was designed to support the superstructure of a bridge while it was in the process of erection, as well as the strain of placing the various parts in position, where such scaffold was built under the direction of the company's agent, the workmen building it having *no control over its construction*; such a scaffold not being of such a character as to come within the general rule exonerating the master where he has furnished suita-

⁴⁰Twomey v. Swift, 163 Mass. 273; s. c. 39 N. E. Rep. 1018.

⁴²Brown v. Todd, 46 App. Div. (N. Y.) 546; s. c. 61 N. Y. Supp. 963 (this case distinguished from those cases in which there is a sufficiency of suitable material from which employ  s can select the necessary material).

⁴³Chicago &c. R. Co. v. Maroney, 170 Ill. 520; s. c. 48 N. E. Rep.

953; aff'g s. c. 67 Ill. App. 618 (scaffold for use of brick-masons in erecting roundhouse was such a "place" or "appliance" as it was the master's duty to furnish).

⁴⁴Hatton v. Hilton Bridge Const. Co., 42 App. Div. (N. Y.) 398; s. c. 59 N. Y. Supp. 272; s. c. aff'd, 167 N. Y. 590 (*mem.*); reargument denied, 168 N. Y. 595 (*mem.*).

ble materials and leaves the construction of the scaffold to those who are to use it, as in the case of bricklayers, carpenters, masons, etc., who know the burden to which the scaffold will be subjected.⁴⁵ Evidence of negligence was also discovered in the cases cited in the marginal note.⁴⁶

§ 3961. **Liability for Injuries from Defective Scaffolds in Shipbuilding.**—The duty of a master to provide a safe place for workmen does not make a shipbuilder liable for negligence of carpenters in preparing a scaffold for other workmen engaged in constructing a ship; since the building of scaffolds, etc., is a part of the necessary work, incident to and simultaneous with, and in fact a part of, the building of the vessel. The case is different from those where the master furnishes a *permanent* place to work, as in a ship or factory when *completed*.⁴⁷

§ 3962. **Injuries from Falling Objects through Failure to Erect Scaffolds.**—Custom, it is held, cannot excuse a failure to erect a scaffold or other safeguards on the side of a brick wall which is being built within a few feet of the entrance of a schoolhouse then in use, so as to prevent bricks from falling and injuring a pupil or any other person having a right to use such entrance. The duty to furnish safeguards in such a case is the same as though the building were being erected on a public street.⁴⁸

§ 3963. **A Question of Pleading in an Action Grounded on this Liability.**—In an action by an administrator of a deceased employé to recover damages for personal injuries resulting in the death of the plaintiff's intestate, where the counts of the complaint, after alleging that at the time of the accident the plaintiff's intestate was stationed upon a swinging scaffold, and was assisting at that point in raising an iron bar under the direct supervision of the defendant's superintendent, who had charge of said work, charge that said superintend-

⁴⁵ F. C. Austin Man. Co. v. Johnson, 89 Fed. Rep. 677; s. c. 32 C. C. A. 309; 60 U. S. App. 661.

⁴⁶ Monahan v. Eidlitz, 59 App. Div. (N. Y.) 224; s. c. 69 N. Y. Supp. 335; Sroufe v. Moran Bros. Co., 28 Wash. 381; s. c. 68 Pac. Rep. 896; Kelly v. Davidson, 32 Ont. Rep. 8; s. c. 20 Can. L. T. Occ. Notes 304; rev'g s. c. 31 Ont. Rep. 521; 20 Can. L. T. Occ. Notes 121. Cases of injuries through defective scaffolds, etc., where the em-

ployer was exonerated: Regan v. Donovan, 159 Mass. 1; s. c. 33 N. E. Rep. 702; McLean v. Cole, 175 Mass. 5; s. c. 55 N. E. Rep. 458.

⁴⁷ Beesley v. Wheeler, 103 Mich. 196; s. c. 27 L. R. A. 266; 61 N. W. Rep. 658 (riveter injured by breaking of scaffold). See *post*, § 4028.

⁴⁸ Mayer v. Thompson-Hutchison Bldg. Co., 104 Ala. 611; s. c. 28 L. R. A. 433; 16 South. Rep. 620 (injury to pupil).

ent, "knowing that to give slack to the rope to which the bar of iron was attached would probably cause said bar of iron to strike upon or against said scaffold, and cause the same to swing or oscillate, negligently ordered the persons in charge of the pulley by which said bar of iron was being hoisted to give slack to the rope, * * * which they did, and because thereof, said bar of iron was thrown or struck against said scaffold, causing the same to swing, and by reason thereof caused plaintiff's intestate to fall off the scaffold to the ground," inflicting the injuries complained of,—the complaint is insufficient and demurrable, it not being averred therein that the order given was unnecessary, or that a reasonable and probable result of the swinging of the scaffold was to throw the deceased off, or that the superintendent had any knowledge that such would be the probable or reasonable result of the giving of said order.⁴⁹

ARTICLE IX. VARIOUS GROUNDS OF LIABILITY, ALPHABETICALLY ARRANGED.

SECTION	SECTION
3966. Bacteria.	3975. Quarries and quarrymen.
3967. Building operations.	3976. Roofs of buildings.
3968. Falling of buildings, walls, etc.	3977. Steam, injuries from, other than from explosions.
3969. Flying chips, protection from, in hammering and chiseling.	3978. Supporting appliances.
3970. Foundries and their operation.	3979. Tearing down buildings.
3971. Gas-works.	3980. Telegraph-poles.
3972. Ice-house.	3981. Trestles.
3973. Platforms in buildings and in mechanical operations.	3982. Tunnels, completed and uncompleted.
3974. Poisons.	3983. Wardrobes in which to hang outer garments of employes.

§ 3966. Bacteria.—It has been held that a packing company is not liable to its employé for an injury to his eye caused by bacteria in rust from an iron rail, from which, in ignorance of the danger, he was removing an accumulation of dried and decayed blood, and rust caused thereby, where the dust from the rail settled over the clothing, faces and hands of about fifteen other persons, but did not injure them, and it was not shown that it was ever before known to produce injury.¹

⁴⁹ Decatur Car Wheel &c. Co. v. Mehaffey, 128 Ala. 242; s. c. 29 South. Rep. 646.

¹ Hysell v. Swift & Co., 78 Mo. App. 39; s. c. 2 Mo. App. Repr. 124.

§ 3967. **Building Operations.**—A master is liable for injuries to a journeyman carpenter from the fall of an iron pillar against the ladder on which the latter, under the direction of the foreman in charge of the work, had mounted, where the fall was due to the unsafe manner in which an independent contractor had braced the pillar, and the foreman had been warned that the brace was insufficient, and the carpenter was unaware of the fact and had no opportunity to discover it.²

§ 3968. **Falling of Buildings, Walls, etc.**^{2a}—A corporation has been held liable for personal injuries sustained by an employé by the fall of a shed in which he was at work, because of the weight of debris and snow, which its agents allowed to remain upon the roof, although such debris was originally placed there by his coservants.³ The employer was not relieved by the fact that the shed was well built, or that he exercised no supervision over its construction, but employed good materials and good workmen to erect it; since the duty is of an *absolute nature* in such a sense that the negligence of those employed to perform it is negligence of the master.⁴ This being so, the fact that the owner of a building in process of erection vests in the architect a discretion as to the mode of doing the work, the owner retaining control of the work, in the exercise of which discretion by the architect and under his direction, an adjoining wall is undermined for the purpose of better securing the building to be erected,—will not defeat an action against the owner for personal injuries suffered by workmen employed by him as the result of negligence in such mode of operation, or of the negligence of workmen on the premises by the invitation or permission of the owner, express or implied, such as the employés of the contractor doing the work.⁵ Although a contractor employed to build cellar walls was not required by his contract to lay the bottom for such foundation walls, yet where he knew, or the conditions were such that he should have known, that the bottom laid was not sufficient for the erection of the walls

² *Herdler v. Buck's Stove & Co.*, 136 Mo. 3; s. c. 37 S. W. Rep. 115. A building in process of construction is not "ways, work, or machinery connected with or used in the business" of a subcontractor helping to build it, so as to render a hole cut in the floor by another subcontractor a defect in the ways, works, and machinery, within the Massachusetts statute, rendering the former subcontractor liable for

an injury to one of his employés by reason thereof: *Beique v. Hosmer*, 169 Mass. 541; s. c. 48 N. E. Rep. 338.

^{2a} See *ante*, § 3882, *et seq.*

³ *Johnson v. First Nat. Bank*, 79 Wis. 414; s. c. 48 N. W. Rep. 712.

⁴ *Johnson v. First Nat. Bank*, *supra*; *ante*, § 3737.

⁵ *Campbell v. Lunsford*, 83 Ala. 512; s. c. 3 South. Rep. 522.

thereon, he might not negligently proceed with the work, and escape liability, as against his employé, for injuries caused by the fall of the walls due to such insufficient bottom.⁶ In an action by an employé for injuries occasioned by the fall of a building which was being erected over a mill in which he was working, an *instruction* was correct which stated that if the jury should find the fall was occasioned by the want of ordinary care and skill in its erection, and that the defendants knew or could have known the fact, and that the accident might have been prevented by ordinary care and skill, the plaintiff was entitled to recover, if guilty of no negligence.⁷

§ 3969. **Flying Chips, Protection from, in Hammering and Chiseling.**—The owner of a mill in which iron or steel is being chiselled,

⁶ *Cochran v. Sess*, 49 App. Div. (N. Y.) 223; s. c. 62 N. Y. Supp. 1088. There was held to be evidence tending to prove negligence of the employer, where the floor in a room in which many were employed gave way under one of them; it appearing that there had previously been an opening there two feet square, that the employer had allowed it to be unsecurely covered over by the lessor, at his request, without replacing the joists which had been cut out, that a year before the accident it had broken under the weight of a girl, and that at the time it was covered over with a board which looked like a thin packing-box lid: *O'Brien v. Sullivan*, 195 Pa. St. 474; s. c. 46 Atl. Rep. 130. Where a switch-track ran under the sheds of a brick-kiln, the railroad company, though not owning the shed, owed its employés the duty of seeing that it was in a reasonably safe condition, and was hence liable to a brakeman on whom the roof of the shed fell by its own weight, while he was coupling cars thereunder; and it was improper to direct a verdict for the defendant, it being a question for the jury: *Doyle v. Toledo &c. R. Co.*, 127 Mich. 94; s. c. 86 N. W. Rep. 524; 8 Det. Leg. N. 249; 54 L. R. A. 461.

⁷ *Hearn v. Quillen*, 94 Md. 39; s. c. 50 Atl. Rep. 402. The plaintiff, an unskilled laboring-man, was assisting in removing from a building a boiler which extended through a brick wall, so that the wall had to be "punched out" in

order to let the boiler through. Bricks had fallen from the space through which another boiler had been removed, and some of the bricks were loose, so that a brace was placed there to sustain them. The plaintiff had seen two other boilers removed in the same way, and had never worked at brick-work, and did not know that the wall was defective, or the work dangerous; and, while assisting in punching out the wall, it fell and injured the plaintiff. It was held that it was error to direct a verdict for the defendant, as there was evidence from which a jury might have found that the defendant negligently failed to provide a safe place to work, or to provide such rules and measures as might have protected the plaintiff: *Proffitt v. Missouri &c. R. Co.*, 95 Tex. 593; s. c. 68 S. W. Rep. 979. Master held liable for the breaking through of a floor over which his servant was required to move a truck carrying a heavy casting: *W. C. De Pauw Co. v. Stubblefield*, 132 Ind. 182; s. c. 31 N. E. Rep. 796. Corporation exonerated from liability for the giving way of a floor in a building in which a quantity of grain was stored, on the ground that it was justified in believing that the floor was strong enough to hold the weight: *Dillon v. Sixth Ave. R. Co.*, 48 N. Y. Super. 283. Master held liable to servant for the breaking of an insufficient support of a heavy tank: *Consolidated Ice Mach. Co. v. Kiefer*, 26 Ill. App. 466.

chipped, or cut, is bound to exercise reasonable care and to supply reasonable devices to prevent his servants from being injured by flying chips, splinters, or fragments of the metal; and where the exercise of reasonable care demands such a precaution, he is bound to adopt some *system*,⁸ or make and enforce reasonable *rules*,⁹ devised for the prevention of accidents of this nature, and his negligence in this particular will generally be a question for a jury. Thus, where the plaintiff, while holding a piece of iron pipe over the head of a bolt which was being driven, was injured by a chip flying from the pipe, and it appeared that the bolts were usually protected by holding some such metal over them, but that copper hammers had been made for a number of years for such work, and that piping was the least desirable of the metals used, because of its brittleness, the question of the defendant's negligence in failing to provide proper material was for the jury.¹⁰ So where, in an action for injuries caused by a piece of steel which flew off a riveting-hammer used by the plaintiff's coemployé, it was shown that such hammer was cracked and chipped from use, and necessarily highly tempered, and that such hammer, when so cracked, was very liable to splinter when in use, and that when sound and new there was little likelihood of its splintering,—it was not error to submit to the jury the question whether or not the defendant had used ordinary care in furnishing such coemployé with a reasonably safe hammer.¹¹ So, where an employé in a mill was injured by a piece of flying steel cut by shears which were worked with steam-power, and it appeared that the cutting of steel was much more dangerous than the cutting of iron, and that no *system* had been adopted to give warning when steel was being cut, although the foreman had usually given such warning,—it was held that the mill-owner was liable although the machine was a perfect one of its kind.¹²

⁸ Choate v. Ontario Rolling Mill Co., 27 Ont. App. 155.

⁹ Smith v. Lidgerwood Man. Co., 56 App. Div. (N. Y.) 528; s. c. 67 N. Y. Supp. 533.

¹⁰ Littlefield v. Edward P. Allis Co., 177 Mass. 151; s. c. 58 N. E. Rep. 692.

¹¹ De la Vergne & Co. Mach. Co. v. Stahl, 24 Tex. Civ. App. 471; s. c. 60 S. W. Rep. 319.

¹² Choate v. Ontario Rolling Mill Co., 27 Ont. App. 155 (plaintiff was engaged in removing pieces as they were cut). In another case a servant was injured, while in the employ of his master, in a large machine-shop, by being struck in the eye by a piece of iron chipped from

a machine by another employé at work nine to twelve feet away. The master had not made and enforced any *rules* which would have prevented such accident, although many employés had received slight injuries, and there was a practical way of preventing such accidents, by the use of screens, which could be improvised by the workmen, and which were in general use in similar shops, but were not required to be used by any rules of the defendant, although the evidence showed that the business was complex enough to require definite rules. It was held that the negligence of the master, in failing to make and enforce rules for the prevention of

§ 3970. **Foundries and their Operation.**—Proof that a rule of a steel company, that molds of a certain class, which were rounding on the bottom, should be laid down when poured, was violated by leaving such a mold standing on end with the empty molds, and that within twenty minutes after it was thus left standing it fell over on an employé, is sufficient to justify a finding that the servants of such company were guilty of negligence; and the plaintiff, a track-repairer in the mill, not being a fellow servant with the iron-workers, was entitled to recover.¹³ Although the owner of a foundry may not be guilty of negligence in failing to guard the knives in a molding-machine at the point where a servant is hurt, yet it may be a question for a jury whether he was guilty of negligence in failing to warn the servant, in view of his age and lack of experience, of the danger of working around the machine.¹⁴ There was no question for the jury as to whether a safe place to work in was provided, where a teaspoonful of molten iron was spilled in a foundry, and, striking on the damp floor, exploded, and a portion of it flew into an employé's eye, and the employé had not been warned of the danger, though there was evidence that the floor was made too damp or used too soon after sprinkling, and that it was the practice in other foundries to sprinkle several hours before molding was done, and that the iron, falling on dry earth, was not likely to explode, where the foundry was, in general, in as safe a condition as any.¹⁵

such danger, would make it liable for the injury to the servant: *Smith v. Lidgerwood Man. Co.*, 56 App. Div. (N. Y.) 528; s. c. 67 N. Y. Supp. 533.

¹³ *Joliet Steel Co. v. Sniels*, 146 Ill. 603; s. c. 34 N. E. Rep. 1108; aff'g s. c. 45 Ill. App. 453.

¹⁴ *Torske v. Commonwealth Lumber Co.*, 86 Minn. 276; s. c. 90 N. W. Rep. 532.

¹⁵ *Nowakowski v. Detroit Stove Works*, 130 Mich. 308; s. c. 9 Det. Leg. N. 25; 89 N. W. Rep. 956 (Montgomery, J., dissenting). The temporary dampness of molds used in an iron foundry, which can be ascertained only at the moment when they are set up, causing an explosion when they are poured, injuring the servant engaged in the act, is not a defective condition of the machinery within the Massachusetts statute or the rules of the common law respecting the duty of a master with respect to his machinery, where the molds are small and numerous and the danger tran-

sitory, and any further inspection than that of employés setting them up is impracticable: *Whittaker v. Bent*, 167 Mass. 588; s. c. 46 N. E. Rep. 121. A molder in a foundry, of but few weeks' experience, was provided with rusty molds, and was not informed and did not know that molten iron would explode on coming in contact with rust, which would require actual experience, special knowledge or scientific skill to know. The room was poorly lighted, and the molder could have lighted the gas, but had been told to make a light by pouring molten iron on the sand near the flask, and in doing this the iron got on the mold and exploded, and he was injured. It was held, in an action against the employer for such injuries, that the question of defendant's negligence was properly submitted to the jury: *Hall v. United States Radiator Co.*, 52 App. Div. (N. Y.) 90; s. c. 64 N. Y. Supp. 1002 (but judgment reversed for error in giving instruction from

§ 3971. **Gas-Works.**—It has been held that a master is not bound to anticipate that an abandoned brick cistern which he directs his servant to penetrate for the passage of gas-pipes contains water, and that the water is poisonous and likely to find its way into the servant's shoes and injure him by causing eczema. It is the master's duty to guard his servant against probable, but not *possible* dangers.¹⁶

§ 3972. **Ice-House.**—The fact that cakes of ice occasionally fell off a runaway at an ice-house, while employes underneath it were engaged in assisting others in transporting the ice from a river to the ice-house, is notice to the proprietors of the dangers of the location, and requires of them the use of ordinary care for the protection of such employes from danger.¹⁷

§ 3973. **Platforms in Buildings and in Mechanical Operations.**—An employer cannot be said to be negligent toward an employé in using cross-pieces to raise a platform, although it might be more easily accomplished by blocks and tackle, where there is a difference of opinion among experts and also among non-experts as to which method is better and safer.¹⁸ Negligence in failing to provide a platform on a car used in hauling clay from a clay-pit, sufficient for the plaintiff to stand on, was not proved where the evidence failed to show that the narrowness of the platform aided in producing the injury.¹⁹ A

which jury might infer it was defendant's duty to see that the gas was lighted).

¹⁶ *Lawless v. Laclede Gas Light Co.*, 72 Mo. App. 679 (gas company connecting private house with main). A gas company was held liable for an injury to an employé caused by gas which was turned into the mains four days before, while they were being laid, at the order of its president, although he was also the chief engineer of a construction company which had a contract to lay the mains,—the two companies being closely related, and having their offices in the same building, and the person who gave the order testifying that he did not know in which capacity he gave the order, whether as president of the gas company or chief engineer of the construction company: *Chicago Economic Fuel Gas Co. v. Myers*, 64 Ill. App. 270; s. c. 1 Chic. L. J. Wkly. 276.

¹⁷ *Knickerbocker Ice Co. v. Bernhardt*, 95 Ill. App. 23.

¹⁸ *East St. Louis Ice &c. Co. v. Sculley*, 63 Ill. App. 147.

¹⁹ *Youngbluth v. Stephens*, 104 Wis. 343; s. c. 80 N. W. Rep. 443 (plaintiff stood on projecting platform of car with his back turned in the direction in which the car was moving, though he had been warned to face the other way and watch the cable by which the car was drawn; cable caught under loose board between rails, raised its end up, and thereby crushed plaintiff's leg between end of car and end of board; if he had been facing the other way he could have seen what was happening in time to have car stopped). Whether an employer was negligent in not employing "skilled workmen" is properly submitted to the jury in an action for injuries from the giving way of a defective platform erected for use in building a one-story shed, where the workmen who built it were usually occupied in other employments; since the term will be understood to imply merely such

platform, though consisting of two loose and movable boards placed on beams, and running over a series of bins, being one on which a part of the employer's work is regularly done, the workmen having to stand on it to dump material into the bins, is a *permanent structure*, and a "place" to work in, and, it having broken when the employé was on it, and precipitated him into a bin, injuring him severely, and there being evidence that it was moth-eaten and rotten, negligence of the master is a question for the jury.²⁰

§ 3974. **Poisons.**—In an action against the master for injuries from contact with metallic poisons in the liquid in a cleaning-vat at which the plaintiff was required to work, the complaint did not allege that the injuries were due to any particular poison in the liquid, but averred that it contained several chemical and metallic poisons. The plaintiff's physician stated that the liquid contained several metals deleterious to health, but could be certain only of the poisons lead and potash. It was held that it was not error to refuse to take from the consideration of the jury any other substance save lead and potash.²¹

§ 3975. **Quarries and Quarrymen.**—An inference of negligence on the part of an employer toward a quarryman may be made from the fact that a rock which had fallen upon a shelf two and a half years before and was left there, subsequently fell and killed such quarryman, without anything unusual occurring to cause its fall.²² In dealing

knowledge of building and materials as to enable them to build a platform that would be safe for those engaged thereon: *Haworth v. Seevers Man. Co.*, 87 Iowa 765; s. c. 51 N. W. Rep. 68; 62 N. W. Rep. 325.

²⁰ *Cunningham v. Sicilian &c. Paving Co.*, 49 App. Div. (N. Y.) 380; s. c. 63 N. Y. Supp. 357.

²¹ *Texas &c. R. Co. v. Gardner*, 29 Tex. Civ. App. 90; s. c. 69 S. W. Rep. 217. In this case it appeared that the servant was required to immerse pieces of machinery in a vat containing lye and caustic soda kept at a high temperature, and to clean the machinery with a steam-jet on their removal, during which operation particles of dirt, grit, etc., adhering to the machinery, were sometimes blown back into his face. He sued for injuries due to contact with chemical and metallic poisons and inhalation of

vapors from the vat. His witnesses testified that his ill-health was due to potash and lead, and that the condition had subjected him to other poison. It was held sufficient to support a verdict that the injuries were due to contact with the poisons: *Texas &c. R. Co. v. Gardner*, *supra*.

²² *Haggerty v. Hallowell Granite Co.*, 89 Me. 118; s. c. 35 Atl. Rep. 1029. In an action by a servant for injuries sustained by reason of the earth falling on him while working at the bottom of a quarry, an *instruction* that an employer is under no greater obligation to look after the safety of the servant than the servant is to look after his own safety, is erroneous, as ignoring the fact that the servant was working at the particular place under the express orders of the defendant, and therefore was not on an equal footing with it: *Western Stone*.

with injuries to quarrymen from the *explosion of blasts*, it is necessary to distinguish carefully between those acts or omissions which are imputable to the employer as an absolute duty, and those which are to be attributed to the negligence of a fellow servant. Generally it may be said that where the master furnishes suitable materials to be used by his servants in blasting, and gives them proper instructions in the use of them, he will not be liable for the death or injury of a servant, who has been struck by a missile from a blast, where the blast was not properly covered, and where the employ  s were not warned that a blast was about to be exploded, and were afforded no opportunity of seeking a safe place, and where the accident would not have happened but for the failure of a coemploy   to give the customary and timely warning, which failure will be deemed the negligence of a fellow servant, and not that of the master, and which will consequently render a decision of the question whether the master was negligent unnecessary.²³

   3976. **Roofs of Buildings.**—One who erects a building and constructs a temporary roof in which he places a flat skylight consisting of a frame with thin plates of ordinary window-glass, projecting but a few inches above the level of the roof, at a time of the year when snow must be shovelled off the roof, has not, as a matter of law, discharged his duty to make a reasonably safe place in which to work toward employ  s who shovel off such snow, where the snow is deep enough to entirely hide such skylight, which is unprotected, and a shoveller falls through the skylight and is killed; but the question is for the jury.²⁴

Co. v. Muscial, 196 Ill. 382; s. c. 63 N. E. Rep. 664; aff'g s. c. 96 Ill. App. 288. It has been held that a railroad company is not guilty of negligence toward an *employ   in a quarry* through a locomotive striking a wire rope of a derrick which had been caused to fall across the track by a blast, where the presence of the rope was unknown to the railway company's employ  s, and it was not visible at any distance, and the owner of the quarry, who knew the rope was across the track, signalled the engineer to enter, and the track belonged to the quarry-owner, and not to the railway company: *Forrest v. Philadelphia &c. R. Co.*, 174 Pa. St. 181; s. c. 38 W. N. C. (Pa.) 70; 34 Atl. Rep. 601.

²³ *Gallagher v. McMullin*, 25 App. Div. (N. Y.) 571; s. c. 49 N. Y. Supp. 734. Barrett, J., dissented on the ground that the negligence of the fellow servant could not be considered the sole, proximate cause of the injury unless it could be said, as matter of law, that the accident would have happened if the blast had been covered, which it was impossible to say, but that the case was for the jury.

²⁴ *Garety v. King*, 9 App. Div. (N. Y.) 443; s. c. 41 N. Y. Supp. 633; 75 N. Y. St. Rep. 1030 (but judgment for plaintiff reversed for error in charge as to assumption of risk).

§ 3977. **Steam, Injuries from, Other than from Explosions.**—Where a locomotive, having a leaky throttle-valve that had been several months known both to the superintendent and the engineer, was left by the latter without his using certain means he knew of (opening the cylinder-cocks) to prevent the escape of steam into the cylinder moving the engine, by reason of which it injured an employé of the company, who was repairing a car on a side-track,—it was held that the company was liable for the injury.²⁵ It has been held that the failure of an employer to repair a steam-gauge attached to a boiler used in operating a pile-driver, after notice that it was defective, will not render him liable for injuries from the escape of steam from the safety-valve, to an employé who went upon the boiler to examine where an alteration could be made, believing such gauge to indicate the steam-pressure, where the employer could not have anticipated that employés would go upon the boiler when under steam.²⁶

§ 3978. **Supporting Appliances.**—Negligence may be imputed to an employer for an injury to an employé, caused by the fall of a heavy iron weight attached to a gate on a fourth floor, where the block which might have prevented the fall of such weight had long been absent from its place, and the rope holding the gate was rotten from constant use, and had not been replaced by any new rope during six months preceding the accident, and there is no proof that any inspection had ever been made; and the question was properly submitted to the jury.²⁷ In an action by an employé against his employer to recover damages for injuries caused by the fall of an elevator, where it appeared that the elevator was an old one, fitted with an old *rope* which had once parted, and that twice before the elevator had fallen for some distance, there was sufficient evidence of negligence to submit to the jury.²⁸ A smelting company owes to its employés the duty of making use of such skill and care as a man of ordinary skill and care would exercise under similar circumstances, in fastening in a hook-socket the end of a cable

²⁵ *Cone v. Delaware &c. R. Co.*, 81 N. Y. 206; s. c. 37 Am. St. Rep. 491; aff'g s. c. 15 Hun (N. Y.) 172.

²⁶ *McCallum v. McCallum*, 58 Minn. 288; s. c. 59 N. W. Rep. 1019 (the gauge indicated sixty-five pounds' pressure; but as safety-valve was in proper condition, the fact that it blew off showed that the real pressure was ninety-five pounds, for which it was set). Evidence in a case where an oiler on a steamship was fatally scalded by escaping steam, when the cushion-

valve, including the rod, wheel and bonnet, blew out,—which justified a finding by the jury that the deceased was not guilty of contributory negligence: *Hoes v. Ocean S. S. Co.*, 56 App. Div. (N. Y.) 259; s. c. 67 N. Y. Supp. 782; s. c. aff'd, 170 N. Y. 581 (*mem.*).

²⁷ *McGuigan v. Beatty*, 186 Pa. St. 329; s. c. 42 W. N. C. (Pa.) 277; 40 Atl. Rep. 490.

²⁸ *Bier v. Standard Man. Co.*, 130 Pa. St. 446.

used for drawing cars up an incline; but if it uses the best and most approved method it is not liable to an employé in consequence of its giving way.²⁹ A master is liable for the negligence of a superintendent who fails to provide a beam of sufficient strength to support blocks and chain-tackle when used for hoisting an iron tank.³⁰

²⁹ *Quintana v. Consolidated & Co.* Smelting Co., 14 Tex. Civ. App. 347; s. c. 37 S. W. Rep. 369.

³⁰ *Fraser v. Collier*, 75 Ill. App. 194 (foreman had offered to brace the beam if the superintendent did not think it was strong enough—which was held to suggest to the superintendent that there might be a question as to its strength). Evidence that a sling in which cotton-bales were being raised broke, injuring a workman, is not sufficient to show negligence of the employer, without proof as to how much the sling was intended to or should carry, or that it was being properly used, and in the usual manner, by the workman or his coemployés: *Madden v. Occidental & Co. S. S. Co.*, 86 Cal. 445; s. c. 25 Pac. Rep. 5. If the latter fact had been proved, the court “conceded” that the rule *res ipsa loquitur* would have applied. Non-liability of a railroad company for the death of a fireman sustained in jumping from an engine upon discovering a log across the track, where the chain by which the log was being pulled across the track by a third person broke, and the crossing was properly constructed for the purpose of public travel: *Lake Shore & Co. R. Co. v. Brazzill*, 13 Ohio C. C. 622; s. c. 6 Ohio C. D. 362; 2 Ohio Dec. 691 (it was claimed that the company was negligent in constructing the railway at the crossing three feet above the natural level of the road, so that there was a sharp rise of the road on each side of the tracks, instead of lengthening the approaches and reducing the grade of the rise, and that it was by reason of such construction that the log became stalled on the track and the chain broke by reason of the strain—under a statute requiring railroad companies to construct “safe and sufficient crossings”). The plaintiff, employed by the defendant in the hold of a ship, was injured by the fall of a bale of cot-

ton which was being lowered into the hold. The evidence tended to show that the *hooks* by means of which the cotton was lowered had become dull from long use, and unsuitable in shape, so that they would not properly take hold of the cotton; that the cotton fell by reason of such defect; and that the defect had existed for such a length of time that the defendant, in the exercise of ordinary care, should have discovered it. The evidence was held to warrant the verdict of the jury that the defendant was guilty of actionable negligence: *Ocean S. S. Co. v. Matthews*, 86 Ga. 418. The plaintiff, while pulling down an iron door of a core-oven, which door was moved by means of a *chain* running over pulleys, and fastened to the top of the door, a weight being attached to the other end of the chain, was injured by the weight falling on him. The accident was caused by the breaking of the chain, which on inspection was found to have been connected together at one point with wire, which had broken or pulled apart. The plaintiff was unaware of this wire connection; and a fellow servant who had been in the defendant's employment for eight years testified that he too was ignorant of it, and had never seen the chain inspected or repaired. It was held that the plaintiff made a sufficient showing to go to the jury: *Tangney v. Wilson & Co.*, 87 Mich. 453. The plaintiff, employed in the defendant's iron foundry, was helping to raise the door of an oven for baking molds. The door was counterbalanced by weights hung on *hooks* at the ends of chains, and a chain hung from each weight to the ground, on which the employés pulled in raising the door. One of the hooks broke and the weight fell on the plaintiff, who was underneath it, pulling. The evidence tended to show that the hook broke at a place where there was a flaw;

§ 3979. **Tearing Down Buildings.**—The work of tearing down an old building is necessarily attended with dangers which arise in the

that there was a visible crack or flaw in the hook above the place of rupture; that a careful examination might possibly have disclosed the flaw which caused the accident, but that the flaws would not be visible on an ordinary inspection. It was held that the jury would be warranted in finding negligence on the part of the defendant: *Spicer v. South Boston Iron Co.*, 138 Mass. 426. A servant, while properly using a hat-pressing machine, not known to him to be out of repair, was injured by the breaking of an iron rod supporting a "dome" at one end and counterweights at the other end. It appeared that the master had caused the machine to be altered so that the "dome" was larger and heavier, and required two iron balls to counterbalance it instead of the one ball furnished by the maker of the machine, but the same rod was retained. In the operation of the machine the weights acquired a pendulum motion, sometimes striking the sides of the building and the floor; and the rod striking certain iron pipes. These blows had a tendency to cause the rod to take on a crystalline structure and become brittle, so as to require annealing from time to time, which was not done. The rod had not been inspected for nearly two years. At the point where the rod broke were indications of a flaw. The evidence was held to justify a finding that the plaintiff was free from negligence and that the master was negligent: *Moynihan v. Hills Co.*, 146 Mass. 586. Railroad companies are not required to make a more careful or closer inspection of a *lifting-jack*, purchased of reliable and well-known maker of such tools, than bridge-builders, house-raisers, or other persons, engaged in equally heavy work, and furnishing such a tool to their employes. But if a railroad company purchases such a tool of such a maker, and, at the time of purchase, there is a latent or concealed defect therein, consisting of a defective weld of the foot attached to the jack, which is not discoverable by any ordinary and

usual inspection, yet, if, after being used, such jack is sent to the shops to have worn or broken cogs repaired, and if, in repairing the jack, it is or ought to be the practice at the shops, before the jack is sent out again for use, to examine the tool for other defects, and any reasonable examination by the *iron-workers* at the shops would disclose the defective weld, then the company is negligent in sending out from its own shops such jack with the defective weld unrepaired, even if the defect is not visible: *Kansas City & C. R. Co. v. Ryan*, 52 Kan 637 (*dictum*—case not tried upon above theory, and evidence conflicting as to whether jack had been sent in for repairs at all). The plaintiff, a stevedore in the defendant's service, was engaged in loading the defendant's ship with iron girders, which were being lifted on board by a chain attached to a donkey-engine, when the chain snapped and allowed a girder to fall on the plaintiff and injure him. The evidence tended to show that some of the links were badly worn, and some badly welded, and that a person accustomed to handle and deal in chains could have observed these defects upon a slight examination; and that there were well-known and ordinary methods adopted by "chain-testers" for examining and testing chains. The chain in question had been used by the defendant for seven years, but had not been examined or tested in any way before the accident. It also appeared that the plaintiff had no knowledge or experience of chains. There were special findings by the jury that the breaking of the chain was caused partly by its worn condition and partly by bad welding; that it was not in a fit condition for the work it was put to or to sustain the weight lifted by it; that the defendant did not know of the defective state, but might have discovered it had he examined the chain himself or had it examined by a competent person. It was held that the defendant was guilty of negligence entitling the plaintiff to

progress of the work, and which the master cannot always anticipate and provide against. Therefore, it has been held that the rule which makes it incumbent upon a master to provide his servant with a safe place within which to work does not apply in such situation;³¹ though it is conceded to be the duty of the master not to send his servants into a place which he knows to be dangerous without apprising them of the danger, and not to change the place wherein they are at work so as to make it less secure without giving notice to them.³² Accordingly, it has been held that the failure of a contractor, before attempting the removal of material in tearing down a building, to clean it up by removing the nails from partially burned timbers, or permitting it to be done by those in his employ, as matter of law is not negligence.³³ In

recover: *Murphy v. Phillips*, 35 Law T. (N. S.) 477; s. c. 24 Wkly. Rep. 647 (no off. rep.) (discharging a rule to enter a nonsuit). An employer is not liable for the death of a workman killed in his coal-yard by the breaking of a chain supporting an iron bucket by means of which barges were unloaded, where the accident might have been due to latent defects in the chain, to the strain to which it was subjected by the giving way of other parts of the machinery, or to weakness induced by the jerking attendant upon the frequent dropping of the bucket, but which was not shown to be of such a character as materially to weaken it, or to be attributable to defects in the machinery, negligence in its management, or of such frequency as to charge the defendant with knowledge; the chain having been in use but three months, and apparently in good condition, and strong enough to bear eight times the weight put on it, and being such a chain as in ordinary use should have lasted many years: *McClain v. Henderson*, 187 Pa. St. 283; s. c. 40 Atl. Rep. 985. In another case the defendant was engaged in putting in a tier of false-work for an iron bridge, the work consisting of bents supported on piles. The plan required longitudinal cross-braces between the bents to prevent them from tipping over lengthwise of the work. No braces had been put in between the last three bents, and none were being put in, when a traveller, weighing thirty tons, was run out over them, and put to work

in raising timbers and materials to place, and such bents and the piles under them were broken down by the weight, killing the plaintiff's intestate, who was working underneath. It was held that the structural defects of the work and the putting of the unbraced bents to use for carrying the traveller were matters for which the defendant was responsible under its duty to exercise care to provide its servants with a reasonably safe place in which to work, and that it could not avoid liability on the ground that the negligence was that of fellow servants of the deceased. The defects were structural, not merely incidental to the doing of anything for the completion of these parts of the work. The procuring and manner of setting the piles, and the putting of these bents to use for carrying the traveller as if completed, belonged to the defendant, as master, represented by those put in charge of the whole, and who while so acting were not fellow servants of the workmen: *Beattie v. Edge Moor Bridge Works*, 109 Fed. Rep. 233.

³¹ *Merchant v. Mickelson*, 101 Ill. App. 401; *Western Wrecking & Co., v. O'Donnell*, 101 Ill. App. 492; *Clark v. Liston*, 54 Ill. App. 578 (defendant was not required to keep the joists in such building in a safe condition for plaintiff to walk or stand on while engaged in tearing off laths and plaster).

³² *Clark v. Liston*, 54 Ill. App. 578.

³³ *Merchant v. Mickelson*, 101 Ill. App. 401.

the destruction of a building there is no attempt or obligation on the part of the master to make it secure; but, on the contrary, the work of removal is one in which in turn each part of the structure becomes insecure. This every workman understands, and he must be governed accordingly. But while a person engaged in the demolition of a building is not bound to furnish a workman engaged therein with a safe place to work, he is under an obligation not to send him into a place known to the master to be dangerous, and which the workman cannot perceive to be so by the use of ordinary care. Nor may the master, without notice to the workman, so change the character of the place where he is at work as to render it more insecure.³⁴ Accordingly, it was held that a master engaged in the demolition of a building was under no obligation to a workman employed to remove lath, to fasten the ends of joists which had been left loose by the removal of a stairway prior to the employment of such workman, so as to afford him a safe place to work; since he had no right to assume that the place was safe. And, it not appearing that any change had been made in the character of the joists for safety after he was put at work, but the support of the joists at the time he fell appearing to have been the same as when he went to work, the master was not liable.³⁵ It has been held that one contracting to repair a building destroyed by fire is in law chargeable with knowledge of the existence of danger caused by the peculiar arrangement of some of the interior appointments of the building, such as an elevator-shaft, stairways, etc., which under certain conditions may become sources of hidden danger to one unfamiliar with their location, and is under the duty of guarding the servant of one whom he employs to rebuild against such danger.³⁶ In another case the master adopted an *improper and unsafe method* of demolishing a building, whereby the plaintiff was injured. The master testified that he did not know or believe that it was a dangerous method, but attempted to defend on the ground that the plaintiff did know the danger and assumed the risk. It was held that the servant had a right to rely upon the superior knowledge and judgment of the master, and was not bound to know more than his master, the danger not being obvious.³⁷

³⁴ Clark v. Liston, 54 Ill. App. 578.

³⁵ Clark v. Liston, 54 Ill. App. 578.

³⁶ Butler v. Lewman, 115 Ga. 752; s. c. 42 S. E. Rep. 98 (stairway and elevator-shaft both contained in a square off-set from partition wall, two doors leading to stairway and and one opening on elevator-shaft;

doors all in same wall, and about same distance apart, and unlocked, but closed; place was dark, and servant walked through door to elevator-shaft while trying to get to stairway—master negligent).

³⁷ Faren v. Sellers, 39 La. An. 1011; s. c. 3 South. Rep. 363. In another case the plaintiff and his fellow servants were pulling the

§ 3980. **Telegraph-Poles.**³⁸—Under the rule that it is the positive duty of the master to provide a servant with a reasonably safe place in which to work, having regard to the nature of the employment, it is the duty of a telegraph company (the jury having found that it is not the duty of a lineman) to see that proper inspection is made of poles which its linemen are required to climb in the course of their duty; and the negligence of a foreman to whom such duty is delegated is the negligence of the company, which renders it liable for an injury done to a lineman by the breaking of a decayed pole on which he was at work, the unsafe condition of which would have been discovered by efficient inspection.³⁹

§ 3981. **Trestles.**—A trestle—and especially a railway trestle—is a very dangerous structure, and its fall is generally attended with calamitous consequences. Nevertheless, if the railroad company exercises what is termed ordinary care in its construction and repair, it will not be liable in damages to a brakeman who is injured by reason of a train breaking through it.⁴⁰ It has been held that where a trestle used to supply coal to locomotives had been constructed for nearly twelve years, and some of the boards out of which the floor on it was made were half decayed, a jury will be justified in finding that such floor was rotten and dangerous, and had been so for a sufficient length of time for the proprietor, in the exercise of reasonable care, to learn of its dangerous condition and repair it;⁴¹ that a railroad company is not liable for injuries received by an employé engaged in the *removal of trestles*, due to the insecurity of a timber apparently solid and fixed, over which the employé was obliged to pass, and which, tilting up, threw him to the ground below, in the absence of knowledge or reason-

lower end of a brace from a building by a rope, when it struck an obstruction; and plaintiff was directed by defendant's foreman to raise the brace over the obstruction, and, before doing so, told the foreman to wait; but foreman directed the other workmen to pull before the plaintiff had lifted the brace over the obstruction, which caused it to fall on plaintiff. It was held that the negligence of the foreman authorized a verdict for plaintiff: *Missouri &c. R. Co. v. Walden*, 27 Tex. Civ. App. 567; s. c. 66 S. W. Rep. 584.

³⁸ See also, §§ 4036, *et seq.*, 4118.

³⁹ *Tracy v. Western Union Tel. Co.*, 110 Fed. Rep. 103; s. c. *aff'd sub nom.* *Western Union Tel. Co.*

v. Tracy, 114 Fed. Rep. 282; 52 C. C. A. 168. Where an employé was injured by the fall of a telegraph-pole through no fault of his own, evidence that the pole fell because it was not placed deep enough in the earth, or because the supporting earth had been worn away, established a *prima facie* case for recovery, in the absence of evidence that the defect was not discoverable by reasonable diligence: *Riker v. New York &c. R. Co.*, 64 App. Div. (N. Y.) 357; s. c. 72 N. Y. Supp. 168.

⁴⁰ *Dolan v. Sierra R. Co.*, 135 Cal. 435; s. c. 67 Pac. Rep. 686.

⁴¹ *McLean County Coal Co. v. Simpson*, 97 Ill. App. 21; s. c. *aff'd*, 196 Ill. 258; 63 N. E. Rep. 626.

able ground to know of such insecurity on the part of the company;⁴² and that a master cannot be held liable for an injury received by an adult servant by falling from a trestle on which he was standing, which was eight feet high and five inches broad at the top, on the ground that such trestle was not a reasonably safe appliance for the purpose for which it was used, no objection having been made thereto by the servant.⁴³

§ 3982. Tunnels, Completed and Uncompleted.—Where a permanent tunnel is under construction, as fast as completed the finished part becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted, and he will be liable for injuries caused to employés working therein from overhanging rock.⁴⁴ Where experienced miners testified that, when working in a tunnel, they had formed the opinion that it was not reasonably safe, and needed timbering, the court reasoned that the superintendent should have known as much about its condition as the workmen under him, and that he was hence presumed to have known that the tunnel needed timbering; and hence, that for his negligence in failing to provide timbers, the mine-owner was liable to an inexperienced laborer, injured by reason of the lack of timbering.⁴⁵

§ 3983. Wardrobes in which to Hang Outer Garments of Employés.—An employer discharges its full duty with reference to providing a safe place for the outer garments of its employés, by providing an *open wardrobe* for that purpose, situated in a locked inclosure inaccessible to the public, and under the guard and supervision of a

⁴² Moore v. Pennsylvania R. Co., 167 Pa. St. 495; s. c. 31 Atl. Rep. 734 (no evidence that company knew, or in the exercise of reasonable care could have discovered, such insecurity—risk incident to the employment).

⁴³ Garnett v. Phoenix Bridge Co., 98 Fed. Rep. 192 (servant fell on account of breaking of a wrench which he was using). A brakeman was killed by the giving way of a trestle-work, near which the railroad company had allowed combustible material to accumulate, which caught fire and burned the trestle-work. The track was over a sink-hole in a marsh, and old ties, etc., were piled there to keep the embankment up. It was held in a suit brought by the brake-

man's administrator against the company, that, though the use of combustible material for such purpose was not of itself negligence, the question of the defendant's negligence was properly left to the jury,—it being for them to say whether due care had been taken, in view of the nature of the material, to prevent, discover, or extinguish fire: Near v. Delaware & Canal Co., 32 Hun (N. Y.) 557; s. c. aff'd, 98 N. Y. 663 (*mem.*).

⁴⁴ Hanley v. California Bridge & Co., 127 Cal. 232; s. c. 59 Pac. Rep. 577; 47 L. R. A. 597 (the work had progressed, for four days, beyond the point from which the rock fell).

⁴⁵ Hanley v. California Bridge & Co., 127 Cal. 232; s. c. 59 Pac. Rep. 577; 47 L. R. A. 597.

competent employé, who uniformly remains by the door all day, and permits only employés to enter, at stated times.⁴⁶

⁴⁶ *Cantancarito v. Siegel-Cooper* 29 (plaintiff, who was familiar Co., 23 Misc. (N. Y.) 664; s. c. 52 with the arrangements, assumed N. Y. Supp. 29; 86 N. Y. St. Rep. whatever risks there were).

CHAPTER CIX.

DUTY OF EMPLOYER TO PROVIDE HIS SERVANTS WITH SAFE MACHINERY, TOOLS, AND APPLIANCES.

- ART. I. General Doctrines and Applications, §§ 3986-4013.
 ART. II. Unguarded or Unfenced Machinery, §§ 4017-4024.
 ART. III. Derricks, Lifting-Cranes, etc., and their Operation,
 §§ 4026-4034.
 ART. IV. Electrical Appliances, §§ 4036-4039.
 ART. V. Applications of the Doctrine to Various Kinds of Ma-
 chinery, Appliances, etc., §§ 4041-4046.

ARTICLE I. GENERAL DOCTRINES AND APPLICATIONS.

- | SECTION | SECTION |
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| 3986. Duty of master to provide reasonably safe tools, machinery, and appliances. | 3997. Rule does not justify master in supplying appliances inherently or obviously dangerous. |
| 3987. Judicial statements of this duty. | 3998. Standard by which to gauge the safety of machinery. |
| 3988. This duty primary and unassignable. | 3999. Safe and sufficient machinery, tools and appliances furnished by master, and mode of their use committed to servants. |
| 3989. Degree of care demanded of the master in this respect. | 4000. Master furnishing suitable appliances, but servant using them for a purpose not contemplated or intended. |
| 3990. The "reputable manufacturer" doctrine. | 4001. Suitable machinery, etc., furnished by master, but servant injured in consequence of its negligent use by his fellow servants. |
| 3991. Ordinary use as a test of the suitability of a machine or appliance. | 4002. Machinery dangerous if improperly used. |
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| 3993. Master not bound to provide the safest and best machinery, but only such as is in common use. | |
| 3994. Further of this subject. | |
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SECTION

- 4004. Lack of suitable appliances.
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- 4006. Injuries to servants through the sudden starting of machinery.
- 4007. Injuries to servants through the sudden starting of machinery where the master was exonerated.
- 4008. Effect of master's assurance that an appliance is safe.
- 4009. Employer need not own the dangerous machine by which employé is injured.

SECTION

- 4010. Temporarily removing safety-appliances.
- 4011. Various defects with respect to which negligence has been imputed to the master.
- 4012. Other injuries where there was evidence of negligence to charge the employer.
- 4013. Injuries from defects in machinery, etc., with respect to which employers have been exonerated.

§ 3986. **Duty of Master to Provide Reasonably Safe Tools, Machinery and Appliances.**—The obligation of the master to provide tools, machinery, and appliances which are reasonably safe for the purposes intended, is of substantially the same nature as his obligation to provide a reasonably safe place in which the servant is to work.¹ The duty is primary and unalienable in the sense that he cannot cast it off and exonerate himself by delegating it to another, but that other is his *alter ego* or vice-principal, and the master is responsible for his negligence as though it were his own.² On the other hand, this duty is not an absolute duty in the sense that the master becomes an *insurer* for the consequence of its non-performance; but the measure of his duty is the exercise of ordinary or reasonable care to the end that the machinery, tools and appliances put into the hands of the servant are reasonably safe for the purpose intended.³ The duty of a master to provide his servants with safe appliances for the performance of their work, extends to the protection of all his servants, without regard to

¹ The difference between an "appliance" and a "place to work" is illustrated by a case where it was held that a platform along the side of an ice-house used in conveying ice to the different rooms and consisting of movable sections raised or lowered by cables and drums, each section operated in front of a room in which ice is stored, the sections being capable of arrangement so as to render the platform as a whole an inclined plane, down a groove in the center of which ice-blocks will move of their own weight, and on the edge of which platform laborers engaged in stor-

ing ice are stationed, constitutes an "appliance" with which such work is performed, and not a "place of work" within the rule governing a master's liability to his servants: *Fink v. Slade*, 66 App. Div. (N. Y.) 105; s. c. 72 N. Y. Supp. 821.

² *Post*, § 3988.

³ *Ante*, § 3767; *Gulf & C. R. Co. v. Beall* (Tex. Civ. App.), 43 S. W. Rep. 605 (no off. rep.); *Cameron v. Great Northern R. Co.*, 8 N. D. 124; s. c. 77 N. W. Rep. 1016; 5 Am. Neg. Rep. 454; 12 Am. & Eng. R. Cas. (N. S.) 520.

their rank or title, provided their own inattention or failure of duty has not contributed to the result. The master is, for example, responsible to his superintendent or foreman, for the master's negligence in this respect, as well as to a servant without rank or title.⁴ The rule that the master is not an insurer of the safety of his tools and appliances, implies that he will not be liable for remote, unforeseen, or improbable consequences to his servants of their breaking or failure.⁵ Cases stating and illustrating this general principle are accumulated in the margin.⁶

*Attix v. Minnesota Sandstone Co., 85 Minn. 142; s. c. 88 N. W. Rep. 436 (derrick-boom broke and killed foreman, who was not shown to have had anything to do with the selection of the boom).

⁴On this principle it was held that the fact that a wrench, furnished by a master to be used by his servant in screwing nuts upon iron rods, broke because of its insufficient strength to do the work, could not render the master liable for an injury received by the servant *by falling*, in consequence of the breaking of the wrench; since the wrench itself was not a dangerous tool, and since the injury which resulted from its breaking was one that could not have been reasonably anticipated: Garnett v. Phoenix Bridge Co., 98 Fed. Rep. 192.

⁵Whitney &c. Co. v. O'Rourke, 172 Ill. 177; s. c. 50 N. E. Rep. 242; aff'g s. c. 68 Ill. App. 487 (if he knew, or by the exercise of due care might have known of the defect); Edward Hines Lumber Co. v. Ligas, 172 Ill. 315; s. c. 50 N. E. Rep. 225; aff'g s. c. 68 Ill. App. 523 (employé who, in piling lumber, allows certain boards to project so other planks can be laid on them to form a scaffold for other servants, must use reasonable care, in selecting the boards so allowed to project, to see that they are suitable for the purpose); Ide v. Fratcher, 194 Ill. 552; s. c. 62 N. E. Rep. 814; aff'g s. c. 96 Ill. App. 549 (could not excuse their own negligence in knowingly allowing an emery-wheel to be defective, by showing that the fellow servants of deceased negligently allowed the wheel to run when not in use, or that they otherwise contributed to the accident); Frost Man. Co. v.

Smith, 197 Ill. 253; s. c. 64 N. E. Rep. 305; aff'g s. c. 98 Ill. App. 308 (servant injured by breaking down of a scaffold could recover damages if the accident was caused by the negligence of the master, through its superintendent, either in the construction of the scaffold or in its use); Gormully &c. Man. Co. v. Olsen, 72 Ill. App. 32; s. c. 2 Chic. L. J. Wkly. 514 (criticising an instruction as to the degree of care which the master is required to use in this particular); Union Bridge Co. v. Teehan, 92 Ill. App. 259; s. c. aff'd, 190 Ill. 374; 60 N. E. Rep. 533; Street's Western Stable Car Line v. Bonander, 97 Ill. App. 601; s. c. aff'd, 196 Ill. 15; 63 N. E. Rep. 688; Hass v. Chicago &c. R. Co., 97 Ill. App. 624 (servant has a right to rely on the performance by the master of this duty); Mallen v. Waldowski, 101 Ill. App. 367 (the fact that a master furnishes the servant with a machine which works improperly, makes it a defective machine, irrespective of the cause); Pennsylvania Co. v. Witte, 15 Ind. App. 583; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 629; 43 N. E. Rep. 319; 44 N. E. Rep. 377 (must exercise the same care to keep them in such condition); Atchison &c. R. Co. v. Kingscott, 65 Kan. 131; s. c. 69 Pac. Rep. 184 (duty of a railway company to provide barrels for its employés, emptying oil by the use of compressed air, that are reasonably sound, and also to use due care in inspecting the condition of the barrels before they are filled with oil); Covington &c. Bridge Co. v. Goodnight, 22 Ky. L. Rep. 1242; s. c. 60 S. W. Rep. 415 (no off. rep.) (rule applied where a part of the work of remodelling the defendant's bridge was done by the

§ 3987. **Judicial Statements of this Duty.**—A judicial statement of this duty is, that an employer owes the duty to his servant to use ordinary care and diligence to provide such sound and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant in performing the service, to discover and repair any defects therein, and to provide a reasonably safe place in which to perform the service; and if he fail in either of these respects, and injury result to the servant because of such failure, the employer will be liable.⁷

§ 3988. **This Duty Primary and Unassignable.**—As already seen,⁸ this is one of those primary, personal and unassignable duties which the law puts upon the master,—the meaning being that he becomes responsible for the negligence or inexperience of whatever person to whom he delegates the performance of it.⁹ This may be well illus-

defendant's own servants, and a part of it by another company under a contract with the defendant, and in the course of the work the tools and appliances of each company were used by the other as occasion required, and a servant of the defendant was injured by the breaking of a chain belonging to the other company while it was being used by the defendant); *Drapeau v. International Paper Co.*, 96 Me. 299; s. c. 52 Atl. Rep. 647 (captain not having good effectual guard to hold the cable in place not a reasonably suitable appliance for drawing logs); *Gray v. Commutator Co.*, 85 Minn. 463; s. c. 89 N. W. Rep. 322; *Jacobson v. Johnson*, 87 Minn. 185; s. c. 91 N. W. Rep. 465 (master cannot shield himself behind the *opinion of an expert* without making it appear that the examination by the expert was thorough); *Orr v. Southern Bell Telephone Co.*, 130 N. C. 627; s. c. 41 S. E. Rep. 880 (employé of defendant company injured on the first day of his employment in taking down a telephone-pole because no pikes, or "dead men," were furnished with which to do the work, such tools having been left in the defendant's workshop several miles away,—company held liable though the superintendent had told the men to get the tools before they started,—a case seemingly badly decided).

⁷ *Hill v. Southern Pac. Co.*, 23 Utah 94; s. c. 63 Pac. Rep. 814.

⁸ *Ante*, § 3986.

⁹ *Croker v. Pusey & Co.*, 3 Pen. (Del.) 1; s. c. 50 Atl. Rep. 61; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; s. c. 50 N. E. Rep. 225; *aff'g* s. c. 68 Ill. App. 523 (negligence of builder of scaffold is negligence of master); *Galasso v. National S. S. Co.*, 27 App. Div. (N. Y.) 169; s. c. 50 N. Y. Supp. 417; rehearing denied, 51 N. Y. Supp. 136 (defendant did not fulfill its full duty in instructing a servant to make all necessary repairs to machinery, and is liable for his neglect to repair latch on self-locking bucket used in unloading ship, by reason of which failure the bucket "dumped" on striking another bucket and injured plaintiff) [*distinguishing* *Schulz v. Rohe*, 149 N. Y. 132 (where it was held that, assuming a foreman to be the *alter ego* of his master, and that he has knowledge of a defect in a machine, negligence in failing to repair it is not imputable to him or his master as regards an operative injured while using the machine, where the foreman directs an engineer, employed for the purpose of making all repairs of machinery, to repair it; and where it was further held that the neglect of such engineer to repair the defect is the negligence of a fellow servant as regards the injured operative)]].

trated by a holding to the effect that a railroad company is bound to use ordinary or reasonable care to furnish safe machinery and appliances for use by its employes in operating its road, and cannot relieve itself of this duty in regard to the condition of its cars by delegating the duty to a car-inspector, but is liable for his neglect; and it is immaterial that a defective car belongs to another road, it being the duty of the company to use the same care in protecting its employes as if the car were its own.¹⁰ The very important question, What are unalienable duties of the master, and what are mere incidents of the work? in which latter case the negligence, if any, is ascribed to the fault of a fellow servant, is discussed in a future Sub-division.¹¹

§ 3989. Degree of Care Demanded of the Master in this Respect.—It has been affirmed,¹² and denied,¹³ that the master discharges his duty to his servant, if he uses such care as persons of ordinary prudence would employ to the end that the machinery and appliances which he requires them to use are reasonably safe; but that he is not required to do *everything* that can reasonably be done for their safety.¹⁴ The case referred to as denying this proposition holds that, in the selection of tools and machinery by a master, the test of their fitness is not that others use like tools and machinery, but to consider whether they are reasonably safe and suitable for the work to be done, and such as a reasonably careful man would use under like circumstances.¹⁵

§ 3990. The "Reputable Manufacturer" Doctrine.—This doctrine is not that a master is exonerated from liability for dangerous defects in machinery, tools, and appliances which he purchases from a reputable manufacturer, by reason of the manufacturer being reputable; but,

¹⁰ *International &c. R. Co. v. Kernan*, 78 Tex. 294; s. c. 9 L. R. A. 703.

¹¹ *Post*, §§ 4851, 4923, *et seq.* In a case which seems to exhibit a complete obfuscation of legal conceptions, it appeared that the plaintiff was injured by the giving way of an elbow in a steam-pump. The court held that if the accident was caused by the stripping of the threads, the defendant could not be held liable if the accident were due to the threads having been imperfectly cut, though the superintendent supervised the designing of the work; since such negligence was the fault of the workman in the

shop where the elbow was constructed, there being no pretense that the superintendent took the place of the workman who manipulated the tools: *Alexander v. Pennsylvania Water Co.*, 201 Pa. St. 252; s. c. 50 Atl. Rep. 991.

¹² *Texas &c. R. Co. v. Bingle*, 9 Tex. Civ. App. 322; s. c. 29 S. W. Rep. 674; s. c. on second appeal, 16 Tex. Civ. App. 653; 41 S. W. Rep. 90; writ of error denied, 91 Tex. 287; s. c. 42 S. W. Rep. 971.

¹³ *Croker v. Pusey &c. Co.*, 3 Pen. (Del.) 1; s. c. 50 Atl. Rep. 61.

¹⁴ *Texas &c. R. Co. v. Bingle*, *supra*.

¹⁵ *Croker v. Pusey &c. Co.*, *supra*.

fairly stated, it is that a master who buys machinery, tools, and appliances from a reputable maker, and who *also* uses reasonable care in inspecting and setting them up, and in putting them into use or operation, is not liable to an employ   for injury resulting from the negligence of the maker in using improper materials or in doing the work in an improper manner.¹⁶ So stated, the doctrine is entirely consistent with the principle which assigns the duty of the master of exercising reasonable care in these particulars, to that class of primary, absolute, and unassignable duties which the master cannot cast off. The fact that he purchases the machine, tool, or appliance from a reputable manufacturer does not excuse his own negligence in inspecting it, in testing it, or in setting it up, but is a circumstance entering into the general ingredient of evidence speaking on the question whether or not he has exercised reasonable care in the premises. The purchase of the machine, tool, or appliance from a reputable maker does not alone excuse him. For instance, where the injury was caused by the bursting of a check-valve in an air-hoist, the defendant was not excused from liability on the ground that it had discharged its duty to the plaintiff by furnishing a valve made by a reputable manufacturer, in the absence of a showing that the valve purchased was adapted to the use to which it was put.¹⁷ A sound application of this doctrine was to hold that an employer is not liable for an injury to an employ   caused by a defect in an eyebolt purchased from a reputable manufacturer, where the defect could not be detected by an external examination, and where, if the eyebolt had been in good condition, it would safely have supported the strain.¹⁸ A statement more indulgent to the master is to say that an employer who is not a boilermaker or an engineer, and who, in the exercise of business prudence, making a selection at the suggestion of those who use boilers, or on the recommendation of experts, gets an unsafe boiler, yet one in ordinary use, is not answerable for the consequences to an employ   injured thereby.¹⁹

¹⁶ *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501; s. c. 47 N. E. Rep. 406 (cylinder of dusting-machine burst through presence of blow-holes in the iron, not capable of being detected by inspection).

¹⁷ *Slattery v. Walker & Co. Man. Co.*, 179 Mass. 307; s. c. 60 N. E. Rep. 782 (maker of a hoist had used a half-inch valve in constructing machine, but defendant substituted for it a three-quarter inch valve guaranteed by its maker to stand a pressure of 300 to 400 pounds, while defendant used it in a place

where it might be subjected to a pressure of 2,700 to 2,800 pounds).

¹⁸ *Doyle v. White*, 9 App. Div. (N. Y.) 521; s. c. 41 N. Y. Supp. 628; 75 N. Y. St. Rep. 628; aff'g s. c. 14 Misc. (N. Y.) 417; 35 N. Y. Supp. 760; 70 N. Y. St. Rep. 417; s. c. aff'd, 159 N. Y. 548 (*mem.*); 54 N. E. Rep. 1090.

¹⁹ *Service v. Shoneman*, 196 Pa. St. 63; s. c. 46 Atl. Rep. 292 (steam was escaping at the edge of a triangular piece of iron covering three boiler-tubes, held by a nut in the center, and on the engineer's

But this statement, in so far as it absolves the master from making a suitable inspection and suitable test by means of a competent engineer (the master himself being incompetent), seems to be unsound. There are decisions which strangely misapply this "reputable manufacturer" doctrine, and some of them seem to proceed in ignorance both of law and of justice. One of them holds that an employé of a contractor for the construction of a building cannot recover from his employer for an injury caused by the giving way of a floor in such building, negligently constructed by a person of skill and experience, under an independent contract with the contractor.²⁰ Another one holds with more reason that a master is not chargeable with negligence because of the breaking of an appliance of the usual size and material, but improperly welded, where the appliance was manufactured by a responsible concern, from which the master purchased it, with others, and it was put in position by a fellow servant, and no weakness was apparent to external observation.²¹ In another case it was held that the owner of a track hired for use in a procession is not under an implied liability to his employé whom he sends to drive it, for defects in a superstructure built upon the truck by the hirer, where the driver knew who built it and had no reason to believe that his employer had taken any part in its erection or supervision.²²

§ 3991. Ordinary Use as a Test of the Suitableness of a Machine or Appliance.—Some of the courts content themselves with holding that in discharging his duty of supplying machinery, tools and appliances to his servants which are reasonably safe for the purposes intended, the master discharges his duty when he supplies such as are in common or general use.²³

attempting to tighten the nut the plate turned with the nut, enlarging the aperture and scalding deceased).

²⁰ *Wittenberg v. Friederich*, 8 App. Div. (N. Y.) 433; s. c. 40 N. Y. Supp. 895; 75 N. Y. St. Rep. 292 (hod-carrier employed by defendant, injured by fall of a floor constructed by his subcontractor, which answered the purpose of a staging for the use of the masons, also in defendant's employ).

²¹ *Doyle v. White*, 9 App. Div. (N. Y.) 521; s. c. 41 N. Y. Supp. 628; 75 N. Y. St. Rep. 628; aff'g s. c. 14 Misc. (N. Y.) 417; 35 N. Y. Supp. 760; 70 N. Y. St. Rep. 417; s. c. aff'd, 159 N. Y. 548 (*mem.*); 54 N. E. Rep. 1090 (while plaintiff was working on iron trolley-pole an

eyebolt holding a span-wire broke, jarring the pole and throwing the plaintiff to the ground).

²² *Hardy v. Shedden Co.*, 78 Fed. Rep. 610; s. c. 47 U. S. App. 362; 24 C. C. A. 261.

²³ *Ante*, § 3769; *post*, § 3993; *Chicago & C. R. Co. v. Lonergan*, 118 Ill. 41; s. c. 7 N. E. Rep. 55 (failure to block turnout); *Shadford v. Ann Arbor St. R. Co.*, 111 Mich. 390; s. c. 69 N. W. Rep. 661 (company used a hand-vise, such as was in common use in constructing curve in a trolley-wire—not defective, but failed to hold—not negligent in failing to use device called a "come along"); *Schroeder v. Michigan Car Co.*, 56 Mich. 132 (planing-machine manufactured by prominent and reputable house,

§ 3992. **Master Bound to a Care in Proportion to the Danger to be Avoided.**—In the performance of his duty of seeing that the machinery, tools and appliances which his servants are required to use are reasonably safe, having regard to the purposes intended, the care which the law demands of the master must, as in other cases,²⁴ be a care in proportion to the danger to be avoided.²⁵

§ 3993. **Master Not Bound to Provide the Safest and Best Machinery, but Only Such as is in Common Use.**—The master is not under an obligation, under all circumstances, to make use of the best and safest known appliances and instruments; nor is he responsible for a failure to discard one which is not of the safest possible kind which can be secured, and to supply something in its place which may be safer;²⁶ nor is he required to furnish, under all circumstances, and

and used all over the country—cog-wheels unguarded); *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; s. c. 80 N. W. Rep. 821 (failure to use screens to protect workmen filling bottles with carbonated liquids under high pressure); *Sisco v. Lehigh & C. R. Co.*, 145 N. Y. 296; s. c. 39 N. E. Rep. 958; rev'g s. c. 75 Hun (N. Y.) 582 (mail-crane with stationary arm, such as was in common use, and placed the ordinary distance from the track); *Nutt v. Southern Pac. Co.*, 25 Or. 291; s. c. 35 Pac. Rep. 653 (sufficient if master furnishes reasonably safe and suitable appliances—need not furnish appliances of a particular kind); *Titus v. Bradford & C. R. Co.*, 136 Pa. St. 618; s. c. 20 Atl. Rep. 517 (transporting broad-gauge car body on narrow-gauge truck, supporting blocks being attached to the bolsters of the truck by telegraph-wire, which worked loose and let car tip over—ordinary method on narrow-gauge roads—no recovery); *Higgins v. Fanning*, 195 Pa. St. 599; s. c. 46 Atl. Rep. 102; *Mississippi River Logging Co. v. Schneider*, 34 U. S. App. 743; s. c. 74 Fed. Rep. 195; 20 C. C. A. 390, and cases cited (failure to protect saw so that board could not come in contact with it by accident); *Washington & C. R. Co. v. McDade*, 135 U. S. 554; s. c. 34 L. ed. 235 (failed to have loose pulley and shifter to shift belt to and from fixed pulley—employee injured while doing it by hand—recovery allowed). It has been held that the

absence of a guard on a mangle was not a defect where there was no evidence to show that a guard would have added to its safety, or that guards were in ordinary use on such machines at the time of the accident. Whatever is according to the general, usual, and ordinary course adopted by those in the same business, is reasonably safe within the meaning of the law. The test is negligence, and negligence cannot be imputed from the employment of machinery in general use; *Higgins v. Fanning*, 195 Pa. St. 599; s. c. 46 Atl. Rep. 102.

²⁴ Vol. I, § 25; *ante*, § 3772.

²⁵ *Croker v. Pusey & C. Co.*, 3 Pen. (Del.) 1; s. c. 50 Atl. Rep. 61; *Lawrence v. Hagemeyer*, 93 Ky. 591; s. c. 20 S. W. Rep. 704; *Covey v. Hannibal & C. R. Co.*, 86 Mo. 635; *Bowen v. Chicago & C. R. Co.*, 95 Mo. 268; s. c. 8 S. W. Rep. 230; *Friel v. Citizens' R. Co.*, 115 Mo. 503; s. c. 22 S. W. Rep. 498; *Ballard v. Hitchcock Man. Co.*, 51 Hun (N. Y.) 188; s. c. 4 N. Y. Supp. 940; *Harroun v. Brush Electric Light Co.*, 12 App. Div. (N. Y.) 126; s. c. 42 N. Y. Supp. 716; *Disano v. New England Steam Brick Co.*, 20 R. I. 452; s. c. 40 Atl. Rep. 7; *International & C. R. Co. v. Doyle*, 49 Tex. 190.

²⁶ *Western & C. R. Co. v. Bishop*, 50 Ga. 465; *Chicago & C. R. Co. v. Smith*, 18 Ill. App. 119; *Eckhart & C. Milling Co. v. Schaefer*, 101 Ill. App. 500 (cannot be required to adopt any particular method of construction, or any particular contri-

without regard to their cost and his ability to pay for them, the newest and best kind of implements which may be in use in his line of business;²⁷ nor is he required, as matter of law, to provide machinery of any particular description;²⁸ but he discharges his duty to his servant when he provides those which are in common and general use in his business,²⁹ which are considered safe by other employers

vance or device, in order to be in the exercise of ordinary care); Louisville & C. R. Co. v. Orr, 84 Ind. 50; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; s. c. 9 West. Rep. 823; 12 N. E. Rep. 380; Atchison & C. R. Co. v. McKee, 37 Kan. 592; s. c. 15 Pac. Rep. 484; Wonder v. Baltimore & C. R. Co., 32 Md. 111; Jones v. Granite Mills, 126 Mass. 84; s. c. 7 Rep. 146; Fort Wayne & C. R. Co. v. Gildersleeve, 33 Mich. 133 [followed in Botsford v. Michigan & C. R. Co., 33 Mich. 256]; Lytle v. Chicago & C. R. Co., 84 Mich. 289; s. c. 47 N. W. Rep. 571; Friel v. Citizens' R. Co., 115 Mo. 503; s. c. 22 S. W. Rep. 498; Piper v. New York & C. R. Co., 1 Thomp. & C. (N. Y.) 290; s. c. aff'd, 56 N. Y. 630; Salters v. Delaware & C. Canal Co., 3 Hun (N. Y.) 338; Thorn v. New York City Ice Co., 46 Hun (N. Y.) 497; s. c. 11 N. Y. St. Rep. 845; Hickey v. Taaffe, 105 N. Y. 26; s. c. 12 N. E. Rep. 286; Stack v. Patterson, 6 Phila. (Pa.) 225.

²⁷ Mackey v. Baltimore & C. R. Co., 19 D. C. 282; s. c. 18 Wash. L. Rep. 767; Chicago & C. R. Co. v. Blevins, 46 Kan. 370; s. c. 26 Pac. Rep. 687; Conway v. Hannibal & C. R. Co., 24 Mo. App. 235; Kern v. De Castro & C. Co., 125 N. Y. 50; s. c. 34 N. Y. St. Rep. 363; 25 N. E. Rep. 1071; Dingley v. Star Knitting Co., 58 Hun (N. Y.) 605 (*mem.*); s. c. 34 N. Y. St. Rep. 989; 12 N. Y. Supp. 31; s. c. aff'd, 134 N. Y. 552; 32 N. E. Rep. 35; Eldridge v. Atlas S. S. Co., 58 Hun (N. Y.) 96; s. c. 33 N. Y. St. Rep. 1016; 11 N. Y. Supp. 468; s. c. aff'd, 134 N. Y. 187; 32 N. E. Rep. 66; Philadelphia & C. R. Co. v. Keenan, 108 Pa. St. 124; Titus v. Bradford & C. Co., 136 Pa. St. 618; s. c. 26 W. N. C. (Pa.) 472; 21 Pitts. L. J. (N. S.) 165; 47 Phila. Leg. Int. 496; 20 Atl. Rep. 517; 8 Lanc. L. Rev. (Pa.) 93; Augerstein v. Jones, 139 Pa. St. 183; s. c. 27 W. N. C. (Pa.) 169; 21 Pitts. L. J. (N. S.)

253; 21 Atl. Rep. 24; Bemisch v. Roberts, 143 Pa. St. 1; s. c. 28 W. N. C. (Pa.) 169; 22 Pitts. L. J. (N. S.) 1; 48 Phila. Leg. Int. 305; 21 Atl. Rep. 998; East Tennessee & C. R. Co. v. Aiken, 89 Tenn. 245; s. c. 14 S. W. Rep. 1082; Sweet v. Ohio Coal Co., 78 Wis. 127; s. c. 9 L. R. A. 861; 47 N. W. Rep. 182; The Maharajah, 40 Fed. Rep. 784.

²⁸ Eckhart & C. Milling Co. v. Schaefer, 101 Ill. App. 500 (cannot be required to adopt any particular method of construction, or any particular contrivance or device, in order to be in the exercise of ordinary care); Wood v. Heiges, 83 Md. 257; s. c. 34 Atl. Rep. 872.

²⁹ *Ante*, §§ 3769, 3991; Chicago & C. R. Co. v. Lonergan, 118 Ill. 41; s. c. 7 N. E. Rep. 55; Shadford v. Ann Arbor St. R. Co., 111 Mich. 390; s. c. 3 Det. Leg. N. 712; 6 Am. & Eng. R. Cas. (N. S.) 584; 69 N. W. Rep. 661 (discharges his duty if he furnishes appliances which are in common and general use throughout the country in the same or similar lines of work); Omaha Bottling Co. v. Theiler, 59 Neb. 257; s. c. 80 N. W. Rep. 821; Sisco v. Lehigh & C. R. Co., 145 N. Y. 296; s. c. 39 N. E. Rep. 958; Linkitus v. Butler Colliery, 7 Kulp (Pa.) 73; Delaware River Iron & Works v. Nuttall, 119 Pa. St. 149; s. c. 13 Atl. Rep. 65; 21 W. N. C. (Pa.) 100; authorities cited in Allison & C. Co. v. McCormick, 118 Pa. St. 519; s. c. 12 Atl. Rep. 273; 20 W. N. C. (Pa.) 571; Titus v. Bradford & C. Co., 136 Pa. St. 618; s. c. 20 Atl. Rep. 517; Reese v. Hershey, 163 Pa. St. 253; s. c. 29 Atl. Rep. 907; 11 Lanc. L. Rev. (Pa.) 300; rev'g s. c. 10 Lanc. L. Rev. (Pa.) 382; Baxter v. Chicago & C. R. Co., 104 Wis. 307; s. c. 80 N. W. Rep. 644 (*customary care exercised by corporations generally in the same line of business*).

generally, who are engaged in the same business,³⁰ and which may be safely operated by the exercise of ordinary or reasonable care;³¹ nor will he become liable by reason of the fact that other machines or methods of work which are safer than his are also in common use;³² but he discharges his duty if the machinery, tools, and appliances which he furnishes for the use of the servant are reasonably safe for the purpose intended.³³ It has been said that an employer is not required to furnish his employé with such appliances as combine the greatest safety with practical use, but only to exercise such care in their selection as a prudent man would exercise for his own protection.³⁴ Under the operation of this rule, it is not sufficient that there are better or safer appliances to be had, but that supplied must have some radical fault, or its use have become so generally obsolete or supplanted by others superior thereto that its adoption or retention will itself indicate negligence.³⁵ On the one hand, a railway company is not bound, in favor of its employés, to adopt new devices on its trains until their utility has been sufficiently tested.³⁶ As our hindsight

³⁰ *Rogers v. Louisville &c. R. Co.*, 88 Fed. Rep. 462.

³¹ *Wormell v. Maine &c. R. Co.*, 79 Me. 397; s. c. 4 N. Eng. Rep. 696; 10 Atl. Rep. 49; *Rooney v. Sewall &c. Co.*, 161 Mass. 153; s. c. 56 N. E. Rep. 789; *Richmond &c. R. Co. v. Dickey*, 90 Ga. 491; s. c. 16 S. E. Rep. 212; *Davis v. Augusta Factory*, 92 Ga. 712; s. c. 18 S. E. Rep. 974; *Payne v. Reese*, 100 Pa. St. 301; *Mississippi River Logging Co. v. Schneider*, 74 Fed. Rep. 195; s. c. 20 C. C. A. 390; 34 U. S. App. 743 (only such as can with reasonable care be used, without danger except such as is reasonably incident to the business).

³² *Degenhart v. Gent*, 97 Ill. App. 145 (deceased, an experienced man, working in a trench that was not braced, had twice rejected his employer's offer to brace the trench, assuring him that it was safe without it); *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; s. c. 5 N. Eng. Rep. 719; 15 N. E. Rep. 576.

³³ *Ante*, §§ 3768, 3986; *Strattner v. Wilmington City Electric Co.*, 3 Pen. (Del.) 245; s. c. 50 Atl. Rep. 57 (but they must be so adapted to, and adequate for, the purposes for which they are to be used, as to be reasonably safe under all conditions of the employment); *Chicago &c. R. Co. v. Finnan*, 84 Ill. App. 383; *American Malting Co. v.*

Lelivelt, 101 Ill. App. 320; *Meyer v. Meyer*, 101 Ill. App. 92; *Higgins v. Missouri &c. R. Co.*, 43 Mo. App. 547; *Berning v. Medart*, 56 Mo. App. 443; *Blanton v. Dold*, 109 Mo. 64; *Friel v. Citizens' R. Co.*, 115 Mo. 503; *Walsh v. Commercial Steam &c. Co.*, 11 Misc. (N. Y.) 3; s. c. 63 N. Y. St. Rep. 461; 31 N. Y. Supp. 833; *Spencer v. Worthington*, 44 App. Div. (N. Y.) 496; s. c. 60 N. Y. Supp. 873; *O'Hare v. Keeler*, 22 App. Div. (N. Y.) 191; s. c. 48 N. Y. Supp. 376; *Dwyer v. Shaw*, 22 R. I. 648; s. c. 50 Atl. Rep. 389.

³⁴ *Sappenfield v. Main St. &c. R. Co.*, 91 Cal. 48; s. c. 27 Pac. Rep. 590; *Brymer v. Southern &c. R. Co.*, 90 Cal. 496; s. c. 27 Pac. Rep. 371.

³⁵ *Sappenfield v. Main St. &c. R. Co.*, 91 Cal. 48; s. c. 27 Pac. Rep. 590.

³⁶ *Burns v. Chicago &c. R. Co.*, 69 Iowa 450. Where a railroad company has used on its cars the same kind of oil generally in use upon railway-cars, and had no knowledge, and by the exercise of ordinary care and inspection would not have known, of anything poisonous connected therewith, it was held that an employé could not recover damages by being poisoned by the use of such oil: *Kitteringham v. Sioux City &c. R. Co.*, 62 Iowa 285. So, while emery-wheels

are better than our foresights, it has been well held that the question of the negligence of a master in furnishing tools to his servant must be determined by the facts existing at the time an accident occurs; and the fact that appliances then in use were discarded subsequently is immaterial;³⁷ and, of course, the fact that other appropriate means might have been used to do the work does not make it negligence on the part of an employer to use an implement also appropriate, although an accident results from its use.³⁸ On the other hand, the master is bound to adopt such improved appliances as are in ordinary use by prudent employers engaged in the like business, and surrounded by like circumstances.³⁹

§ 3994. **Further of this Subject.**—One court has imposed a higher obligation upon railroad companies, by sanctioning the following instruction: "It is negligence to use cars dangerous in their construction. When there are others to be used which are not dangerous, railroad companies are bound to procure the best; otherwise they must be held responsible."⁴⁰ This statement of doctrine is obviously unsound, and out of line with the modern current of authority, and it is abandoned in the jurisdiction where it was pronounced.⁴¹ Other courts go to what seems the opposite extreme, and hold that, as between himself and his servant, a manufacturer has the right to keep a machine in use after it has become old and defective, unless its de-

are notoriously dangerous, by reason of their tendency to burst, it has been held that the mere fact that one manufactory has adopted the method, in making emery-wheels, of filling them with copper wire, where such practice is not general, does not make it negligence for a proprietor to use a wheel not filled with such wire: *Breig v. Chicago &c. R. Co.*, 98 Mich. 222; s. c. 57 N. W. Rep. 118.

³⁷ *Friel v. Citizens R. Co.*, 115 Mo. 503; s. c. 22 S. W. Rep. 498.

³⁸ *Harely v. Buffalo Car Man. Co.*, 142 N. Y. 31; s. c. 58 N. Y. St. Rep. 437; 36 N. E. Rep. 813; *Young v. Virginia &c. Const. Co.*, 109 N. C. 618; s. c. 14 S. E. Rep. 58; *Kehler v. Schwenk*, 144 Pa. St. 348; s. c. 13 L. R. A. 374; 22 Atl. Rep. 910; *Dwyer v. Shaw*, 23 R. I. 648; s. c. 50 Atl. Rep. 389.

³⁹ *Richmond &c. R. Co. v. Jones*, 92 Ala. 218; s. c. 9 South. Rep. 276.

⁴⁰ *St. Louis &c. R. Co. v. Valirius*, 56 Ind. 511, 519. The court say: "We cannot hold this rule as in-

correct. The same rule, in reference to spark-arresters, was laid down by this court in the case of *Toledo &c. R. Co. v. Wand*, 48 Ind. 476, and, we think, fully sustained by the authorities: *Smith v. New York &c. R. Co.*, 19 N. Y. 127; *Hege-man v. Western R. Corp.*, 13 N. Y. 9."

⁴¹ The case of *St. Louis &c. R. Co. v. Valirius*, *supra*, has not been followed in Indiana. It was criticised and limited in *Lake Shore &c. R. Co. v. McCormick*, 74 Ind. 440; *Umbach v. Lake Shore &c. R. Co.*, 83 Ind. 191; *Pennsylvania Co. v. Long*, 94 Ind. 250. See *Louisville &c. R. Co. v. Bates*, 146 Ind. 564, where the standard is held to be ordinary care in furnishing and maintaining reasonably safe cars and other appliances; and where it is held that the company need not furnish absolutely safe cars and appliances, nor need it make impracticable or unreasonable tests.

fect expose the servant to some latent extraordinary danger.⁴² On the other hand, it has frequently been pointed out, by the judges dealing with this question, that many business enterprises could not be carried on if it were incumbent upon the proprietor to provide himself with machinery that is new and sound. Such, clearly, is not the law. It all comes to this: the obligation of the master is one of social duty growing out of an intimate contractual relation. It is the duty, founded on considerations of justice and humanity, of exercising reasonable care and entirely good faith to the end of securing the safety of his servant, so far as the same is compatible with the nature of the employment. This obligation is discharged by the master when he does what he reasonably may, consistently with his means and the proper conduct of his business, towards furnishing the servant with safe machinery, tools and appliances and keeping them safe, and of apprising him of the extent of the risks which he undertakes.⁴³

§ 3995. Duty to Maintain Machinery, Tools, and Appliances in a Reasonable State of Repair.—It is almost needless to say that the master does not discharge his duty by merely seeing that the tools, machinery, and appliances are safe and suitable in the first instance; but he must also exercise ordinary or reasonable care to the end of seeing that they are kept in a suitable state of repair.⁴⁴ A limitation of the liability of the master in this respect has already been indicated,⁴⁵ which is, that he is not liable for injuries occasioned by machinery, in consequence of its having become defective and unsafe, either through the acts of a fellow servant or otherwise, unless the master knows, or ought to know—that is, might have found out by a reasonable inspection—its defective and unsafe condition.⁴⁶ It is

⁴² *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Kelley v. Silver Spring & Co.*, 12 R. I. 112; s. c. 7 Rep. 60.

⁴³ *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Wonder v. Baltimore & C. R. Co.*, 32 Md. 411; *Dynen v. Leach*, 26 L. J. (Exch.) 221.

⁴⁴ *Ante*, §§ 3781, 3786; *Gualden v. Kansas City & C. R. Co.*, 106 La. 409; s. c. 30 South. Rep. 889; *Strauss v. Haberman Man. Co.*, 23 App. Div. (N. Y.) 1; s. c. 48 N. Y. Supp. 425. For example, the fact that a machine to which an inexperienced servant is assigned was, as originally constructed, suitable and proper, does not relieve the master from liability for injuries to the

servant resulting from the dangerous condition of the machine owing to the fact that the foreman has fastened up and rendered useless a device necessary to the safe operation of the machine, without informing or warning the servant, thus thrusting him into a new and unusual danger: *Strauss v. Haberman Man. Co.*, *supra* (foreman wired in a sliding part by which die could be safely withdrawn from stamping-machine—plaintiff injured while using his hands to remove die).

⁴⁵ *Ante*, §§ 3782, 3785.

⁴⁶ *Cowan v. Umbagog Pulp Co.*, 91 Me. 26; s. c. 39 Atl. Rep. 340.

scarcely necessary to add that if the appliance becomes unsafe by reason of the negligence of the servant who is thereby injured, who has been charged with the duty of keeping it safe and who has neglected that duty, he cannot recover damages from the master for his own wrong.⁴⁷

§ 3996. **Machinery Long Used without Accident.**⁴⁸—If, in addition to the fact that the instrument is one in ordinary use in the particular business, the further fact appears that it has been well and safely operated in the particular case for a long time before the accident in question, this will exonerate the master from the imputation of a want of reasonable care.⁴⁹ So, it has been held that, where a servant has worked in a particular place for several years without its being lighted, and has incurred no injury thereby, the master is not liable to him for an injury which may have resulted from this circumstance.⁵⁰ It has been held that the mere fact of age and long use of a stick, which broke while being used as a lever, causing the death of an employé, will not justify a finding that the employer ought to have known that the stick was *defective*, especially where the employer kept on hand a stock of lumber of suitable size for use as levers.⁵¹

§ 3997. **Rule does not Justify Master in Supplying Appliances Inherently or Obviously Dangerous.**—To exonerate a master from the charge of negligence in furnishing his employé unsafe appliances with which to work, it is not sufficient that the appliances furnished were such as were in common use for similar purposes in the same neighborhood, but they must have been such as would have commended themselves to a reasonably prudent man.⁵² It has been well reasoned that examination and repair are not all of a master's duties; but that the original or permanent structure or machine furnished by a mas-

⁴⁷ *Conway v. Chicago &c. R. Co.*, 103 Iowa 373; s. c. 72 N. W. Rep. 543 (where a handhold on the floor at the top of a ladder was raised two inches from the floor by means of blocks, but the foreman negligently allowed coal-dust to accumulate under it so that he could not grasp it in descending, by reason of which he was injured, there could be no recovery).

⁴⁸ See also, *ante*, § 3803a.

⁴⁹ *Dingley v. Star Knitting Co.*, 58 Hun (N. Y.) 605; s. c. 34 N. Y. St. Rep. 989 (*mem.*); 12 N. Y. Supp. 31; s. c. *aff'd*, 134 N. Y. 552; 32 N. E. Rep. 35; *Sappenfield v. Main*

St. &c. R. Co., 91 Cal. 48; s. c. 27 Pac. Rep. 590.

⁵⁰ *Kelley v. Silver Spring &c. Co.*, 12 R. I. 112; s. c. 7 Rep. 60. See also, *Seymour v. Maddox*, 16 Q. B. 326.

⁵¹ *Allen v. Smith Iron Co.*, 160 Mass. 557; s. c. 33 N. E. Rep. 581 (and this was so even if the stick could be considered a part of the works or machinery of the employer under the Employers' Liability Act of that State).

⁵² *Geno v. Fall Mountain Paper Co.*, 68 Vt. 568; s. c. 35 Atl. Rep. 475.

ter should be reasonably safe, irrespective of any question of examination and repairs. For example, it may be negligence to use machinery which, though not defective, is dangerous,—as where cash-carriers or parcel-carriers, running on a wire in the defendant's store, frequently fell.⁵³ In another jurisdiction, where, in this and other relations, the courts seem to display more care for the rights of the laboring classes than is disclosed by the American rule which makes the common negligence of employers the rule of the law,—it has been held that an employer who uses means to perform his work which threaten constant danger to his employés, when other means somewhat more expensive and less rapid could be used, by which the danger could be avoided, is liable for an injury caused by the use of such means.⁵⁴

§ 3998. Standard by which to Gauge the Safety of Machinery.—It has been reasoned that the question whether the particular machinery provided by a master is proper and suitable is to be determined by its actual condition, and not by comparing it with other machinery.⁵⁵ The rule that appliances furnished by a master must be reasonably fit for the purpose for which they are to be used, has reference to their fitness with relation to the *safety of the servant* who is required to use them.⁵⁶

§ 3999. Safe and Sufficient Machinery, Tools and Appliances Furnished by Master, and Mode of their Use Committed to Servants.—Where safe and suitable machinery, tools, appliances, etc., and a sufficient number of competent servants to operate them are furnished by the master to his servants to be used in their employment, and they are properly warned and instructed where such warning and instruction is necessary, and the mode of using such machinery, tools, appliances, etc., is committed to the servants themselves, and in the use of them one of the servants is injured, the master will not be held

⁵³ *Stock v. Le Boutillier*, 19 Misc. (N. Y.) 112; s. c. 43 N. Y. Supp. 248; aff'g s. c. 18 Misc. (N. Y.) 349; 41 N. Y. Supp. 649. That an employer is not, as matter of law, liable for injuries to his servant *employed to do other work*, in setting him at work upon a dangerous machine, where the machine is perfect in its construction and operation,—see *National Malleable Castings Co. v. Luscomb*, 6 Ohio C. D. 313; s. c. 2 Ohio Dec. 636. A railroad company is liable for an injury to a fireman caused by the

breaking of machinery constructed in the company's own shop by its employés, because of a defect in its original construction, where the defect must have been obvious to those engaged in the work of constructing the machinery: *Atchison & c. R. Co. v. Carey*, 58 Kan. 815 (*mem.*); s. c. 49 Pac. Rep. 662.

⁵⁴ *Scanlan v. Detroit Bridge & c. Works*, Rap. Jud. Que. 16 C. S. 264.

⁵⁵ *Wood v. Heiges*, 83 Md. 257; s. c. 34 Atl. Rep. 872.

⁵⁶ *Garnett v. Phenix Bridge Co.*, 98 Fed. Rep. 192.

liable, for he has been guilty of no negligence and has done no wrong; but the accident will be ascribed either to the negligence of the servant who is injured, or to the negligence of his fellow servants, according to the circumstances shown in the evidence.⁵⁷ The duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe, does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of their use, and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine.⁵⁸ In those jurisdictions where a mere foreman of work is not regarded as a vice-principal of the master, the doctrine is, that as to details in the performance of work in which an employé is injured, though the particular manner in which it is done is by direction of the foreman, the master is not liable; he having furnished everything proper, and the foreman being a fellow servant in directing the performance of the details.⁵⁹

⁵⁷ *Stewart v. International Paper Co.*, 96 Me. 30; s. c. 51 Atl. Rep. 237 (plaintiff was injured by falling into a drain in defendant's pulp-mill; a fellow servant of plaintiff had negligently left the cover off the drain, and the use of the drain by the servants was a matter of daily occurrence, and in the line of their duties); *Pellerin v. International Paper Co.*, 96 Me. 388; s. c. 52 Atl. Rep. 842; *Small v. Alington & Co.*, 94 Me. 551; s. c. 48 Atl. Rep. 177 (failure of employés to secure piece of machinery in temporary position while they readjusted the tackle by which it was being raised); *Regan v. Lombard*, 181 Mass. 329; s. c. 63 N. E. Rep. 895; *Erickson v. Victoria Copper Min. Co.*, 130 Mich. 476; s. c. 9 Det. Leg. N. 120; 90 N. W. Rep. 291; *Wagner v. Portland*, 40 Or. 389; s. c. 60 Pac. Rep. 985; 67 Pac. Rep. 300; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464 (employé's mistaken judgment as to the strength of a hook which he had selected from a number for lifting certain materials).

⁵⁸ *Eicheler v. Hanggi*, 40 Minn. 263; s. c. *sub nom.* *Eicheler v. St. Paul Furniture Co.*, 41 N. W. Rep. 975.

⁵⁹ *O'Connell v. Thompson-Starrett Co.*, 72 App. Div. (N. Y.) 47; s. c. 76 N. Y. Supp. 296. In a case illustrating this principle it appeared

that the defendant kept in its storehouse sufficient materials for the construction of staging required by its workmen in painting ceilings. There was no evidence that defendant undertook to furnish the staging in question for its workmen as a completed structure, and it did not assume the responsibility of adopting specific hooks to the construction of a particular staging. Plaintiff's fellow workmen procured the hooks from the company's storehouse and erected the staging themselves. It was held that if they failed to exercise due care in selecting the hooks, and the accident to plaintiff resulted therefrom, defendant was not liable, the defendant having furnished sufficient and suitable hooks: *Pellerin v. International Paper Co.*, 96 Me. 388; s. c. 52 Atl. Rep. 842. In another case the plaintiff was injured by the fall of curbstones piled in tiers on a wharf. The stones were lifted on to the wharf by a crane, and piled by plaintiff's fellow servants in tiers, with sticks or pieces of wood, selected by plaintiff's fellow servants, between the stones. The stones in the piles were moved at various times, as occasion required, to get particular stones in each pile as they were wanted; and it did not appear how long the pile which fell had been piled, or had been in a dangerous condition. It was held

§ 4000. Master Furnishing Suitable Appliances, but Servant Using them for a Purpose Not Contemplated or Intended.—Where a master discharges his duty by furnishing suitable tools, machinery, or appliances, but the servant uses them for a purpose not contemplated or intended, nor required by the orders under which he is working, and, in so doing, receives an injury, he cannot make his own folly or negligence a ground for recovering damages against the master.⁶⁰ A good illustration of this statement of doctrine is found in a case where an employé hauling buckets of tar upon a roof lost his balance, and, in falling, grasped a triangular wooden “horse,” used as an appliance in hauling up the buckets. The “horse” was insufficient to withstand the strain, and fell with him. It was held, in an action for the injuries sustained, based on the employer’s negligence in not furnishing proper appliances, that a peremptory instruction for the defendant was proper; since the fact that the “horse” fell when jerked by

that, in the absence of such proof, the negligence, if any, was the improper piling, or the furnishing of improper dunnage between the stones, both of which were acts of fellow servants, and plaintiff was therefore not entitled to recover: *Regan v. Lombard*, 181 Mass. 329; s. c. 63 N. E. Rep. 895. In another case the plaintiff was injured while at work in defendant’s mine by a plank which escaped from the rope by which the timber-boss was lowering it down the shaft. The plank was merely fastened with a half-hitch around each end, and the evidence was conflicting as to whether that, or boring a hole and putting the rope through, was the customary method of lowering such planks. There was undisputed testimony that defendant had furnished augers, with which such holes could be bored, which were in the warehouse, to which the boss had access. It was held that, defendant having furnished proper tools, it was not responsible for neglect of plaintiff’s fellow servant in failing to use them: *Erickson v. Victoria Copper Min. Co.*, 130 Mich. 476; s. c. 9 Det. Leg. N. 120; 90 N. W. Rep. 291. When four or five fellow servants were taking down electric wires, and were not acting under any regulations, the cutting of a wire at the proper place for the convenience of the work, and to insure safety to the employés, was a mere detail of the

work, which was for the judgment and control of the workmen themselves, and not for the master to regulate by adoption of rules for their guidance; so that where plaintiff’s fellow servants cut a wire so that it fell across a heavily charged primary wire, and plaintiff, not knowing the fact, was shocked while handling it, the master was not liable; the evidence showing that plaintiff was acquainted with the hazards of his employment: *Wagner v. Portland*, 40 Or. 389; s. c. 60 Pac. Rep. 985; 67 Pac. Rep. 300. The superintendent of a railroad company told some bridge-carpenters and trackmen to load some rails on a car, and as they loaded them a section foreman said “Up high,” and “Heave away,” till the third rail was being loaded, when he failed to say “Heave away,” and one of the bridge-carpenters had his hand jammed under the rail as they were lowering it to the car. It was held that the company was not negligent; it having no duty to direct the details of such simple work: *Anderson v. Oregon R. & C. Co.*, 28 Wash. 467; s. c. 68 Pac. Rep. 863.

⁶⁰ *Graham v. Chicago & C. R. Co.*, 62 Fed. Rep. 896; *Fortier v. Lauzier*, Rap. Jud. Que. 14 C. S. 359. See a learned note on this subject in 18 L. R. A. 124; also, *Schmidt v. Leistekow*, 6 Dak. 386; s. c. 43 N. W. Rep. 820.

the plaintiff did not show that it was insufficient for the use for which it was intended.⁶¹ But this does not exclude the conclusion that the master may be liable where he has constructed an appliance for a particular use, but *permits* his servants to put it to another use, and in so using it a servant is injured through its negligent construction. This may, perhaps, be illustrated by a case where the defendant constructed a "dry well" of loose bricks for the purpose of receiving waste water from the factory, which entered the well through pipes at the bottom, along with a little steam. Afterwards the well was used to receive waste steam, which was led into it by a pipe in the top. The pipes in the bottom becoming stopped up by sediment, the steam forced its way through them and through the walls of the well into the surrounding earth, where it formed a hole underneath the surface filled with steam, hot water, and hot mud. While the plaintiff was passing over the spot in the discharge of his duties the earth gave way beneath him, precipitating him three or four feet into the hole and scalding him severely. It was held that the defendant was liable.⁶²

§ 4001. **Suitable Machinery, etc., Furnished by Master, but Servant Injured in Consequence of its Negligent Use by his Fellow Servants.**⁶³—The liability of a master does not extend to a case where the master furnishes reasonably safe tools, materials and appliances, and commits their use to his servants, and one of them is injured, not by a defect in the appliance, but by the negligent or improper use of it either by himself or by his fellow servants.⁶⁴ On this principle it has been held that where a mere *foreman of work* orders an ordinary employé to use a defective appliance not furnished by the employer for such use, in consequence of which the employé so commanded is injured, the negligence will be deemed that of a *fellow servant*, and the master will not be liable;⁶⁵ otherwise in those jurisdictions where such negligence is deemed to be that of a vice-principal.⁶⁶

⁶¹ Bell v. Refuge Oil-Mill Co., 77 Miss. 387; s. c. 27 South. Rep. 382.

⁶² Lauter v. Duckworth, 19 Ind. App. 535; s. c. 48 N. E. Rep. 864. For a case where the plaintiff, in endeavoring to effect a coupling in the gearing above a vat of hot dye, slipped on the wet floor and fell into the vat, and it was held that he could not recover damages on the ground that the defendant did not furnish safe and sufficient machinery,—see Bessey v. Newich-

wanick Co., 94 Me. 61; s. c. 46 Atl. Rep. 806.

⁶³ See *ante*, § 3806; *post*, § 4175.

⁶⁴ *Post*, § 4852; Yaw v. Whitmore, 37 App. Div. (N. Y.) 98; s. c. 55 N. Y. Supp. 1091 (derrick properly constructed, but improperly set up by defendant's servants).

⁶⁵ Butterworth v. Clarkson, 3 Misc. (N. Y.) 338; s. c. 52 N. Y. St. Rep. 9; 22 N. Y. Supp. 714.

⁶⁶ *Ante*, §§ 3814, 3815; *post*, §§ 4921, 4940.

§ 4002. Machinery Dangerous if Improperly Used.—It is said that the fact that a machine may be dangerous if improperly used, or that it actually injures its operator, is not the test of the master's liability. If the machinery is of ordinary character, and such as can with reasonable care be used without danger to the servant, it is all that can be required of the master.⁶⁷

§ 4003. Servant Selecting Something Insufficient where the Master has Provided Materials or Appliances which are Sufficient.—A master is not liable for injuries to a servant resulting from his selection, from an adequate stock of suitable appliances, of an appliance which was unsuitable for the purpose for which he intended to use it, if such unsuitableness was the result either of a defect which could not have been detected and provided against, with reasonable care on the part of the master, or of its being too light for the use for which it was intended.⁶⁸

§ 4004. Lack of Suitable Appliances.—Where a servant has been injured from lack of appliances with which to do his work, it is necessary, in order to make out his case, to show that no such appliances were at hand.⁶⁹ If a necessary tool or appliance is not at hand, and a servant quits his work and proceeds a short distance from his place of work in order to procure one, he is deemed to be still acting in the line of his employment, so that if he receives an injury from some source, proceeding from the negligence of his master, he will be entitled to recover damages. Thus, the plaintiff, in going along a path to procure a ladder which was necessary in his work, and was not more than twenty-one feet distant, and in plain sight, was not a trespasser nor outside the line of his employment; so that he could recover damages for an injury received through slipping into a tub of scalding water beside the path and on a level with the ground, used for receiving exhaust-steam, and having no cover, and of which he had no knowledge.⁷⁰

§ 4005. Defects or Dangers Suddenly Appearing.—An employer is not chargeable with negligence by reason of a defect which sud-

⁶⁷ *Smith v. Foster*, 93 Ill. App. 138 (experienced employé injured by bursting of emery-wheel fitted up in standard way; employé stood in front of it to do his work, knowing it was unsafe to do so).

⁶⁸ *Toohy v. Equitable Gas Co.*, 179 Pa. St. 437; s. c. 36 Atl. Rep. 314 (employé whose duty it was to supervise the testing of gas-wells

selected for the purpose a valve which was either too light, or else contained some latent defect which reasonable care would not have disclosed).

⁶⁹ *Cogan v. Burnham*, 175 Mass. 391; s. c. 56 N. E. Rep. 585.

⁷⁰ *Conley v. Lincoln Foundry Co.*, 14 Pa. Super. Ct. 626.

denly appears in a tool or instrumentality furnished an employé, unless he has been remiss in testing the same, or knew or ought to have known of the defect.⁷¹ The fact that a floor in a mill had been in a dangerous condition *three hours* by reason of grease left thereon by employés in the mill, has been held insufficient to charge the master with constructive notice of the defect, so as to render him liable for failure to furnish safe premises.⁷²

§ 4006. **Injuries to Servants Through the Sudden Starting of Machinery.**—The cases are numerous where servants have recovered damages from their masters for injuries received in consequence of the sudden starting up of machinery. Where the evidence, if believed by the jury, shows that this is due to defects in the machinery for which the master is responsible, and the risk of injury from which the servant has not assumed, the ground of recovery is clear. It was so held where the plaintiff was injured in operating a mangle in the defendant's laundry, by reason of the fact that the machine, while it would run smoothly for a while, would stop, and then start up with a jerk, making it dangerous to the hands of the person feeding it, where the plaintiff was not advised of the danger, which was not apparent.⁷³ Quite in conformity with this doctrine, and in the appli-

⁷¹ Atchison &c. R. Co. v. Napole, 55 Kan. 401; s. c. 40 Pac. Rep. 669 (lever of hand-car had been bent in a collision, and straightened while cold, which tended to weaken and impair the fibers of the iron; foreman of section-gang and assistant roadmaster knew of its being bent and weakened—held to be notice to the company).

⁷² Burke v. National India Rubber Co., 21 R. I. 446; s. c. 44 Atl. Rep. 307. In another case, the evidence disclosed that the death of the plaintiff's husband was caused by the derailment of the engine on which he was fireman, by a horse escaping on to the track through a fence which it was the duty of the defendant to repair; that the fence consisted of barb-wire and a plank, that the plank was placed between the top and second wire, which were about three feet apart, that such plank was off for about fifteen hours before the accident, and that the horse escaped between such wires; that such defect in the fence was about a mile from a station. It was held that defendant was not guilty of negligence in not

ascertaining and repairing the defect before the accident; since the defect was not such as would cause an ordinarily prudent person to apprehend danger and difficulty from its existence; and if it had been, fifteen hours was not an unreasonable time for it to exist without being discovered: Goodrich v. Kansas City &c. R. Co., 152 Mo. 222; s. c. 53 S. W. Rep. 917.

⁷³ United States Laundry Co. v. Schilling, 21 Ky. L. Rep. 1798; s. c. 56 S. W. Rep. 425 (no off. rep.). Where the evidence showed that a machine, which in proper working order would make but one cut and then stop, was reported to the foreman of the defendant, about two years before the injury to the plaintiff, as repeating itself, and starting from a stop, and that the plaintiff also reported that the machine repeated itself on the day when he was injured by reason of the machine starting from a dead stop, and the evidence also tended to show that certain defects found in the machine after the accident would cause the machine to start from a dead stop,—this

cation of the rule of *res ipsa loquitur*, which sometimes applies in actions by servants against their masters for negligent injuries,—it has been held that the fact that mill machinery, which was started and stopped by the pulling of ropes attached to a lever in the room above, began to move without apparent cause when the ropes were in the position proper to keep it at rest, thereby inflicting injuries on an employé who had no notice that it was liable to do so, and who had received instructions from his superior that the use of the rope was necessary to start the machinery, is *prima facie* evidence of some want of care in its original construction or then condition, and casts the burden of explanation upon his employer.⁷⁴ In other cases the right of recovery has been made to rest upon the negligence of the superin-

was held to be sufficient proof of the defendant's negligence to take the case to the jury: *Packer v. Thomson-Houston Electric Co.*, 175 Mass. 496; s. c. 56 N. E. Rep. 704. Where the evidence tended to show that the plaintiff was injured by the sudden starting of a threshing-machine separator, while he was working on the same, by reason of the defective condition of the valves of the engine, which, from a leakage of steam, was liable to start at any moment, but the defective condition of which was unknown to the plaintiff; and there was evidence that the plaintiff's employer had said that he would wait until the threshing was over at that ranch before he had the engine repaired,—there was sufficient evidence of negligence on the part of the master to sustain a verdict for the plaintiff: *Hencke v. Babcock*, 24 Wash. 556; s. c. 64 Pac. Rep. 755. In another case it appeared that a woman employed in a laundry lost her right arm while operating a clothes-drier. The machine was put in and out of operation by pushing a lever, whereby the belt was thrown from the fixed pulley on to a loose pulley, and *vice versa*. Plaintiff, after drying some clothes in the machine, stopped it absolutely, as she claimed, and put her hand in the drier to take out the clothes, when the belt slipped and started the machine, and her arm was taken off by the revolving of the drier. There was direct evidence that the pulley, belt, and shifter were defective. It was also shown that the machine had been

successfully operated without starting, except by use of the lever, for weeks before and immediately after the accident. It was held that the evidence sustained a finding that the injury was occasioned by defective machinery, which could have been discovered and remedied by due care: *Thiel v. Kennedy*, 82 Minn. 142; s. c. 84 N. W. Rep. 657. Plaintiff was injured, while engaged in feeding washed goods into an ironing-mangle in a laundry, by having her hand drawn into the machine, as she alleged, by a *sudden acceleration of the speed* of the machine. The plaintiff's evidence tended to show that the machine was not in good working-order, but was defective, which caused the machine to jerk in its operation, and its speed to be suddenly increased; that it needed adjusting some days fifteen or twenty times; that the unsafe condition was known to defendant; and that plaintiff did not resume her work until assured by defendant's manager that the machine had been properly adjusted and repaired. Defendant's evidence contradicted the material portion of plaintiff's testimony and her witnesses. It was held that, if the evidence of plaintiff's witnesses was believed, it established the plaintiff's right to recover, and hence the case was properly submitted to the jury: *Young v. Mercantile Steam Laundry Co.*, 198 Pa. St. 553; s. c. 48 Atl. Rep. 497.

⁷⁴ *Blanton v. Dold*, 109 Mo. 64; s. c. 18 S. W. Rep. 1149.

tendent or other person, who, under the common or the statute law, stands as the vice-principal of the master in ordering the machinery to start without giving the proper warning.⁷⁵ Without regard to the source of the injury, whether the defectiveness of the machinery, or the negligence of the master or his vice-principal in starting it up suddenly and without warning, and always excepting cases where it is to be ascribed to the negligence of a fellow servant, where the rule which puts upon one servant the risk of injury from the negligence of a fellow servant prevails,—a servant injured by the starting of machinery without any warning, does not assume the risk even though the master has failed to provide any means of warning him, since servants cannot be held to assume risks that are unreasonable or extraordinary, or that arise from the negligence of the master.⁷⁶ It need not be said that, where machinery is allowed by the master to run without warning to a servant who is engaged in repairing the machinery and who has been led to believe by the master that it is at rest, whereby he is injured, it is due to the personal negligence of his master, and the servant may recover damages.⁷⁷

⁷⁵In one such case it appeared that the plaintiff operated a machine in the defendant's factory, which, becoming defective, the superintendent attempted to repair. After doing some work on it he told plaintiff to "start up," in doing which her hand was injured. The superintendent testified that his order merely meant for plaintiff to start the machine by placing her foot on the treadle, so that he could see whether the machine worked all right; that he did not mean for her to resume her work, which would require her to rest her hand on the machine. The evidence was contradictory, but it was held to justify a finding that the superintendent had reason to know that the plaintiff might understand his order as a command to see, *by resuming work*, whether the machine was all right; that she so understood it, and was justified in such understanding and in attempting to resume her work; that while starting the machine, in the exercise of due care, plaintiff's hand was thrown from its usual place by the unusual shaking of the machine, and injured; and that the order of the superintendent was negligent;—making a case for the plaintiff: *Eaves v. Atlantic Novelty Man. Co.*, 176 Mass. 369; s. c.

57 N. E. Rep. 669. In another case it was held that an ice company was guilty of negligence rendering it liable to an employé injured by the starting up of the machinery in a slide while he was at work therein making some repairs under orders from the superintendent and general manager, where the latter not only went away from his post at a bell-cord intended to notify the engineer when to start and stop, but also failed to conform to a rule of the company requiring the engineer to be personally notified when any person was in the slide, so that the engine would not be started at a signal from the bell, nor without specific orders to start again; and a piece of material thrown by such employé from the slide struck the bell-cord, rang the bell, and caused the engineer to start the machinery: *Gerrish v. New Haven Ice Co.*, 63 Conn. 9; s. c. 27 Atl. Rep. 235.

⁷⁶*Chicago & C. R. Co. v. Spurney*, 197 Ill. 471; s. c. 64 N. E. Rep. 302; aff'g s. c. 97 Ill. App. 570.

⁷⁷*Kinney v. Folkerts*, 78 Mich. 687; s. c. 44 N. W. Rep. 152. The fact that a machine which an employé is repairing is set in motion by touching some part of the mechanism thereof, does not prevent a recovery for an injury which

§ 4007. **Injuries to Servants through the Sudden Starting of Machinery where the Master was Exonerated.**—Other decisions are found where servants have been injured in consequence of the sudden starting of machinery, and where on one ground or another the master was exonerated from liability. For example, it was held that a cotton-mill owner was not liable to an employé for injuries sustained while cleaning the gears on a spinning-frame at the cleaning hour, due to the starting of the frame without notice by the spinner, who was a competent and ordinarily careful employé.⁷⁸ But here the servant (a doffer) who was injured and the spinner were deemed to stand in the relation of fellow servants. In another such case the plaintiff, an assistant to the operator of a machine used in cutting iron, was standing at the machine pulling scrap-iron out of a heap, and placing it convenient to the operator's hands. While doing this the operator passed between the plaintiff and the machine, and, with his back turned toward the plaintiff, who was pulling iron out of the heap, started the machine. Within two seconds after the operator passed him, the plaintiff presumably stumbled or slipped while pulling out the iron, and placed his hands between the shears of the machine, thereby losing his fingers. It was held that it was not negligence on the part of the operator to start the machine without notice to the plaintiff, as an ordinarily prudent person would not have anticipated that the boy would put his hands between the shears, and as he did not intend to do so and it was no part of his duty to touch the shears.⁷⁹

would not have happened but for the fact that the power of the overhead shaft is on without his knowledge and contrary to his reasonable expectation: *Martineau v. National Blank Book Co.*, 166 Mass. 4; s. c. 43 N. E. Rep. 513 (defects in belt and overhead driving-pulley caused belt to creep from loose to tight pulley on machine; such motion as plaintiff caused by touching the mechanism of the machine would not have been forcible enough to injure him, had it not been for the power from the overhead shaft taking up and continuing the motion). Condition of evidence, in a case of this kind, under which the jury were warranted in finding that the proximate cause of the injury was the negligence of the defendant: *Wells v. Bourdages*, 88 Ill. App. 473.

⁷⁸ *Fournier v. Columbian Man.*

Co., 70 N. H. 629; s. c. 44 Atl. Rep. 104.

⁷⁹ *Glover v. Kansas City Bolt & Co.*, 153 Mo. 327; s. c. 55 S. W. Rep. 88. It has been held that an owner of a stone quarry is not liable for the death of an employé engaged in unloading coal from a car, by the sudden moving and collision with that on which he was engaged, of two heavily-loaded cars secured on a grade by one brake and one chock under the wheels, unless in the exercise of ordinary care such method of securing them was insufficient,—especially where such employé is conversant with the danger: *Hoosier Stone Co. v. McCain*, 133 Ind. 231; s. c. 31 N. E. Rep. 956 (special verdict did not find the use of one brake and one chock to be negligence, nor did it state the degree of the grade or the size of the chock used; so that the

§ 4008. **Effect of Master's Assurance that an Appliance is Safe.**⁸⁰—Where the defendant's agent, who employed the plaintiff to work, and who directed him what to do, told him to get a particular mule, and assured him that it was safe, and it turned out to be unsafe and vicious, to the injury of the plaintiff,—it was held that the defendant was bound by the statement of his agent and must pay damages, in the absence of evidence showing that the plaintiff knew that in fact the mule was dangerous.⁸¹

§ 4009. **Employer Need Not Own the Dangerous Machine by which Employé is Injured.**—It is scarcely necessary to say that the fact that an employer does not own a machine, does not relieve him from liability for an injury to an employé caused by a defect therein, where, through his superintendent, he pays for the use of such machine, and it is set up and used under the superintendence of his foreman and representative, though the fact that such machine is being used is not known personally to the employer.⁸²

§ 4010. **Temporarily Removing Safety-Appliances.**—It seems to have been well held that an employer is not negligent toward an employé in temporarily removing a safety-appliance of his own invention with which the employé was accustomed to work the machine, and ordering him to work without it, if he gives proper instruction and warning to the employé, and such appliance is not in general use in the business.⁸³

§ 4011. **Various Defects with Respect to which Negligence has been Imputed to the Master.**—It has been held that liability of the master for injuries to a servant cannot be based upon the mere fact that a car used for carrying refuse had accidentally "dumped" in operation, and that there was a slight straightening of the hook used for fastening the side of the car, not shown to have been defective enough to have had any connection with the accidental dumping;⁸⁴ nor upon the fact

court could not determine the question as a matter of law. The special verdict found that the two cars causing the collision were made to move by other cars being moved down to them from the quarry, but did not find this to be negligence).

⁸⁰ See *post*, §§ 4072, 4664.

⁸¹ *East Jellico Coal Co. v. Stewart*, 24 Ky. L. Rep. 420; s. c. 68 S. W. Rep. 624 (no off. rep.).

⁸² *Higgins v. Williams*, 114 Cal. 176; s. c. 45 Pac. Rep. 1041.

⁸³ *Reese v. Hershey*, 12 Lanc. L. Rev. (Pa.) 353 (removal of guard from in front of rolls of candy-making machine).

⁸⁴ *Soderman v. Kemp*, 145 N. Y. 427; s. c. 65 N. Y. St. Rep. 352; 40 N. E. Rep. 212; *rev'g s. c. sub nom. Soderman v. Troy Steel Co.*, 70 Hun (N. Y.) 449. It was the duty of the employés to fasten the hooks holding the body of the car in place after it was dumped; no dumping similar to the one causing the in-

that the master had failed to provide a more secure door for a carding-machine, which door, after having been in use in the defendant's mill for a number of years without having caused an injury, fell out while a servant was dusting the machine, allowing his hand to slip through into the machinery, it appearing that the plaintiff was experienced in the use of machines, had never made a complaint that the fastening was defective, and on his recovery had returned to his work without suggesting any change in the fastening.⁸⁵ A workman employed upon a traveller on an elevated track, used for moving heavy stone, whose duty requires him to go to the ground, and who steps, in descending, upon a shaft, which suddenly revolves when a gust of wind strikes the traveller, causing his ankle to be drawn into the bevel gearing and crushed, is injured in the line of duty, without his fault, and by reason of the master's neglect to secure the wheels of the traveller, which are usually wedged, the master knowing it is necessary to keep the traveller from being moved by the wind, and which the employé has reason to believe are wedged at the time, where the employé cannot see from his position that this precaution has been omitted, and cannot see without making a close inspection; and he is entitled to a recovery.⁸⁶ Where the evidence showed that the machine from which the injury proceeded, when properly constructed, could be thrown out

jury ever happened, either before or after the injury. The evidence pointed clearly to the negligence of the plaintiff's coemployés as the cause of the accident: *Soderman v. Kemp, supra*.

⁸⁵ *Riverside Cotton Mills v. Green*, 98 Va. 58; s. c. 34 S. E. Rep. 963 (master was not liable for the further reason that the defect, if any, was well known to the plaintiff). Where the plaintiff was injured by reason of a change in the adjustment of a planer by one who used it during his absence from the room, and after the accident it was found that the rear table of the machine was slightly depressed, due to a general impairment of one of the supports, occasioned by long use of the machine, such fault would not justify submitting the case to the jury, since, if such condition might be said to be due to negligence on the part of the master, it was too slight: *Wyman v. Clark*, 180 Mass. 173; s. c. 62 N. E. Rep. 245. Another abstract of the last decision may be given as follows: Where it had been defend-

ant's usual and long-continued practice to allow his other servants, and contractors not in his employ, to use a planer in his factory; and plaintiff, well acquainted with such practice, and knowing that persons using the planer adjusted it to suit their purposes, and that the blades might become nicked, failed to examine the planer after having been absent from the room for half an hour, contrary to his usual custom, and was injured by reason of a change in the adjustment of the planer by such a person, and by reason of the blades having become nicked and dull,—neither the allowance of such use, nor defendant's failure to anticipate that such use would work such changes in the condition of the machine as to render it specially dangerous, was negligence rendering defendant liable for the injury: *Wyman v. Clark*, 180 Mass. 173; s. c. 62 N. E. Rep. 245.

⁸⁶ *Salem-Bedford Stone Co. v. O'Brien*, 150 Ind. 656; s. c. 49 N. E. Rep. 457.

of gear by the operator, and that it would remain stationary until started by some one; that by the use of ordinary care it could be kept in good condition; that when the employé was injured he had properly stopped the machine; and that it was not started in motion by his act, or failure to use due care, or by the act of any other person,—it was held that the evidence sustained a finding that the injury was caused by the negligence of the employer.⁸⁷ On the loading of a vessel merchandise was drawn up an inclined plane to the deck-level, and then by a derrick and sling swung over a certain hatch. The arm of the derrick was too low to swing the merchandise over the center of the hatch, but swung it six inches from the center, and that much nearer another hatch, under which the plaintiff was working. When the load, upon reaching the deck-level, was not opposite the center of the hatch, it was the duty of the foreman, who acted as gangwayman, to adjust it, so it would swing over the center. A load was swung over the hatch under which the plaintiff was working, and fell, injuring him. The evidence was held sufficient to show the injuries to be due to defective rigging or handling on the part of such foreman.⁸⁸

§ 4012. Other Injuries where there was Evidence of Negligence to Charge the Employer.—The master being under the duty of using ordinary or reasonable care to procure machinery which is safe and suitable for the purpose intended, and to keep it in such a condition that the risk to his servant will not be unnecessarily increased, any such greatly increased risk is—in the absence of contributory negligence or an acceptance of such increased risk by the servant—ascribed to the master, so as to make him responsible in damages for an injury to the servant proceeding from that source.⁸⁹ Evidence that a machine,

⁸⁷ *Gulf &c. R. Co. v. Hayden*, 29 Tex. Civ. App. 280; s. c. 68 S. W. Rep. 530.

⁸⁸ *Young v. Hahn* (Tex. Civ. App.), 69 S. W. Rep. 203 (no off. rep.). But on a writ of error to the Supreme Court this case was reversed because the Court of Civil Appeals, in the absence of evidence tending to raise an inference that the negligent foreman was a vice-principal, assumed that he was such: *Young v. Hahn*, 96 Tex. 99; s. c. 70 S. W. Rep. 950. Where the putting in of a heater in a distillery was the joint undertaking of the distillery company and the makers of the heater, the distillery company is liable to one of its servants, who assisted in the work by the direction of its foreman, for an in-

jury resulting from the breaking of a defective rope furnished for the work by the distillery company: *Old Times Distillery Co. v. Zehnder*, 21 Ky. L. Rep. 753; s. c. 52 S. W. Rep. 1051 (no off. rep.).

⁸⁹ This rule was applied so as to sustain a recovery of damages in an action by a boy to recover for the cutting off of his hand in a brick-making machine, owing to the excessive depression of the mold-plunger at which the boy was at work, due to wear and tear: *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434. A stove-manufacturer was held liable to a workman injured by a defective machine in his factory when he was working under a stove-mounter, who had agreed to furnish the men and

which was so constructed that it would not repeat its movement without coming to a full stop or start from a full stop, if it were in order,—was out of order and not safe to run, that it started from a full stop after it had repeated, and that the repeating was reported by the person who was employed on the machine and was injured by such movement, will warrant a finding of negligence on the part of the employer.⁹⁰

§ 4013. Injuries from Defects in Machinery, etc., with Respect to which Employers have been Exonerated.—It is little more than a platitude to say that the employer of one who is in the regular discharge of

mount stoves at so much each, the company to furnish the power and keep the machinery in repair, the stove-mounter agreeing to make such repairs *as their representative*, for a suitable compensation, and the manufacturer had general oversight of the work, the men were paid from the office, there was no limit set for the time for which the stove-mounter was employed, and the stove-mounter had agreed with the workmen to repair the machine,—the fact that he knew of the defect as foreman of the room charging the company with notice of it. He was not an independent contractor: *Toledo Stove Co. v. Reep*, 18 Ohio C. C. 58; s. c. 9 Ohio C. D. 467. In an action for the death of an oiler in defendant's packing-house, alleged to have been caused by a defective shaft-coupling from which bolts projected from one-half to one inch, the evidence was conflicting as to whether the accident occurred through deceased's clothes catching on such bolts, or through cotton-waste in his pocket catching on the shaft; a witness who was present when his body was taken down attributing it to the former cause, while other witnesses, testifying from appearances, attributed it to the latter cause. No one saw the accident. The coupling introduced in evidence did not show any of the defects alleged, but the testimony as to whether it was the identical coupler which caused the accident was conflicting. It was held that the evidence of defendant's negligence was sufficient to warrant the submission of the case to the jury:

Swift & Co. v. Zerwick, 88 Ill. App. 558. The use by a steamship company of an ordinary nail as a substitute for a steel pin in the machinery of a winch, the nail being much smaller than the pin which had been provided by the maker of the machinery, and also subjected to an additional strain because it did not fill the socket for which the pin was designed, was negligence which rendered the ship liable for an injury to a workman resulting from the giving way of the nail, notwithstanding the previous use of similar nails without accident for eighteen months: *The Nordfarer*, 115 Fed. Rep. 416.

⁹⁰ *Packer v. Thomson-Houston Elec. Co.*, 175 Mass. 496. Where, in an action for personal injuries alleged to have been caused by defects in a travelling crane in the factory in which plaintiff was employed, defendant's evidence tended to prove that there were many cranes in the factory, and that they were liable to be changed about from one track to another, and a witness for plaintiff testified that the crane which caused the accident was the same one that broke down a few days before, and that the foreman's attention had been called to it, the evidence was sufficient to support a finding by the jury that the crane in use at the time of the accident was the same one that had been previously reported to the foreman as defective and unsafe, and also to support findings that the crane was in fact defective and that its defective condition was the cause of the accident: *Nicoud v. Wagner*, 106 Wis. 67.

his duty, the employer having taken the ordinary precautions to prevent accidents, is not liable for damage resulting from the accidental breaking of a sledge-hammer or other tool used by him;⁹¹ or that it is not the duty of an employer to anticipate that an inexperienced employé, eighteen years old, will put his hand under the cap covering the knives of a planing-machine, in attempting to sweep an accumulation of shavings off the machine.⁹² The fact that a wrench furnished by a master for the use of the employé in screwing nuts upon iron rods broke because of insufficient strength for the work, cannot render the master liable for an injury received by the servant by falling in consequence of the breaking of the wrench, as the wrench itself was not a dangerous tool, and the injury resulting from its breaking was one that could not reasonably have been anticipated.⁹³ An employer is not liable for an injury to an employé caused by striking his finger against the sharp point of a hook while attempting hurriedly to hang meat upon another hook, although the former hook had been turned from its position so that its point was nearer to the latter by half an inch than it would otherwise have been; the hooks being placed four inches apart in a wooden frame, the room being without windows, and the work being done by the light of a lamp, which sometimes became dim with smoke and steam.⁹⁴

⁹¹ *Boyd v. Graham*, 5 Mo. App. 403 (head of sledge-hammer which employé of subcontractor for plumbing was using, broke off and went through gunny-bag stretched beneath his work, and damaged glass, stored underneath the place where he was working by another subcontractor).

⁹² *Huffer v. Herman*, 66 Ill. App. 481.

⁹³ *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192 (employé was standing on a trestle eight feet high and only five inches wide at the top). A girl sixteen years old, who was in the habit of using a card-cutting machine, the knife of which worked up and down when she placed her foot on the treadle, was denied a recovery for injuries sustained by the descent of the knife after she had raised it to clean away pieces of card, nothing more appearing to show neglect on the part of her employer. The evidence showed conclusively that the machine was in perfect condition, both before and after the accident; and that, after she had raised the knife, it could not possibly come down

again unless she put the machine in gear by placing her foot on the treadle: *Reardon v. New York &c. Card Co.*, 51 N. Y. Super. 134. A servant employed in operating an ironing-machine was injured by the iron jumping towards that part of the machine where the servant's hand was, while, as alleged, her foot was off the treadle by which the iron was operated. The servant had never noticed it jump that way before. Her sister, who had operated the machine, testified that she had seen it do so, but did not testify that complaint thereof had been made to the master or to any one else. There had been complaints made to the master that the machine did not work easily, and he knew some of the bearings were worn, but such defects were not shown to have had any connection with the accident. It was held not sufficient to show the master's liability; and the dismissal of the complaint at the close of the evidence was proper: *Campbell v. Jughardt*, 50 App. Div. (N. Y.) 460; s. c. 64 N. Y. Supp. 198.

⁹⁴ *Armour v. Ryan*, 61 Ill. App.

ARTICLE II. UNGUARDED OR UNFENCED MACHINERY.

SECTION

4017. Duty of master to cover, fence, or guard dangerous machinery.
4018. Decisions illustrating this liability of the master.
4019. Statutes defining and enforcing this duty.
4020. Doctrines and decisions which exonerate the master in this regard.
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SECTION

4022. Decisions relating to injuries from unguarded set-screws—Employers exonerated.
4023. Canadian doctrine that an employer whose servant is injured by an unguarded set-screw is liable.
4024. When servant deemed to accept the risk of injury from such unguarded machinery.

§ 4017. **Duty of Master to Cover, Fence, or Guard Dangerous Machinery.**—It is obviously the duty of an employer, under the principles of this chapter, to cover, fence or guard dangerous machinery or dangerous places in the premises where his employes are required to work or to be, provided this can be done consistently with a reasonably proper and effectual operation of such machinery, or with the proper and effectual conduct of his business;¹ and if it is not practicable to

314 (simple accident; decayed animal matter on point of hook disabled his finger). For the purpose of hauling and dumping dirt on a railroad-track a box was placed on rollers on a push-car. The plaintiff was injured by being thrown from the car by the tilting of it. The car and one similar to it had been in use for some time before the accident, and the car on which the plaintiff was injured was used for a long time after without change, and never tilted before or after the injury to plaintiff. The plaintiff had assisted in the construction of the apparatus, was experienced in such work, and the contrivance was in perfect order at the time he was injured. It was held that as a matter of law the apparatus was not inadequate or unsafe: *Corletti v. Southern Pac. Co.*, 136 Cal. 642; s. c. 69 Pac. Rep. 422.

¹*McCormick Harvesting Co. v. Burandt*, 136 Ill. 170; s. c. 26 N. E. Rep. 538; aff'g s. c. 37 Ill. App. 165; *Taylor v. Felsing*, 164 Ill. 331; s. c. 45 N. E. Rep. 161; aff'g s. c. 63 Ill. App. 624; *Knuth v. Geo. A. Weiss Malting & Co.*, 72 Ill. App. 389

(jacket of foreman caught in cog-wheels connected with unguarded shafting; room poorly lighted—employer liable); *Mastin v. Levagood*, 47 Kan. 36; s. c. 27 Pac. Rep. 122; *Hull v. Hall*, 78 Me. 114 (but not absolute duty to provide guards for saws); *Levy v. Clark*, 90 Md. 146; s. c. 44 Atl. Rep. 990; *Craver v. Christian*, 36 Minn. 413; s. c. 31 N. W. Rep. 457; *Carroll v. Williston*, 44 Minn. 287; s. c. 46 N. W. Rep. 352; *Jaroszeski v. Osgood & Co. Man. Co.*, 80 Minn. 393; s. c. 83 N. W. Rep. 389; *Walker v. Grand Forks Lumber Co.*, 86 Minn. 328; s. c. 90 N. W. Rep. 573 (failing to guard certain machinery in a saw-mill; question of negligence was for the jury); *Reichla v. Gruensfelder*, 52 Mo. App. 43; *Lemser v. St. Joseph Furniture Man. Co.*, 70 Mo. App. 209 (failing to guard a circular saw); *Edwards v. Tilton Mills*, 70 N. H. 574; s. c. 50 Atl. Rep. 102 (duty to furnish a safe place to work extends to a passageway between two machines in a mill long used by the servants with the master's consent, though the injured employe had never before used it); *Turner v. Goldsboro Lumber Co.*,

do this, then, under principles hereafter considered,² it becomes his duty to see that his employés, and especially his minor employés,³ have sufficient *warning* of the risks incurred by their presence in the vicinity of such exposed machinery or dangerous places,—unless those dangers are entirely obvious to them.⁴

§ 4018. **Decisions Illustrating this Liability of the Master.**—Masters have been held liable for this species of negligence under the following conditions of fact:—Where an employer leaves an enormous, rapidly-revolving cogwheel partially unprotected, so that tongs carrying large masses of iron are liable to be caught and broken in it, and the pieces thrown all about the room with such force as to kill any person with whom they come in contact, after having been advised by a skilled workman to encase it;⁵ where the master failed to provide means for throwing machinery out of gear, and the servant was employed to perform a task in its vicinity;⁶ where the master placed an inexperienced girl of fifteen at work at passing linen through the rollers of a machine which usually had a guard before it to prevent the hand of the operator from getting caught, but the guard had been removed and the girl had received no warning and believed that the roll-

119 N. C. 387; s. c. 2 Chic. L. J. Wkly. 32; 26 S. E. Rep. 23; Myers v. Lumber Co., 129 N. C. 252; s. c. 39 S. E. Rep. 960 (not error to instruct that if the jury found that a countershaft, or loose pulley, or a covering for a saw running naked, was a proper and reasonable safeguard for its employés, and defendant failed to provide it, that was negligence); Miller v. Inman, 40 Or. 161; s. c. 66 Pac. Rep. 713; Rummell v. Dilworth, 111 Pa. St. 343; Bennett v. Standard Plate-Glass Co., 158 Pa. St. 120; s. c. 27 Atl. Rep. 874; Pennsylvania Coal Co. v. Nee (Pa.), 13 Atl. Rep. 841 (no off. rep.) (case was properly submitted to the jury); Le Febvre v. Lawton Spinning Co., 24 R. I. 215; s. c. 52 Atl. Rep. 1025; Couch v. Steel, 3 El. & Bl. 402; Godwin v. Newcombe, 1 Ont. L. Rep. 525 (absence of guards for a jointer, consisting of two revolving knives driven by steam-power and projecting slightly above the surface of a table, was a defect in the machine, where such guard could have been provided); Myers v. Sault St. Marie Pulp & Co., 3 Ont. L. Rep. 600; Thompson v.

Wright, 22 Ont. Rep. 127; George Matthews Co. v. Bouchard, Rap. Jud. Que. 8 B. R. 550; s. c. aff'd, 28 Can. Sup. Ct. 580.

² *Post*, § 4055, *et seq.*

³ *Post*, § 4091, *et seq.*

⁴ Levy v. Clark, 90 Md. 146; s. c. 44 Atl. Rep. 990; Craver v. Christian, 36 Minn. 413; s. c. 31 N. W. Rep. 457; Carroll v. Williston, 44 Minn. 287; s. c. 46 N. W. Rep. 352; Turner v. Goldsboro Lumber Co., 119 N. C. 387; s. c. 2 Chic. L. J. Wkly. 32; 26 S. E. Rep. 23; Le Febvre v. Lawton Spinning Co., 24 R. I. 215; s. c. 52 Atl. Rep. 1025; George Matthews Co. v. Bouchard, Rap. Jud. Que. 8 B. R. 550; s. c. aff'd, 28 Can. Sup. Ct. 580.

⁵ Richland's Iron Co. v. Elkins, 90 Va. 249; s. c. 17 Va. L. J. 431; 17 S. E. Rep. 890 (liable for an injury to a servant resulting from the tongs catching in the cogs).

⁶ Taylor v. Felsing, 164 Ill. 331; s. c. 45 N. E. Rep. 161; aff'd s. c. 63 Ill. App. 624 (not relieved from liability for an injury to the servant while in the exercise of due care, because the slipping which was the immediate cause of the injury was accidental).

ers were too close together to permit her hand to go between them, and her hand was caught between them;⁷ where the hood or blower of a revolving cylinder with knives, in a planing-machine, was battered and worn so that it did not fit closely, whereby a suction of air was created over a roller into the cylinder under the hood;⁸ where the owner of a planing-machine which had a shaving-hood which when up was an absolute protection, ordered it to be kept down while the knives were being adjusted, and until, by running a plank through, they were found to be properly arranged, without giving proper warning of the danger to an inexperienced employé, who, in assisting to remove a plank from the machine under the orders of a superior, stepped into the knives, which were under the table of the machine;⁹ where a rip-saw and molding-machine were dangerously close to each other, and in order to comply with his orders the servant was compelled to pass between them with a load in his arms, the master having permitted the regular passageway to become filled up and not having provided another;¹⁰ where the owner of a pulp-mill required a servant to climb a stepladder and to step over an unguarded cogwheel on to a plank in order to perform his duties, and the cogwheel might easily have been guarded, and the stepladder was not fastened to the floor;¹¹ where a boy of seventeen was required to clean a machine by the use of pieces of bagging while the machine was in motion, the employer having refused to furnish proper material for the purpose and having failed to stop the machine while the cleaning was going on;¹² where an employé in a saw-mill was required to clear away the trimmings and sawdust which had accumulated between one of the saws and a wall four or five feet distant from the saw; and over this space a line-shaft revolved at the rate of 500 revolutions per minute; and at the end of the line-shaft near the wall there was a large pulley over which ran a ten-inch belt; and the line-shaft was in two pieces, joined by couplings held together by bolts and nuts; and the bolts ran parallel to the shaft and one of them extended out on the opposite side from the pulley about one and one-half inch beyond the nut; so that, in stooping under the shaft to remove the trimmings, the employé was

⁷ *Levy v. Clark*, 90 Md. 146; s. c. 44 Atl. Rep. 990 (evidence of defendant's negligence sufficient to carry the case to the jury).

⁸ *Jarozeski v. Osgood & Co. Man. Co.*, 80 Minn. 393; s. c. 83 N. W. Rep. 389 (held that the hood was not a proper protection to dangerous machinery).

⁹ *Turner v. Goldsboro Lumber Co.*,

119 N. C. 387; s. c. 2 Chic. L. J. Wkly. 32; 26 S. E. Rep. 23.

¹⁰ *Myers v. Lumber Co.*, 129 N. C. 252; s. c. 39 S. E. Rep. 960 (instruction approved that such acts would constitute negligence on the part of the master).

¹¹ *Myers v. Sault St. Marie Pulp & Co.*, 3 Ont. L. Rep. 600.

¹² *Thompson v. Wright*, 22 Ont. Rep. 127.

caught, whirled around the shaft and killed;¹³ where a boy employed to work on a train of rollers in a spike-mill, after having been at work for a few days, was, while fulfilling his duties, caught by the cogs of the rollers, drawn in and hurt, by reason of the fact that a board protection which extended along the rollers stopped short of the point at which the boy had to stand to perform part of his work, when, if it had extended three feet further, he could have done his work in safety;¹⁴ where a boy, employed to keep culm in motion down a chute in a coal-breaker, was killed in consequence of going into it through an opening other than that prepared for the purpose, and coming in contact with unguarded machinery;¹⁵ where a girl of twelve and one-half years, who had worked only seven or eight weeks in a mill at removing the full bobbins from the twistors, her place of work being in an alley three feet wide with twistors on both sides, and with the floor slippery with oil from the machine, was instructed to remove the bobbins by kicking them off when they stuck, in which operation she was caught in the machinery and hurt.¹⁶

§ 4019. Statutes Defining and Enforcing this Duty.¹⁷—Statutes have been enacted in England and in various States of the American Union imposing upon employers of labor the duty of guarding dangerous machinery to the end of protecting their employes from injury therefrom. Under a statute declaring this duty and making a violation of it a misdemeanor, a servant injured by its violation has a right

¹³ *Miller v. Inman*, 40 Or. 161; s. c. 66 Pac. Rep. 713 (master negligent and servant not shown to have known of the bolt or to have been negligent in not knowing it—recovery).

¹⁴ *Rummell v. Dilworth*, 111 Pa. St. 343 (question for jury).

¹⁵ *Pennsylvania Coal Co. v. Nee* (Pa.), 13 Atl. Rep. 841 (no off. rep.) (case was properly submitted to the jury).

¹⁶ *Le Febvre v. Lawton Spinning Co.*, 24 R. I. 215; s. c. 52 Atl. Rep. 1025 (proper to submit to the jury the question whether the mode of removing the bobbins by kicking them off when they stuck was reasonable and proper). In another case the plaintiff, nineteen years old, was employed to operate a rip-saw which had no guard on it, but was assured that a guard would be put on immediately. He was not

accustomed to running such saw, and the danger was not so imminent but that it was reasonably safe to operate it for a short time without a guard. He worked for two weeks, when the machinery was stopped for repair, but no guards were put on, and, on resuming work, he was instructed to saw some short, thick pieces of wood, which work was more dangerous, but of which fact he was unaware, and in performing it was injured because of the absence of a guard. It was well held that, in view of evidence tending to show that the majority of such machines were furnished with guards, and that the increased safety was well known, the question of negligence of the employer was for the jury: *Crooker v. Pacific Lounge &c. Co.*, 29 Wash. 30; s. c. 69 Pac. Rep. 359.

¹⁷ See also, *post*, § 4590, *et seq.*

of action.¹⁸ One statute of this kind, imposing upon the owners of manufacturing establishments the duty of seeing that all cogs shall be properly guarded, has been held to be merely an affirmation of the common law; so that the omission to provide guards did not create a liability for injuries to a servant where the cogs could not have been guarded in any manner that would have tended to make them safer for employes, without preventing their use.¹⁹ Generally speaking, such statutes do not impose an absolute liability on the master regardless of the contributory negligence of the servant. In other words, they do not give the servant a right of action against the master to recover damages for an injury which the servant brings upon himself.²⁰ Such a statute was held not to render an employer liable for an injury received by a boy in falling into cogwheels left uncovered in violation of the statutory mandate, where the notice from the inspector provided for by the statute had not been given.²¹ If the statute requires machinery of a certain description to be guarded, and also makes it the duty of the owner of an establishment where machinery is used to furnish belt-shifters in the discretion of a public officer called the chief inspector,—then it becomes the absolute duty of the owner properly to guard all dangerous machines in his establishment without reference to the direction of the inspector.²² Where the statute requires certain specified machines and machinery to be located so as not to be dangerous to employes, or to be guarded or otherwise protected where an employe is required to pass or to be employed near them, and an action is brought by an employe in a saw-mill to recover damages for injuries received from dangerous wheels which were left unguarded, an *instruction* that the dangerous wheels by which the plaintiff was injured should have been, as far as practicable, properly guarded or otherwise protected, was held proper.²³ A statute requiring the owner of any factory to “properly guard machinery of every description” has been held not to require every machine to be fenced, but only

¹⁸ *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; s. c. 64 N. E. Rep. 610.

¹⁹ *Spaulding v. Tucker & Co.*, 13 Misc. (N. Y.) 398; s. c. 34 N. Y. Supp. 237; 68 N. Y. St. Rep. 117.

²⁰ *Thompson v. Edward P. Allis Co.*, 89 Wis. 523; s. c. 62 N. W. Rep. 527.

²¹ *Borck v. Michigan Bolt & Co. Works*, 111 Mich. 129; s. c. 3 Det. Leg. N. 595; 69 N. W. Rep. 254. Nor was defendant liable under a statute prohibiting the employment

of children under fourteen in factories without the consent of the parent or guardian, where it appeared that the boy knew and appreciated the danger, and was injured by reason of getting into a scuffle with another employe: *Borck v. Michigan Bolt & Co. Works*, *supra*.

²² *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479; s. c. 63 N. E. Rep. 239.

²³ *Walker v. Grand Forks Lumber Co.*, 86 Minn. 328; s. c. 90 N. W. Rep. 573.

those which, in reasonable anticipation, may be a source of danger.²⁴ A statute requiring manufacturers properly to guard cogs, belting, shafting, set-screws, etc., does not impose the duty upon an employer to guard machinery which is being installed, so as to render him liable for the failure to guard a sprocket-wheel forming a part of new machinery, in consequence of which failure an employé is injured while the machinery is being installed.²⁵ Somewhat opposed to this is a holding to the effect that a statute providing for the covering of all gearing so located as to be dangerous to employés when in their ordinary duties, applies to an employé engaged in work upon the gears themselves, as well as to other employés.²⁶ The failure of an employer to guard a sprocket-wheel projecting just above the floor at a place where an inexperienced employé is set to work, is actionable negligence under the statute just referred to, where such wheel is so located as to be dangerous to the employé while engaged in his ordinary duties, unless guarded in some proper way.²⁷ This statute, it need scarcely be said, extends no further than to require the guarding of such machinery as is dangerous if left unguarded, and its dangerous condition is not determined by the fact that an employé is injured thereby, since his injury may be brought about by his own carelessness.²⁸ Construing the same statute, it has been held that where an unguarded shafting is so located that an employé must necessarily go out of his ordinary course, or out of the course which he might be reasonably expected to take, in order to reach it, the mandate of the statute does not require the master to guard it.²⁹ A statute requiring that all dangerous parts of machinery in a factory or workshop shall be securely fenced applies to all machinery from which, in the ordinary course of working it, danger may reasonably be anticipated, although such danger may arise only by reason of careless working or of external causes.³⁰ This statute is not limited to such machinery as supplies or conveys the motive power to the machine by which the industrial operations of the factory are immediately effected, but it applies to all machinery in the factory.³¹ Whether or not the owner

²⁴ *Byrne v. Nye & Co. Carpet Co.*, 46 App. Div. (N. Y.) 479; s. c. 61 N. Y. Supp. 741.

²⁵ *Foster v. International Paper Co.*, 71 App. Div. (N. Y.) 47; s. c. 75 N. Y. Supp. 610.

²⁶ *Thompson v. Edward P. Allis Co.*, 89 Wis. 523; s. c. 62 N. W. Rep. 527.

²⁷ *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641; s. c. 73 N. W. Rep. 563.

²⁸ *Powalske v. Cream City Brick Co.*, 110 Wis. 461; s. c. 86 N. W. Rep. 153.

²⁹ *Powalske v. Cream City Brick Co.*, 110 Wis. 461; s. c. 86 N. W. Rep. 153.

³⁰ *Birtwistle v. Hindle*, 66 L. J. Q. B. (N. S.) 173.

³¹ *Redgrave v. Lloyd*, [1895] 1 Q. B. 876; s. c. 64 L. J. M. C. (N. S.) 155.

of a manufacturing establishment is guilty of a violation of the New York statute above cited, in failing to guard cogwheels which are placed six feet above the floor but very near machinery bearings which the employés are required to clean while in motion because of the absence of belt-shifters,—has been held a question for a jury.³² Under a statute requiring that “all * * * shafting, set-screws and machinery shall be carefully guarded,” it has been held error to hold, as matter of law, that a set-screw projecting five-eighths of an inch on a revolving shaft fifteen feet above the floor, and which was reached by a ladder used only when necessary to oil the shaft-bearing, was not properly guarded.³³

§ 4020. Doctrines and Decisions which Exonerate the Master in this Regard.—There is a collection of decisions holding that an employer who uses dangerous machinery or keeps dangerous pitfalls or places in his establishment, is under no duty to his employés to cover, fence or guard the same, provided they are visible to the employés or provided they otherwise have notice of them.³⁴ One of these decisions

³² *Kinsley v. Pratt*, 75 Hun (N. Y.) 323; s. c. 58 N. Y. St. Rep. 213; 31 Abb. N. C. (N. Y.) 289; 26 N. Y. Supp. 1010.

³³ *Glens Falls &c. Cement Co. v. Travelers' Ins. Co.*, 162 N. Y. 399; s. c. 56 N. E. Rep. 897; aff'g s. c. 42 N. Y. Supp. 285; 11 App. Div. (N. Y.) 411. In like manner, shafting and a set-screw in a factory, suspended nine feet above the floor, were held not to be within the provisions of the statute: *Glassheim v. New York &c. Printing Co.*, 13 Misc. (N. Y.) 174; s. c. 68 N. Y. St. Rep. 24; 34 N. Y. Supp. 69. That the owner of a manufacturing establishment, who has provided a covering for machinery, sufficient to prevent the clothing of the employés from coming in contact therewith, is not liable, under a statute providing that all machinery “shall be properly guarded,” for injuries occasioned by an employé's throwing her hair over her head as she is coiling it, in such a manner that it flies underneath a table back of the covering of the machinery,—see *Cobb v. Welcher*, 75 Hun (N. Y.) 283; s. c. 53 N. Y. St. Rep. 200; 26 N. Y. Supp. 1068. A city ordinance requiring every vat with hot liquids to be surrounded with “proper safeguards” for preventing

accidents or injury to those employed at or near them, has been construed as requiring some practical safeguard which, while affording reasonable security, does not unreasonably interfere with the work which must be performed: *Chicago Packing &c. Co. v. Rohan*, 47 Ill. App. 640. That Pub. Stat. Mass., ch. 125, § 160, requires a guard only where some portion of the structure “crosses” the railroad,—see *Quinn v. New York &c. R. Co.*, 175 Mass. 150; s. c. 55 N. E. Rep. 891.

³⁴ *Arizona Lumber &c. Co. v. Mooney* (Ariz.), 42 Pac. Rep. 952 (no off. rep.); *Guedelhofer v. Ernsting*, 23 Ind. App. 188; s. c. 55 N. E. Rep. 113 (not legally bound to place guard over knives of wood-cutting machine, where injury could result only from using machine, and danger was obvious to any one using it); *Cunningham v. Bath Iron Works*, 92 Me. 501; s. c. 43 Atl. Rep. 106; *Demers v. Marshall*, 178 Mass. 9; s. c. 59 N. E. Rep. 454 (set-screw projecting from a shaft); *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67; s. c. 47 N. E. Rep. 506; *Shinners v. Proprietors*, 154 Mass. 168; s. c. 28 N. E. Rep. 10; *Downey v. Sawyer*, 157 Mass. 418; s. c. 32 N. E. Rep. 654;

holds that where a servant agrees to do work which compels him to pass under a *revolving shaft* placed four feet above the floor and across a doorway, which shaft is a part of the permanent construction of the mill and in good repair, and was plainly visible when the servant entered the employ of the master, such master owes no duty to the servant to change the construction and arrangement of the shaft, and hence he is not liable for an injury to the servant caused by his being caught thereon.³⁵ Another holds that an employer is not liable for injuries received by an employé in consequence of his clothes catching upon a *set-screw* unnecessarily projecting from a shaft upon which he fell, where it could not reasonably have been anticipated that one so engaged would fall upon that part of the shaft.³⁶ It is scarcely neces-

Sullivan v. India Man. Co., 113 Mass. 396; Gilbert v. Guild, 144 Mass. 601; s. c. 12 N. E. Rep. 368; Ciriack v. Merchants' Woolen Co., 146 Mass. 182; s. c. 15 N. E. Rep. 579; Lemoine v. Aldrich, 177 Mass. 89; s. c. 58 N. E. Rep. 178; Rock v. Orchard Mills, 142 Mass. 522; Murphy v. American Rubber Co., 159 Mass. 266; Hale v. Cheney, 159 Mass. 268; McGuerty v. Hale, 161 Mass. 51; s. c. 36 N. E. Rep. 682; Wilson v. Massachusetts Cotton Mills, 169 Mass. 67; Groff v. Duluth Imperial Mill Co., 58 Minn. 333; s. c. 59 N. W. Rep. 1049; French v. Aulls, 72 Hun (N. Y.) 442 (excusing absence of guard for saw where it was not shown that a proper guard would have prevented the accident); Roth v. Northern Pac. Lumbering Co., 18 Or. 205; s. c. 22 Pac. Rep. 842; Townsend v. Langles, 41 Fed. Rep. 919.

³⁵ Lemoine v. Aldrich, 177 Mass. 89; s. c. 58 N. E. Rep. 178.

³⁶ Groff v. Duluth Imperial Mill Co., 58 Minn. 333; s. c. 59 N. W. Rep. 1049. See also, Cunningham v. Bath Iron Works, 92 Me. 501; s. c. 43 Atl. Rep. 106; Rock v. Orchard Mills, 142 Mass. 522; Murphy v. American Rubber Co., 159 Mass. 266; Hale v. Cheney, 159 Mass. 268; McGuerty v. Hale, 161 Mass. 51; Wilson v. Massachusetts Cotton Mills, 169 Mass. 67; Sullivan v. India Man. Co., 113 Mass. 396. That an employer is not, under the Massachusetts theory, liable for injuries to an employé in a spinning-factory whose hands were caught in the *gearing* of a spinning-machine called a "mule," while he was pass-

ing through the alleyway between two mules, where the accident was due to the fact that his attention was diverted by the outcry of another employé and that he turned quickly around and dropped his hand into the gearing, where there was no defect in, or want of instruction to him respecting the machine,—see Cheney v. Middlesex Co., 161 Mass. 296; s. c. 37 N. E. Rep. 175. The failure of a foundry-owner to place a guard around the place where castings were broken by the dropping of a heavy weight upon them, to arrest flying pieces of iron, does not authorize a finding of negligence on his part rendering him liable for injuries to a servant struck by a flying piece of iron, while twenty or thirty feet away, where ordinarily the pieces of iron did not fly more than ten feet, and had never been known to fly so far before: Wood v. Heiges, 83 Md. 257; s. c. 34 Atl. Rep. 872. That an employer is not liable for an injury to an employé caught in an *open gearing* six feet four inches above the floor, unless it might reasonably be anticipated that an employé might be injured thereby,—see Eckels v. Chicago Ship Bldg. Co., 63 Ill. App. 436; s. c. 1 Chic. L. J. Wkly. 199. That an employer is not negligent because guards furnished for emery-wheels used for certain work are lighter than those for emery-wheels used for other work, where a good reason for the difference exists,—see Berning v. Medart, 56 Mo. App. 443. An employer is not liable for an injury to an employé while engaged

sary to say that, in all these cases, the absence of the protection to the dangerous machinery or pitfall must be the efficient cause of the injury, and that there can be no recovery where the injury would have happened under the same circumstances if the machinery or pitfall had been protected.³⁷ Nor does the obligation of the master to guard or protect dangerous machinery extend so far as to raise a duty on his part to guard or protect it in order to promote the safety of such of his servants as have no business to go in its vicinity; as, for example, machinery situated in a place not intended for workmen, but separated because of its danger from the rest of the building by a fence within which no one has occasion to go except the engineer when oiling the machinery.³⁸

§ 4021. Comments on these Decisions.—These decisions, in so far as they excuse the master in the performance of this duty, where it could be performed without detriment to his business, are brutal and unworthy of the jurisprudence of a civilized people. The mere fact that it is possible for his employes in the exercise of a continuance of extreme care and attention, to avoid being caught in such dangerous machinery or falling into such dangerous pitfalls, does not excuse him, in sound morals, and it ought not to excuse him in law, from the duty of providing suitable guards against such consequences, where it can be done without injury to his business. Other courts exonerate the master upon proof that he carries on his business in the usual manner—that he leaves his machinery unfenced, or exposes his servants to dangers which he might have avoided, the same as other employers do.³⁹ These decisions are scarcely more deserving of respect than those just previously referred to. In the language of Mr. Justice Willes, in a leading English case, “no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.”⁴⁰ The true view is, that the fact that no other person

in operating a laundry-machine which had no guard rails and could not be operated with guard-rails, but was in perfect working condition, and of a kind in general use, merely because other machines differently constructed and furnished with guard-rails, the operation of which would be less dangerous, were in use: *Keenan v. Waters*, 181 Pa. St. 247; s. c. 40 W. N. C. (Pa.) 241; 37 Atl. Rep. 342.

³⁷ *French v. Aulls*, 72 Hun (N. Y.) 442; s. c. 54 N. Y. St. Rep. 866; 25 N. Y. Supp. 188; *Tooke v. Ber-*

geron, 27 Can. Sup. Ct. 567 (employer not liable for an injury to a servant by coming in contact with machinery in a factory unless the accident was directly due to the employer's neglect).

³⁸ *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; s. c. 47 Atl. Rep. 1128.

³⁹ *Clark v. Barnes*, 37 Hun (N. Y.) 389; *Wabash Paper Co. v. Webb*, 146 Ind. 303; s. c. 45 N. E. Rep. 474.

⁴⁰ *Indermaur v. Dames*, L. R. 1 C. P. 274; s. c. aff'd, L. R. 2 C. P.

in a similar business had used a certain device or covering to protect employes from harm, is not conclusive evidence that a master was not guilty of negligence in not providing it;⁴¹ or that the fact that other employers are not in the habit of protecting machinery which is in fact dangerous, does not exonerate the employer in the particular case;⁴² but that each case must be judged upon its own circumstances, with reference to what is reasonable and what is unreasonable.⁴³

§ 4022. Decisions Relating to Injuries from Unguarded Set-screws—Employers Exonerated.⁴⁴—Injuries to servants from unguarded set-screws have been of such frequent occurrence, and the means of preventing them being so obvious and inexpensive, there is something peculiarly atrocious in those judicial decisions which condone the use of this species of murder-machine. It is gratifying to note that the exposed or unguarded set-screw on revolving shafts is now rapidly going out of use, not in consequence of judicial decisions condemning it, but under the compulsion of statutes. A few decisions justifying the retention of this infamous contrivance, even in factories where children are employed, linger in the books. Some of them are here given. A machinist and engineer, who undertakes extra work for extra pay, first examining the place and receiving particular directions as to what is to be done, the work being done within three feet of a rapidly revolving shaft, which he knows is in motion, and who is caught by a set-screw projecting from a collar in plain sight on the shaft, next to a journal which he has once before oiled, the screw being of a kind in common use, and he knowing as an engineer that set-screws are in constant use, and that from the purpose for which they are employed it may be expected that the collar is kept in position by one,—cannot recover from his employer for an injury so received.⁴⁵ Where a paper mill and machinery are constructed and maintained after approved plans, of good pattern and design, of good material, adapted

311; s. c. in full, 1 Thomp. Neg. (1st ed.), p. 283. See also the excellent opinion of Biggs, J., in *Reichla v. Gruensfelder*, 52 Mo. App. 43, 60, where this language is quoted.

⁴¹ *McCormick Harvesting Mach. Co. v. Burandt*, 136 Ill. 170; s. c. 26 N. E. Rep. 588; aff'g s. c. 37 Ill. App. 165; *Reichla v. Gruensfelder*, 52 Mo. App. 43.

⁴² *Craver v. Christian*, 36 Minn. 413; s. c. 31 N. W. Rep. 457.

⁴³ *Ante*, § 3767, *et seq.* That an owner of a sawmill is not lia-

ble for injury to a servant while stepping over a shaft, occasioned by the catching of a set-screw in his clothing, if the machinery is not defective, and is such as is in common use, and is not particularly dangerous, and no one has previously been injured in the same place,—see *Lewis v. Simpson*, 3 Wash. 641; s. c. 29 Pac. Rep. 207.

⁴⁴ See also, *post*, § 4124.

⁴⁵ *Goodnow v. Walpole Emery Mills*, 146 Mass. 261.

to the use for which they are intended, and such as are in use in the best paper mills, although the gearings, set-screws, pulleys, belts, and other exposed parts of such machinery might be rendered more safe by boxing them, but well-conducted mills are operated without this extra care, the master has exercised as high a degree of care as can be asked. Extraordinary care cannot be demanded; and the usual and ordinary risks attendant upon work about such machinery are hazards of the service which are assumed by the employé.⁴⁶ Where a person enters the service of another, he impliedly agrees to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used; and it is immaterial whether he examined the machinery before making his contract or not. Hence, if the proprietor of a factory has in use a projecting set-screw for holding a collar on the end of a shaft, near a pulley, although there is a safer kind of set-screw in common use, by virtue of the implied contract the employer owes no duty to such workman to box the pulley or shaft, or to change the set-screw for a safer one,—and this though the workman is not engaged about the machinery, has never seen the set-screw, which cannot be seen when in rapid motion, and testifies that previously to the accident he had never heard of a set-screw and did not know what it was for.⁴⁷ Though a mill-owner may have been

⁴⁶ *Wabash Paper Co. v. Webb*, 146 Ind. 303 (employé nineteen years old, who had worked for two years in the mill and for three weeks as oiler of the particular machinery about which he was injured, was chargeable with notice of set-screw or oil-cup on shaft near floor, over which he tried to step, though it was invisible when shaft was in motion).

⁴⁷ *Rooney v. Sewall & Co. Cordage Co.*, 161 Mass. 153. More fully, the case was that the plaintiff was engaged in dragging bundles of hemp to the various machines. After he had been at work for three weeks, and three days before the accident, a certain machine was started for the first time, and the hemp used in its operation obstructed the way the plaintiff had theretofore been using. The foreman thereupon directed him to haul the hemp through a space only three or four feet wide, on one side of which were the shaft, belt, pulleys and set-screw. The plaintiff avoided accident for the first two days, by crowding toward the side of the passage away from the shaft,

but on the third day his hands got twisted in the hemp, which was caught in the machinery in some way, and he was thrown bodily six feet away, his arm being torn off below the elbow. On stopping the machine the collar and set-screw were found to be off the shaft—evidently jerked off by the accident. The plaintiff testified that he knew there was some danger from the pulleys and belt, but that he did not know of the collar and set-screw, which were shown to be invisible. Knowlton, J., was of opinion that because the plaintiff knew the danger from the belt and pulleys, it was unnecessary to warn him of the set-screw; and that it was unnecessary for the further reason that the set-screw was visible when the machine was *at rest* (though the plaintiff was not shown to have had any duties to perform near the machinery when it was at rest). The plaintiff also testified that immediately after the accident he noticed that no hemp was caught in the pulleys or belt; and there was corroborative evidence to this effect by the operator of the machine, who looked

negligent in allowing a set-screw to project beyond the hub of a pinion-wheel, yet such negligence was not the proximate cause of an injury to an oiler who was caught by it while attempting to fill the oil-cup of a loose pulley two or three feet away from the pinion, and eighteen inches above and twelve inches back of the shafting, the set-screw being on the side of the pinion away from the pulley, and the chances of injury from it being very remote if the plaintiff placed his ladder in the natural and proper position for reaching the oil-cup, as he testified he did.⁴⁸

§ 4023. Canadian Doctrine that an Employer whose Servant is Injured by an Unguarded Set-screw is Liable.—In sublime contrast from the infamous decisions collected in the preceding paragraph are the reasoning and judgment of the Supreme Court of Canada. In a case of this kind, the reasoning of the court was that the application of the principle that the responsibility of the employer is that of a *bon père de famille* requires at his hands care and protection against even the mistakes and thoughtlessness of the servant, in the performance of acts in the ordinary discharge of his duties. While the employer may not be responsible for the consequences of unusual or unnecessary acts of the workman, and while certainly he is not responsible for acts committed in violation of orders or in defiance of ordinary rules of self-protection, a greater degree of prudence may be enforced against an employer is protecting his workmen against possible dangers, than can be exacted from the workman. From the employer is expected the prudence of experienced judgment; from the workman, obedience only to express orders and general principles of safety and self-protection. In the present case, therefore, where the wedge of a screw on a revolving shaft was left projecting near where the workman was employed, and his clothing caught thereon, the employer was held responsible although the accident might have been avoided by greater care on the part of the workman.⁴⁹

§ 4024. When Servant Deemed to Accept the Risk of Injury from such Unguarded Machinery.—If it is not consistent with the due conduct of his business to cover, fence or guard such dangerous machinery or places, and if his servants have been duly warned and instructed concerning the dangers which they thereby incur, then such dangers will be deemed to be a part of the ordinary risks of the em-

around immediately after the plaintiff was injured: *Rooney v. Sewall &c. Cordage Co.*, *supra*.

⁴⁸ *Groff v. Duluth Imperial Mill Co.*, 58 Minn. 333.

⁴⁹ *George Matthews Co. v. Bouchard*, 28 Can. S. C. 580.

ployment, which the servant accepts when he enters into it, under principles hereafter to be considered.⁵⁰

ARTICLE III. DERRICKS, LIFTING-CRANES, ETC., AND THEIR OPERATION.

SECTION	SECTION
4026. Care demanded of master in the construction and operation of derricks, lifting-cranes, etc.	4030. Defects with respect to which the employer was held liable.
4027. Care in selecting the materials from which such appliances are constructed.	4031. Defects with respect to which the employer was exonerated.
4028. Distinction between permanent structures and temporary devices.	4032. Operation of the New York statute.
4029. Allowing parts of derricks to become worn out and defective.	4033. Operation of the English Workmen's Compensation Act.
	4034. Faults in the operation of derricks with respect to which negligence has been ascribed to the master.

§ 4026. **Care Demanded of Master in the Construction and Operation of Derricks, Lifting-Cranes, etc.**—The reasonable or ordinary care demanded of a master in the construction of the appliances with which his servant is to work, applies to such dangerous appliances as derricks, lifting-cranes, etc.; and, on a principle already considered,¹ it is a care in proportion to the danger or to the risk of injury to be avoided.²

§ 4027. **Care in Selecting the Materials from which such Appliances are Constructed.**—It need not be said that the ordinary care or reasonable care of the law is demanded of a master in selecting the materials from which to construct a derrick to be used by his servants.³

⁵⁰ *Post*, § 4608, *et seq.*; *Young v. Burlington Wire Mattress Co.*, 79 Iowa 415; s. c. 44 N. W. Rep. 693.

¹ Vol. 1, § 25; *ante*, § 3772.

² *Rollings v. Levering*, 18 App. Div. (N. Y.) 223; s. c. 45 N. Y. Supp. 942 (such care demanded of a master who furnishes only the hooks actually used for sustaining a scaffold used in painting a building, the painters being given no power of selection).

³ *Ambrose v. Angus*, 61 Ill. App. 304. Where an employé in the de-

fendant's iron-works was injured by the breaking of the clamp to which a derrick guy-rope was fastened, and the clamp had been forged in defendant's shop from material furnished by it, and the derrick had been in use only from two to six weeks; and there was expert testimony that the break could have been caused only by the use of defective materials in making the clamp, or the subsequent overstraining of the derrick; and there was evidence that a derrick should

§ 4028. **Distinction between Permanent Structures and Temporary Devices.**—Here, as elsewhere,⁴ a seemingly sound distinction is taken between *permanent* appliances and tools furnished by the master for the use of his servants, and those *temporary* devices provided by the servants themselves to meet particular exigencies in the progress of the work. For example, an ordinary derrick remaining in one place for a considerable space of time and until the completion of the work for which it is used, is a permanent structure, within the rule that a master must use reasonable care in providing his servants with suitable appliances with which to perform his work, and in keeping such appliances in a reasonably safe condition of repair.⁵ So also, where a scaffold between piers in a river for the erection of a bridge fell, in course of construction, injuring a workman, by reason of the piles having been too short and of the absence of sufficient braces where a crane for lifting material was placed, the negligence did not relate to a mere detail of work entrusted to the fellow servants of the injured workman so as to relieve the master from liability.⁶ But on the other hand, an employer is not liable for an injury resulting from a defective block and hook used as a temporary incident of a particular job.⁷ So also, an employer who furnishes his employés with a derrick and with the necessary appliances intended to be used in different parts of the building in process of construction, does not, in the absence of statute, owe to them the duty of setting it up and supporting it at each place where it may be required.⁸

be inspected at least once a day, but that the derrick in question was not inspected more than twice a week, and then only by the eye, the inspector standing on the ground,—it was error, in an action for the injuries sustained, to take the question of defendant's negligence from the jury; since the evidence warranted the inference that the clamp was made of defective material or had been overstrained, and that such condition could have been detected by a proper inspection: *Welsh v. Cornell*, 49 App. Div. (N. Y.) 203; s. c. 63 N. Y. Supp. 44. In an action for the death of an employé caused by the breaking of the boom of a derrick which he was operating, evidence that when the boom was selected and put in use it was unfit for the purpose intended, because of the fact that at the point where it subsequently broke there were several knots which rendered it unsafe, is sufficient to sus-

tain a finding that defendant failed to furnish reasonably safe instrumentalities for the performance of the work: *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142; s. c. 88 N. W. Rep. 436.

⁴ *Ante*, § 3999, *et seq.*

⁵ *Yaw v. Whitmore*, 46 App. Div. (N. Y.) 422; s. c. 61 N. Y. Supp. 731; s. c. aff'd, 167 N. Y. 605 (*mem.*); 60 N. E. Rep. 1123; s. c. on former appeal, 37 App. Div. (N. Y.) 98.

⁶ *Pursley v. Edge Moor Bridge Works*, 56 App. Div. (N. Y.) 71; s. c. 67 N. Y. Supp. 719; s. c. aff'd, 168 N. Y. 589 (*mem.*); 60 N. E. Rep. 1119.

⁷ *Harnois v. Cutting*, 174 Mass. 398; s. c. 54 N. E. Rep. 842 (arrangement of ropes and blocks used in moving a building was made by fellow servants of plaintiff, and block bearing defective hook was taken from among a number of suitable ones).

⁸ *Kennedy v. Jackson Agric. Iron*

§ 4029. **Allowing Parts of Derricks to become Worn Out and Defective.**—So also, it is not enough that the master exercises reasonable care to the end of furnishing for the use of his servants a reasonably safe derrick in the first instance; but he is, on a principle already considered,⁹ under the duty of maintaining a reasonable and continuous inspection to the end of seeing that it does not fall into a state of ill repair, and he is held to the exercise of reasonable care and skill in keeping it in good repair.¹⁰

Works, 12 Misc. (N. Y.) 336; s. c. 33 N. Y. Supp. 630; 67 N. Y. St. Rep. 335. But a recent statute of New York changes this rule: *Post*, § 4032.

⁹ *Ante*, § 3786.

¹⁰ In a case illustrating this principle it appeared that the plaintiff, while riding on an iron column which was being raised by a derrick, as it was his duty to do, was injured by the column and boom of the derrick falling. The operator of the derrick testified that a pin connected with the derrick, and holding the gear in a position, was much worn, and had been defective for some time, and that the vibration from the machinery would cause it to drop from its place, and that after plaintiff's fall the pin was found out of position. This evidence was corroborated by testimony of another operator. It was held that the evidence was sufficient to sustain a verdict in plaintiff's favor: *Union Bridge Co. v. Teehan*, 190 Ill. 374; s. c. 60 N. E. Rep. 533; aff'g s. c. 92 Ill. App. 259. In another such case the plaintiff's intestate, employed by defendant, was killed by the breaking of a mast of a derrick used in lifting stone, the mast being "powder-posted" and dry-rotted in the center. Deceased watched for and answered signals from the bottom of the quarry, and gave them to the engineer, took care of and oiled the derricks, and directed the disposition of slack from the quarry. The mast had been constructed of spruce timber three and one-half years before, and had been covered with two coats of paint while it was green, which would tend to shorten its life and make it dozy and rotten within, but it was apparently sound, the paint making

a hard outer surface. Four months before the accident the derrick was moved, and defendant's superintendent and another employé, whose duty was to take care of the mill and machinery, examined the mast, stabbed into it with a knife, cut off some shavings, but did not bore into the mast to see whether it was sound in the center, by doing which the rotten condition which caused the breaking would have been discovered. No subsequent examination was made. It was held that it was error to nonsuit plaintiff, since there was sufficient evidence from which the jury might have inferred that the master had failed in its duty of inspection, and that such omission caused the injury: *Jarvis v. Northern New York Marble Co.*, 55 App. Div. (N. Y.) 272; s. c. 67 N. Y. Supp. 78. In still another case an employé was injured by the breaking of a bolt at the top of the mast of a derrick, which let the boom of the derrick fall. The head of the mast was out of repair, and several attempts had been made by the workmen to repair it. The bolt, when put in, was in good condition, and was open to inspection, and could and should have been inspected by the workmen. The derrick had been in use for some years, and had not been inspected by defendant from the time of its erection. The employé was familiar with the use of derricks. It was held that it was for the jury to say whether the injury was caused by defendant's negligence, or whether such employé's own negligence contributed thereto: *Dyer v. Pittsburgh Bridge Co.*, 198 Pa. St. 182; s. c. 47 Atl. Rep. 979.

§ 4030. **Defects with Respect to which the Employer was Held Liable.**—Under various conditions of fact the employer has been held liable where the steel cables supporting a derrick were old and had been used on another job, and the outer surface had become worn, and many of the wires were broken, and the cable broke, injuring an employé;¹¹ where a derrick was erected by experienced men, but was thereafter removed, under the direction of the master, by inexperienced workmen, and the master made no inspection to see whether it had been properly erected after removal, and a servant was injured by its fall.¹² In another case a brakeman on a freight-train was killed by the falling of derricks placed on each side of the track, and used by an independent contractor to unload heavy stones from the cars on the track. The derricks were fastened together by overhead wires, and were kept in position by guy-ropes fastened to posts, one of which, a fence-post, was decayed. The fall was caused by the breaking and pulling up of such posts. It was held that the railroad company was negligent in failing to furnish plaintiff a reasonably safe place to work while operating its own trains over its own tracks, which duty is inherent in the contract of employment.¹³

§ 4031. **Defects with Respect to which the Employer was Exonerated.**—In one such case the plaintiff, an employé of the defendant, was injured by the breaking and falling of a clamp to which the guy-rope of a derrick was attached. In an action to recover therefor there was no evidence that there was any defect in the iron of which the clamp was made, or that it was not properly maintained, except such as might be inferred from the fact that it broke. There was no evidence that the defendant knew of, or with reasonable diligence might have ascertained, the supposed defect. It was held insufficient to justify a verdict for the plaintiff.¹⁴ In another such case it was held that an

¹¹ *Yaw v. Whitmore*, 46 App. Div. (N. Y.) 422; s. c. 61 N. Y. Supp. 731; s. c. aff'd, 167 N. Y. 605 (*mem.*); 60 N. E. Rep. 1123; s. c. on former appeal, 37 App. Div. (N. Y.) 98.

¹² *Westbrook v. Crowds* (Tex. Civ. App.), 58 S. W. Rep. 195 (no off. rep.).

¹³ *Gulf & C. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; s. c. 55 S. W. Rep. 538. See also, *Jacobson v. Johnson*, 87 Minn. 185; s. c. 91 N. W. Rep. 465 (stays were twenty years old, and had been used for eighteen years for *another purpose*; and the employer, without having any special knowledge himself, and

after a casual examination by an expert, had adopted them to the use of stays for his derrick); *Scandell v. Columbia Const. Co.*, 50 App. Div. (N. Y.) 512; s. c. 64 N. Y. Supp. 232 (pin joining plate to a spar became loose and wobbled and an accident followed); *Burnside v. Novelty Man. Co.*, 121 Mich. 115; *Hustis v. James A. Banister Co.*, 63 N. J. L. 465.

¹⁴ *Welsh v. Cornell*, 168 N. Y. 508; s. c. 61 N. E. Rep. 891; rev'g s. c. 49 App. Div. (N. Y.) 203; 63 N. Y. Supp. 44. It has been held that an employer is not chargeable with negligence for the failure of his foreman employed to superintend

operator of a steam-crane is not chargeable with reckless indifference to consequences, in swinging back the crane in the usual manner, because of the presence of other employés in the way, when he knows that such employés are aware of the operation and are instructed to get out of the way of the crane, and they have always previously done so, and the plaintiff was warned of its approach in time to have got safely out of the way had he made any effort to do so.¹⁵

§ 4032. Operation of the New York Statute.—A statute of New York¹⁶ provides that an employer shall not furnish or erect hoists or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed, and operated as to give proper protection to life and limb. A *derrick* was constructed in such a manner that it was necessary, in operating it, to remove a large proportion of its supports, and make its safety depend upon the watchfulness and care of a fellow servant in restraining the swinging of a boom, which, if neglected, would cause a collapse of the whole structure. Evidence offered in behalf of an employé injured by its collapse tended to show affirmatively that such construction was improper. It was held to make a case for the jury, the concurring negligence of a coservant in the matter of operation furnishing no defense.¹⁷ Under this statute a master is responsible for a *scaffold* so defective that it is not sufficient to bear the burden placed upon it because of his failure to brace the uprights, notwithstanding the fact that he furnished sufficient and proper material and entrusted its construction to competent employés.¹⁸

§ 4033. Operation of the English Workmen's Compensation Act.—The American practitioner may possibly derive aid, by analogy to some of the American statutes, by examining decisions which have

mason-work, to see that the check-rope was attached to a derrick employed about the building, by reason of which a bricklayer ordered by the foreman to work near the derrick was injured by its fall: *Jenkinson v. Carlin*, 10 Misc. (N. Y.) 22; s. c. 62 N. Y. St. Rep. 643; 30 N. Y. Supp. 530 (negligence was that of man in charge of derrick, who was a fellow servant with plaintiff; and the foreman was not a vice-principal).

¹⁵ *Anniston Pipe Works v. Dickey*, 93 Ala. 418; s. c. 9 South. Rep. 720. See also, *Gates v. Chicago &c. R. Co.*, 4 S. D. 433; s. c. 57 N. W. Rep.

200; aff'g on rehearing s. c. 2 S. D. 422; 50 N. W. Rep. 907 (state of evidence held not conclusive that a derrick which was allowed to swing across a railroad-track, injuring a brakeman who came in contact with the chain of it, had been placed in care of the station-agent, who was deemed a fellow servant, so as to relieve the company from liability).

¹⁶ Laws N. Y. 1897, c. 415, § 18.

¹⁷ *Walters v. George A. Fuller Co.*, 74 App. Div. (N. Y.) 388; s. c. 77 N. Y. Supp. 681.

¹⁸ *Stewart v. Ferguson*, 34 App. Div. (N. Y.) 615; s. c. 54 N. Y. Supp. 615.

been rendered under the English Workmen's Compensation Act of 1897, § 7, some of which are noted in the margin.¹⁹

§ 4034. **Faults in the Operation of Derricks with Respect to which Negligence has been Ascribed to the Master.**—Negligence was imputed to the master where a foreman and an employé were engaged in unloading stone with a derrick, and a stone had become obstructed, and the foreman allowed the derrick to continue to move without stopping while the servant was endeavoring to get the stone loose,—the foreman, of course, being regarded as a vice-principal;²⁰ and where the employers of men hired to operate a derrick were often present at the place where it was erected and operated, and it fell because of the displacement of a key which was in plain sight, the fall being due to its not being properly erected,—the conclusion being that such facts might be found to establish a personal duty of the employers, when present, to inspect the derrick and to see that the key was properly fastened.²¹

ARTICLE IV. ELECTRICAL APPLIANCES.¹

SECTION

4036. Electrical appliances.

4037. Further of injuries from defective electrical appliances.

4038. Servant injured through de-

SECTION

fects in electrical appliances not obviously dangerous.

4039. Breaking of elevator of electric-light tower.

§ 4036. **Electrical Appliances.**—A person or corporation operating electrical appliances is bound to exercise reasonable care to the end that such appliances shall be so protected, insulated, and operated, as not to subject his or its servants to unnecessary danger; and here, as in other cases,² this care is a care proportionate to the danger to be avoided. In the neighboring Province of Quebec, whose jurisprudence is founded upon the French civil law, this obligation is described in

¹⁹ Wood v. Walsh, [1899] 1 Q. B. 1009; s. c. 68 L. J. Q. B. (N. S.) 492 (repairs done on a building more than thirty feet high, by means of a ladder placed outside the building, with one end of a plank tied to a rung of the ladder, and the other end resting on a window-sill for the purpose of standing on it, are not repairs done "by means of a scaffolding," within the statute); Hoddinott v. Newton, [1899] 1 Q. B. 1018; s. c. 68 L. J. Q. B. (N. S.) 495 (scaffolding used

in constructing or repairing a building more than thirty feet high, although the scaffolding itself is less than thirty feet from the ground, is within the statute). See also, *post*, § 4575, *et seq.*, where this act is more fully considered.

²⁰ Dolese & Co. v. Schultz, 101 Ill. App. 569.

²¹ McMahon v. McHale, 174 Mass. 320; s. c. 54 N. E. Rep. 854.

¹ See *ante*, § 3980; *post*, § 4118.

² Vol. I, § 25; *ante*, § 3772.

language which would be adopted by an American court only in describing the care demanded of a common carrier of passengers. It is there reasoned that an electric light and power company owes to a lineman the duty of using the utmost care and adopting every precaution and all known devices which can be taken to prevent live wires causing accidents; and where there is evidence that there was a precaution which might have been taken but was not adopted, the company is liable.³ No doubt, in the application of the rule thus described, the same result would be reached under the American rule of ordinary or reasonable care. In that country an electrical power company has been held liable for the death of an employé from an electric shock from a wire not properly insulated, where it failed to provide him with protecting gloves, which it was accustomed to furnish its employés when engaged in similar work, and which would have prevented the accident.⁴ An electric-supply company, having a contract with an electric-railway company by which the supply company has the right to use the poles of the railway company to sustain its feed-wire, has been held liable for an injury to an employé caused by the breaking of an unsafe pole which such employé had climbed for the purpose of removing the feed-wire, where he had no knowledge of the defect, which was not obvious, and his employer might have discovered the same by a reasonable inspection of the pole.⁵ Where an employer had, by means of the cut-off switch on a street-lamp, the use of which his servant knew, guarded him absolutely against danger from wires coming in contact with those of other companies,—it was held that he was not liable for an injury to the servant from such cause, it being the servant's duty to use the switch and cut off all current from the lamp before attempting to trim it.⁶

³ *Citizens' Light &c. Co. v. Lepitre*, 29 Can. Sup. Ct. 1 (failure to wrap with insulating material the tie-wires by which live wires were attached to porcelain knobs).

⁴ *Desjardins v. Citizens Light &c. Co.*, Rap. Jud. Que. 15 C. S. 28 (in French).

⁵ *San Antonio Edison Co. v. Dixon*, 17 Tex. Civ. App. 320; s. c. 42 S. W. Rep. 1009; distinguishing *Dixon v. Western Union Tel. Co.*, 68 Fed. Rep. 630; s. c. 71 Fed. Rep. 143 (where an employé engaged in erecting a telegraph-pole climbed a telephone-pole belonging to another company, in order to remove some wires which obstructed the erection of the telegraph-pole).

⁶ *Carr v. Manchester Electric Co.*,

70 N. H. 308; s. c. 48 Atl. Rep. 286. In another case it appeared that the plaintiff was employed as an electric lineman, and had never been furnished with any tools for the purpose of inspecting poles, nor was he required to do so by his contract of employment. There was some evidence that the linemen were in the habit of testing the poles for themselves by kicking or shaking them, but not by digging to see whether they were sound underground. Though the plaintiff kicked the pole before going up, to see whether it was sound, it was shown that he was under no duty of inspection, whereas the master was shown to have failed in such duty. Upon his cutting the wires

§ 4037. Further of Injuries from Defective Electrical Appliances.—Where a lineman was putting up a telegraph-wire, when both the wire and the cross-arm broke, and the lineman was thrown to the ground and killed, and there was no positive evidence that the materials were carefully selected by the company, and the evidence as to their actual soundness was conflicting, it was held that their breaking was evidence of negligence, and a judgment against the company was sustained.⁷ On the other hand, it was held that an electric-light company was not liable to a lineman for injuries sustained by him from a fall from one of its poles, caused by the giving way of a hood and frame which he was removing under the direction of a foreman, where the company furnished competent co-servants and proper appliances with which to take down the frame with perfect safety.⁸

§ 4038. Servant Injured through Defects in Electrical Appliances Not Obviously Dangerous.—Patent defects in the appliances given the servant with which to work, not obviously dangerous, are placed by just views of the law among the ordinary risks of the service which he impliedly assumes. Thus, an employé of an electric-light com-

the pole broke, injuring him. It was held that he had a right to presume that his employer had discharged his duty, and that the pole was sound, and that he was not guilty of contributory negligence in cutting the wires as he did, but was entitled to recover damages: *Dupree v. Alexander*, 29 Tex. Civ. App. 31; s. c. 68 S. W. Rep. 739. Where an electric company negligently cut an electric wire, and, because of the consequent crossing of other electric wires, a lineman received a shock resulting in his death, a finding that the cutting of the wires was the cause of the lineman's death was proper, though it operated through the consequent crossing of other wires: *Broughel v. Southern New England Tel. Co.*, 72 Conn. 617; s. c. 45 Atl. Rep. 435.

⁷*Clairain v. Western Union Tel. Co.*, 40 La. An. 178; s. c. 3 South. Rep. 625.

⁸*Gibbons v. Brush Electric Illum. Co.*, 36 App. Div. 140; s. c. 55 N. Y. Supp. 378. That a telephone company owes no duty to a lineman employed by the city, which has the right to use the topmost of the cross-bars on its poles, so to maintain the cross-bars used by the com-

pany that they will sustain his weight,—see *New York & C. Teleph. Co. v. Speicher*, 59 N. J. L. 23. The fact that a lineman knew that a pole which he was about to use did not belong to the telephone company by which he was employed did not relieve the company from liability for defects in such pole, where the lineman was not chargeable with notice of an arrangement by which his employer did not have the right to inspect or repair the poles: *McQuire v. Bell Teleph. Co.*, 167 N. Y. 208; s. c. 60 N. E. Rep. 433; 52 L. R. A. 437; aff'g s. c. 66 N. Y. St. Rep. 1137. A workman who went on the roof of a house to assist in repairing a skylight, and was killed while there by contact with a wire which an electric company had imperfectly insulated, was in the discharge of his duty while standing or moving in a space where he could readily answer the calls of his foreman, or render the assistance required by him, although he had taken two or three steps away: *Grennis v. Louisville Electric Light Co.*, 20 Ky. L. Rep. 1293; s. c. 49 S. W. Rep. 184 (no off. rep.) (judgment for defendant set aside—case should have gone to jury).

pany, of mature age and ordinary mental capacity, who is injured by reason of a defective ladder, one rail of which is broken off near the top, both master and servant knowing of the defect, and neither regarding it as dangerous, cannot recover damages therefor from the company.⁹ In an action for damages for the death of the plaintiff's intestate, a lineman in the employ of the defendant telegraph company, it appeared that the deceased was seated upon the outer end of a cross-arm at work when it broke under his weight and he fell to the ground and was killed. The arm had been in use about six years. It was of the material, size and apparent strength and safety then in use by all telegraph companies. The court held that the defendant was bound to use ordinary and reasonable care to provide the deceased with a safe place to work, and that he assumed the ordinary risks of the employment; that there was no defect in the cross-arm discernible from an ordinary inspection; that it had been so inspected; and that the accident was one of the risks of the employment and the plaintiff could not recover.¹⁰ In a similar action it was held that the duty of inspecting and testing telegraph-poles might be imposed by the company upon its linemen, and that a lineman with knowledge of this requirement, who neglects his duty in this particular, and as a result is injured, cannot recover damages of the company, on the theory that the master must furnish a safe place for the servant to work; and it is a question for the jury whether in a given case the duty of inspection rests upon the lineman.¹¹ In another case the plaintiff, a lineman in the employ of defendant telegraph company, was engaged in stringing wires on its poles. In the course of his work he was ordered to climb a pole of another company in order to remove certain wires which were in the way. In descending from this pole, owing to its defective condition he was precipitated to the ground and injured. It was held that he could not recover damages of the defendant, as the cause of the accident was one of the risks of the employment which was assumed by the plaintiff.¹²

§ 4039. Breaking of Elevator of Electric-Light Tower.—If an employé of such company is injured in consequence of an elevator of an electric-light tower breaking while he is ascending it to trim the lamps, it will not be a good defense that his lamps were already trimmed, and that he was consequently not in the performance of his

⁹ *Jenney Electric &c. Co. v. Murphy*, 115 Ind. 566; s. c. 18 N. E. Rep. 30.

¹⁰ *Flood v. Western Union Tel. Co.*, 131 N. Y. 603; s. c. 30 N. E. Rep. 196.

¹¹ *McGorty v. Southern &c. Teleph. Co.*, 69 Conn. 635; s. c. 38 Atl. Rep. 359.

¹² *Dixon v. Western Union Tel. Co.*, 68 Fed. Rep. 630.

duty. If he was proceeding in good faith and without negligence in the discharge of the duty which he owed to his master, the latter will be none the less liable from the mere fact that the servant may have been mistaken as to the necessity of performing the particular duty on the particular occasion.¹³

ARTICLE V. APPLICATIONS OF THE DOCTRINE TO VARIOUS KINDS OF MACHINERY, APPLIANCES, ETC.

SECTION	SECTION
4041. Animals, vicious.	4045. Sawmills, pulp-mills, saws, etc.
4042. Belts.	
4043. Drawbridges.	4046. Teams, wagons, vehicles, drawn by animals.
4044. Ladle to hold molten metal, negligence in repairing.	

§ 4041. **Animals, Vicious.**¹—There is a doctrine inherited from the ancient common law and entirely at variance with modern analogies, which exonerates the owner of a vicious animal from liability to pay damages to a third person injured in consequence of its viciousness, unless the owner *knew* that it was vicious,²—ignoring the obvious conception that it is the *duty* of the owner of every species of property to know whether it is likely to be hurtful to others. The doctrine of the ancient law is not applied in the relation of master and servant; but if a master furnishes, for the use of his servant, a horse or other animal of such a vicious nature that the servant is liable to be injured in consequence of its viciousness, the master will be liable if he knew, or by the exercise of reasonable care could have known, of the vicious propensities of the animal,³ unless the servant knows that the animal is dangerous, but nevertheless continues to use it, in which case he assumes the risk of injury from it.⁴ A vicious animal furnished to a servant by the master stands on the same footing as a dangerous machine, tool or appliance: it is “defective” in a similar sense. This rule has been justly applied in a case where a street-railway company used, in propelling its cars, a *broncho* which would kick when struck by its drivers, in consequence of which kicking habit its driver was injured;⁵ where a railway laborer was ordered to assist

¹³ *Weiden v. Brush Electric Light Co.*, 73 Mich. 268; s. c. 41 N. W. Rep. 269. 24 Ky. L. Rep. 420; s. c. 68 S. W. Rep. 624 (no off. rep.).

¹ See *post*, § 4117.

² Vol. I, § 839.

³ *George H. Hammond Co. v. Johnson*, 38 Neb. 244; s. c. 56 N. W. Rep. 967.

⁴ *East Jellico Coal Co. v. Stewart*,

Leigh v. Omaha St. R. Co., 36 Neb. 131; s. c. 54 N. W. Rep. 134. Circumstances under which a coal company using a mule was not liable to its driver for an injury received by the animal, it not appearing that it was vicious: *Pitts-*

a foreman in putting a vicious steer in a pen, and the foreman failed to warn the laborer that the steer was mad and dangerous, in consequence of which the laborer was injured by the steer.⁶

§ 4042. **Belts.**—Negligence may be imputed to an employer for the act of placing a pulley made of rags, the ends of which are left loose, on a shaft easily accessible, where the belt used on it is in poor condition and requires frequent repair and readjustment, so that some one is brought in close proximity to the pulley.⁷ An employer is not liable for the death of an employé while attempting to rescue another employé, who was assisting him, from a dangerous position in which he had been placed because of a defective belt, where the injury would not have happened but for the negligence of such employés in attempting to place the belt on a pulley without instructions and without its being in the line of their duty.⁸

ton Coal Co. v. McNulty, 120 Pa. St. 414; s. c. 12 Cent. Rep. 722; 14 Atl. Rep. 387; 21 W. N. C. (Pa.) 472.

⁶ International & C. R. Co. v. Smith (Tex. Civ. App.), 30 S. W. Rep. 501 (no off. rep.).

⁷ Dodd v. Bell, 15 App. Div. (N. Y.) 258; s. c. 44 N. Y. Supp. 198 (plaintiff, fifteen years of age, was holding belt over shaft while repairer fixed it, and was caught by loose ends hanging from pulley).

⁸ Deceased and another servant, after completing repairs on a washing-machine, attempted to put on the belt, with the assistance of another servant who was standing near by, who was caught in the belt; deceased pulled the other employé out of the loop of the belt and was himself caught and killed: Sann v. H. W. Johns Man. Co., 16 App. Div. (N. Y.) 252; s. c. 44 N. Y. Supp. 641. Where a belt used to run a stamp-hammer was allowed to drag the floor for three months in summer, when the hammer was not in use, so that it became worn and defective, whereby plaintiff was injured in attempting, under orders, to put the belt on a rapidly-revolving pulley, it was held that a finding that the owner of the factory was negligent would not be disturbed on appeal as contrary to the evidence: Toomey v. Avery Stamping Co., 20 Ohio C. C. 183; s. c. 11 Ohio C. D. 216. Plaintiff, who had worked around machinery for

four years, and had arrived at years of discretion (twenty years), was employed by defendant, among his duties being that of applying a certain compound to a certain revolving pulley whenever the belt slipped. He had had no experience with belts or with pulleys run with belts, and so informed the defendant's superintendent, who showed him how to apply the compound, which was done by holding it against the pulley midway between the belts. This he did four or five times a day, until the block of compound became very thin, whereupon he asked for another, "so as not to run out of it," and was told to use what he had. Later the superintendent told the plaintiff that he would tighten the belt, as the plaintiff had advised him to do, so as to prevent its slipping; but, while he did not do so, it did not appear that such tightening would have obviated applying the compound. Shortly after, the thin block of compound broke while the plaintiff was applying it, and he was caught on the belt-pulley and injured. The evidence was held insufficient to sustain a verdict for damages for negligently causing the injury: Cantwell v. Brennan, 125 Mich. 349; s. c. 84 N. W. Rep. 299; 7 Det. Leg. N. 543. It has been held that a verdict in favor of a workman whose hand was caught in a running belt on which he was applying pressure with an iron rod

§ 4043. **Drawbridges.**—The plaintiff, while employed by the defendant as tender of a drawbridge, was injured by the breaking of a wrench used to turn the draw. There was evidence that it was of insufficient strength on account of the material of which it was made and its improperly fitting the head of the shaft. It was held that a verdict that the defendant had negligently furnished a defective appliance was justified.⁹

§ 4044. **Ladle to Hold Molten Metal, Negligence in Repairing.**—A manufacturing company was held liable to an employé for an injury caused by negligence in the work of restoring to a condition of safety the apparatus employed to keep from tipping a ladle in which molten iron was conveyed from one place to another.¹⁰

§ 4045. **Sawmills, Pulp-Mills, Saws, etc.**—A jack used in drawing logs up to the carriage on which they were sawed was devised so as to stop when the lever was released. On a particular occasion it failed to stop, thereby causing an accident to the employé whose business it was to release the lever. It had worked perfectly for sixty days before the accident, and immediately afterward, and no proof was offered tending to show that it was out of repair. It was held that the failure of the jack to stop when the lever was released on the particular occasion did not raise presumptive evidence of negligence of the company to the jury.¹¹ The operator of a pulp-mill was held not negligent as matter of law in requiring an employé to use a mended circular saw, where it had been worked for a month, and was not shown to be weaker at the mended point than at any other, or to have broken at that point, or in consequence of the crack in its mended condition, where the evidence tended to show that saws frequently broke even though perfectly sound.¹² A jury may find that

in order to tighten it, is not justified, on the theory that the belt was loose and he was required to expose himself to danger, where his act was not necessary to the operation of the machine, and the proximate cause of the injury was the striking of the rod from his hand by something on the surface of the belt, and not its looseness. The belt was running on a loose pulley or "idler" at the time, and was not being used to operate the machine. Nor did he need to use the iron rod to *shift* the belt to the fixed pulley, as a suitable and safe belt-shifter had been provided: Phillips

v. Romona Oolitic Stone Co., 19 Ind. App. 341; s. c. 49 N. E. Rep. 467.

⁹Galveston &c. R. Co. v. Newport, 26 Tex. Civ. App. 583; s. c. 65 S. W. Rep. 657.

¹⁰Scherer v. Holly Man. Co., 86 Hun (N. Y.) 37; s. c. 66 N. Y. St. Rep. 833; 33 N. Y. Supp. 205 (workmen who repaired safety-catch on ladle did work in negligent manner; catch failed to hold, allowing ladle to tip and spill iron on plaintiff).

¹¹Redmond v. Delta Lumber Co., 96 Mich. 545; s. c. 55 N. W. Rep. 1004.

¹²Lau v. Fletcher, 104 Mich. 295; s. c. 62 N. W. Rep. 357.

an employer is negligent in furnishing for an employé a cross-cut saw for the purpose of sawing blocks three and one-half inches long, which is operated by placing the wood on a slide and pushing the slide towards the saw, holding the wood in place with the hand, where the slide is unsupported for eighteen inches next to the saw, and when any pressure is placed on that side the slide is lifted from the guide-rail at the other end, so that the slide will swing around when the saw strikes the board held by the operator, and the operator's hand is likely to be injured.¹³ In an action for the death of a servant while employed in putting lumber in a saw, where the evidence tended to show that the saw "wobbled," which caused the injury, and also that the servant's carelessness was the cause of the accident, the question as to the cause of the accident was for the jury.¹⁴ A manufacturing

¹³ *Stiller v. Bohn Man. Co.*, 80 Minn. 1; s. c. 82 N. W. Rep. 981 (the slide was a light wooden structure resting on top of and sliding on parallel bevelled rails). Evidence which was held not sufficient to show that a saw-clearer who was killed in the defendant's mill met his death in consequence of the defendant's negligence in failing to furnish him with a safe place in which to work, the nature of his duty precluding a safer place, or in setting him to work with an incompetent fellow servant: *Kellogg v. Stephens Lumber Co.*, 125 Mich. 222; s. c. 84 N. W. Rep. 136; 7 Det. Leg. N. 483. In an action for injuries caused by a slat-saw which defendant worked, where the theory was that plaintiff's hand passed beneath the overhanging steel guard, and came in contact with the saw, and it was apparent that the space was not sufficiently large to allow plaintiff's hand to pass in the manner claimed, and it was physically impossible for the accident to happen in the manner claimed, a verdict for plaintiff was set aside as not supported by any of the evidence: *Beyersdorf v. Cream City Sash & Co.*, 109 Wis. 456; s. c. 84 N. W. Rep. 860. In another case it appeared that a band-saw in a saw-mill was supported by an upright, hollow iron cylinder, in two sections; the upper section, called the "sleeve," covering the upper end of the lower section, and capable of being raised by a jack-screw and levers so as to regulate the tension of the saw. It was worked in the

opposite direction by means of weights attached to it, and weighed with its attachments about three tons. In the lower end of the sleeve was a slot, intended merely for certain levers to pass through, used in regulating the tension, but large enough for a man to pass his arm through. In the base of the lower section were manholes, for the purpose of admitting the hand for whatever was needful to be done in the way of adjusting the weights on the weight-rod, etc., within the cylinder, which manholes could be used with perfect safety and were known to the plaintiff. Other employés were attempting to raise the sleeve by means of the jack-screw and levers. It worked so hard that they thought the weights were caught. The plaintiff inserted his hand through the hole in the sleeve, found that the weights were free, and called out that they were not caught; upon which the men threw their weight upon the lever, and, a defective nut giving way, the sleeve fell and cut off the plaintiff's hand. It was held that the master was not, as matter of law, required to foresee that an employé might thrust his arm through such opening; and a verdict failing to find that the use of such machine constituted negligence toward the plaintiff, or that such negligence was the cause of the accident, did not support a judgment for the plaintiff: *Rysdorp v. George Pankratzen Lumber Co.*, 95 Wis. 622; s. c. 70 N. W. Rep. 677.

¹⁴ *McLean v. Paine*, 181 Mass. 287;

company was deemed guilty of actionable negligence in maintaining a slide for guiding and pushing lumber against a revolving saw, the controlling, grooves, and fastenings of which were so defective as to cause the slide to leave its proper position, and to throw the operator's hand against the saw.¹⁵

§ 4046. **Teams, Wagons, Vehicles, Drawn by Animals.**—A master who furnishes to his servant, who is not acquainted with the road, a wagon not furnished with brakes, and has it loaded with lumber of more than twice the weight of a reasonable load, of which weight the servant is ignorant, is liable for an injury to the servant caused by his losing control over the team, on account of the pressure of the heavy load, without fault on his part, while descending a grade.¹⁶ A servant employed to transport lumber about a yard upon a two-wheeled truck drawn by a team of horses, can recover for injuries sustained from the fall of a load of lumber, caused by a wheel separating from the axle on account of a defective pin, where he was ignorant of the defect and without contributory fault, and the defendant had used the truck in the yard for two years and had made no inspection thereof.¹⁷

s. c. 63 N. E. Rep. 883. In the same action it appeared that the saw might have been sprung, so that it might have been improperly set on the arbor, or the arbor improperly set in the boxes, or the boxes so worn that the saw would not run smoothly, which could have been discovered by proper care. Defendant's servant whose duty it was to put on the saw, and who did put it on, testified that he did not pay any particular attention to ascertain whether the saw was true and in perfect running-order. It was held sufficient to warrant a finding that defendant did not exercise proper care: *McLean v. Paine*, *supra*.

¹⁵ *Central Man. Co. v. Cotton*, 108 Tenn. 63; s. c. 65 S. W. Rep. 403.

¹⁶ *Lee v. Smart*, 45 Neb. 318; s. c. 63 N. W. Rep. 940 (the plaintiff became alarmed, and jumped from the wagon, in doing which he was injured).

¹⁷ *Boyce v. Schroeder*, 21 Ind. App. 28; s. c. 1 Repr. (Ind.) 55; 51 N. E. Rep. 376. In another case, the plaintiff, a laborer, was injured while engaged with the defendant, his employer, and a teamster, in

loosening skids, embedded in snow and ice, to be sawed up into logs. After seven or eight skids had been removed, the teamster tried a skid which was held fast, and the plaintiff and the teamster commenced chopping it to loosen it, the plaintiff working between two skids which were some seven feet apart, with his back to the team, so near the skid that if it should loosen suddenly it would very likely do just what it did do; whereupon the defendant directed the teamster to start the team *without warning* the plaintiff. The log snapped loose, and was jerked around, crushing the plaintiff's leg. It was held sufficient to show actionable negligence: *Sweain v. Donahue*, 105 Wis. 142; s. c. 81 N. W. Rep. 119. A laborer shovelling dirt into a cart stood between the tail of his cart and a bank which was being removed. The horse threw his head around to one side, and a rein or some part of the bridle caught on a hook attached to the saddle, which cramped his head to one side and caused him to back, crushing the laborer between the cart and the bank. The hook was alleged,

but not proved, to be defective and improperly placed. It was held that the defect in the hook, if it was in fact defective, was not the proximate cause of the injury, and that the plaintiff was properly nonsuited: *Kerrigan v. Hart*, 40 Hun (N. Y.) 389. Where a driver of one of defendant's wagons hitched his horses thereto, and, without looking to see whether any one was in a position of danger, and without warning, started the team, and ran over plaintiff, a coemployé, who was working beside the wagon with one of his legs extending in front of

the back wheel, negligence in the employer was shown sufficient to warrant a recovery; plaintiff being free from contributory negligence, being engaged in work requiring his whole attention, and the wagon not having been hitched up when he took his position. The defendant might have invoked the negligence of a fellow servant as a defense, but could not do so because it had not set it up as an affirmative defense to the action: *Layng v. Mount Shasta Mineral Spring Co.*, 135 Cal. 141; s. c. 67 Pac. Rep. 48.

CHAPTER CX.

DUTY OF EMPLOYER TO PROVIDE COMPETENT, SOBER, AND FIT FELLOW SERVANTS.¹

SECTION	SECTION
4048. General nature of this obligation.	4051. Cases exhibiting evidence of negligence in this respect.
4049. When servants incompetent within this rule, and when not.	4052. Cases exhibiting no evidence of negligence in this respect.
4050. Continuing incompetent servants in the employment.	4053. Evidence to make out a case of incompetency on the part of an employé.

§ 4048. **General Nature of this Obligation.**—While, as hereafter seen, the master is not in general liable for an injury happening to one of his servants through the negligence of another of them engaged in the same general employment,² yet this rule does not exonerate the master from exercising reasonable or ordinary care in the selection of competent, careful, sober and fit servants, to the end that other servants shall not be exposed to unnecessary peril by reason of their incompetency, carelessness, drunkenness, or other unfitness, and of maintaining such a reasonable supervision over their conduct³ as will apprise him of the fact of their falling into the habit of drunkenness, carelessness, negligence, etc., while in his service, and of discharging them therefrom on the discovery of such facts. This obligation is analogous to the obligation of the master to furnish safe machinery, appliances and places of work.⁴ If the master fails in the performance of this duty, he becomes liable in damages to the servant injured in consequence of such failure, without fault on his own part.⁵ Here, as in respect of those other absolute duties which

¹ See also, *post*, § 4882, *et seq.*

² *Pcst*, § 4846.

³ *Ante*, § 3790.

⁴ *Ante*, §§ 3873, *et seq.*, 3986, *et seq.*

⁵ *Senior v. Ward*, 1 El. & El. 385; s. c. 5 Jur. (N. S.) 172; 28 L. J. (Q. B.) 139; 7 Wkly. Rep. 261; *Tarrant v. Webb*, 18 C. B. 796; s. c. 25 L. J. (C. P.) 261; *Walker v. Bolling*, 22 Ala. 294; *St. Louis & C.*

R. Co. v. Hackett, 58 Ark. 581; s. c. 24 S. W. Rep. 881; *Taylor v. Western Pac. R. Co.*, 45 Cal. 323; *Colorado & C. R. Co. v. O'Brien*, 16 Colo. 219; s. c. 10 Rail. & Corp. L. J. 351; 48 Am. & Eng. R. Cas. 235; 27 Pac. Rep. 701; *Illinois & C. R. Co. v. Jewell*, 46 Ill. 99; *Chicago & C. R. Co. v. Sullivan*, 63 Ill. 293; *Cincinnati & C. R. Co. v. Madden*, 134 Ind. 462; s. c. 34 N. E. Rep.

the law imposes upon the master, he does not stand under the liability of an *insurer*, but the measure of his duty is the exercise of *reasonable* or *ordinary care*,—in other words, such a measure of care as is reasonable and proper in view of the nature and character of the business, and the consequences likely to flow from the hiring or retaining in the service of an incompetent or unfit servant.⁶ For example, a master is not liable for injury caused by reason of the intemperate habits of a fellow servant, unless he previously knew of such habits, or might have known of them upon reasonable inquiry, and yet retained the unfit servant in his employ.⁷ Balancing the correlative knowledge of the master and the servant, according to a principle already stated,⁸ the servant may recover damages from the master where he is injured through the incompetency of a fellow

227; *Thayer v. St. Louis &c. R. Co.*, 22 Ind. 26; *Chicago &c. R. Co. v. Harney*, 28 Ind. 28; *Lake Shore &c. R. Co. v. Stupak*, 123 Ind. 210; s. c. 23 N. E. Rep. 246; 41 Am. & Eng. R. Cas. 382; *Couch v. Watson Coal Co.*, 46 Iowa 17; *Kansas &c. R. Co. v. Salmon*, 14 Kan. 512; s. c. 11 Kan. 83; *Chicago &c. R. Co. v. Doyle*, 18 Kan. 58; *Union Pac. R. Co. v. Young*, 19 Kan. 488; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233; s. c. 13 Allen (Mass.) 433; *Sweat v. Boston &c. R. Co.*, 156 Mass. 284; s. c. 31 N. E. Rep. 296; *Cumberland &c. R. Co. v. State*, 44 Md. 283; *Harper v. Indianapolis &c. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. Co.*, 49 Mo. 167; s. c. in full, 2 *Thomp. Neg.* (1st ed.), p. 951; *Connor v. Chicago &c. R. Co.*, 59 Mo. 285; *Lee v. Michigan &c. R. Co.*, 87 Mich. 574; s. c. 49 N. W. Rep. 909; 48 Am. & Eng. R. Cas. 356; *Crandall v. McIlrath*, 24 Minn. 127; *Laning v. New York &c. R. Co.*, 49 N. Y. 521; s. c. 2 *Thomp. Neg.* (1st ed.), p. 932 [qualifying *Wright v. New York &c. R. Co.*, 25 N. Y. 562; rev'g s. c. 28 Barb. (N. Y.) 80]; *Sizer v. Syracuse &c. R. Co.*, 7 Lans. (N. Y.) 67; *Chapman v. Erie R. Co.*, 55 N. Y. 579; s. c. 1 *Thomp. & Co.* (N. Y.) 526; *Stewart v. New York &c. R. Co.*, 54 Hun (N. Y.) 638; s. c. 28 N. Y. St. Rep. 215; 8 N. Y. Supp. 19; s. c. aff'd, 126 N. Y. 631; 27 N. E. Rep. 416; *Coppins v. New York &c. R. Co.*, 122 N. Y. 557; s. c. 34 N. Y. St. Rep. 214; 44 Am. & Eng. R. Cas. 618; 19 Am. St.

Rep. 523; 25 N. E. Rep. 915; aff'g s. c. 48 Hun (N. Y.) 292; 17 N. Y. St. Rep. 916; *Tonneson v. Ross*, 58 Hun (N. Y.) 415; s. c. 35 N. Y. St. Rep. 273; 12 N. Y. Supp. 151; *Mann v. Delaware &c. R. Co.*, 91 N. Y. 495; *Hardy v. Carolina &c. R. Co.*, 76 N. C. 5; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Knoxville Iron Co. v. Dobson*, 7 Lea (Tenn.) 367; *Bonner v. Whitcomb*, 80 Tex. 178; s. c. 15 S. W. Rep. 899; *Mexican Nat. R. Co. v. Mussette*, 7 Tex. Civ. App. 169; s. c. 24 S. W. Rep. 520; s. c. aff'd, 86 Tex. 708; 26 S. W. Rep. 1075; 24 L. R. A. 642; *Southwest Virginia Imp. Co. v. Andrew*, 86 Va. 270; s. c. 9 S. E. Rep. 1015; 13 Va. L. J. 634; 17 Wash. L. Rep. 599; *Norfolk &c. R. Co. v. Thomas*, 90 Va. 205; s. c. 17 S. E. Rep. 884; *Core v. Ohio River R. Co.*, 38 W. Va. 456; s. c. 18 S. E. Rep. 596; *Kerlin v. Chicago &c. R. Co.*, 50 Fed. Rep. 185; *Lindvall v. Woods*, 44 Fed. Rep. 855.

⁶ Vol. I, § 25; *ante*, § 3772; *Wall v. Delaware &c. R. Co.*, 54 Hun (N. Y.) 454; s. c. 28 N. Y. St. Rep. 132; 7 N. Y. Supp. 709; s. c. aff'd, 125 N. Y. 727; 26 N. E. Rep. 757; *Gulf &c. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38; s. c. 31 W. N. C. (Pa.) 221; 25 Atl. Rep. 175.

⁷ *Zumwalt v. Chicago &c. R. Co.*, 35 Mo. App. 661.

⁸ *Ante*, § 3801.

servant, if the master knew of such incompetency and if it was unknown to the injured servant.⁹ While, on the one hand, the master is liable for an injury sustained by one servant through the incompetency, negligence, drunkenness, etc., of another servant, provided the master knew of such vices in the servant causing the injury, and failed to discharge him,—on the other hand, an employé cannot recover for personal injuries sustained because of the incompetency of a coemployé, if with ordinary care he could have known of such incompetency.¹⁰ It has been noted elsewhere that the master is bound to exercise reasonable care to the end of furnishing a *sufficient number* of servants for the safe accomplishment of his work.¹¹

§ 4049. When Servants Incompetent within this Rule, and When Not.—This rule applies to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow servants. It is not restrained to mere physical or mental attributes, but it relates also to the disposition with which the servant performs his duties. For example, a servant who habitually neglects his duties is incompetent within the meaning of the rule under consideration.¹² On the other hand, the mental competency which is required in the servant does not, in all cases, exact that he should be skilled or experienced in the particular line of work. If the work is of such a nature that any one of fair intelligence and the requisite physical ability can perform it, then the employer is not required, out of any duty which he owes to his other servants, to inquire into the experi-

⁹ *American Wire-Nail Co. v. Connelly*, 8 Ind. App. 398; s. c. 35 N. E. Rep. 721.

¹⁰ *Galveston Rope &c. Co. v. Burkett*, 2 Tex. Civ. App. 308; s. c. 21 S. W. Rep. 958. A railway company was bound by the acts of one of its officers, in favor of an injured employé, in sending out an incompetent engineer on a train where he had the authority to order such engineer out, although he was not authorized to employ and discharge him: *Missouri &c. R. Co. v. Patton* (Tex.), 26 S. W. Rep. 978 (no off. rep.); aff'g s. c. 25 S. W. Rep. 339 (no off. rep.). Although the servant selected may be generally competent, yet if the master sends him to perform a piece of work, in respect of which he is incompetent by reason of his want of special knowledge, and another servant is injured by reason thereof, the mas-

ter will be liable on the same principle,—as where a railway company employs a competent engineer and sends him to a place on the road with which he is not acquainted, and another employé of the company is injured by reason of that fact: here, the fact that the engineer may have been competent for the performance of his general duties will not exonerate the railroad company: *Missouri &c. R. Co. v. Patton* (Tex. Civ. App.), 25 S. W. Rep. 339 (no off. rep.); s. c. aff'd, 26 S. W. Rep. 978 (no off. rep.).

¹¹ *Ante*, § 3807; *post*, §§ 4175, 4768, 4829, 4865.

¹² *Coppins v. New York &c. R. Co.*, 122 N. Y. 557; s. c. 34 N. Y. St. Rep. 214; 44 Am. & Eng. R. Cas. 618; 19 Am. St. Rep. 523; 25 N. E. Rep. 915; aff'g s. c. 48 Hun (N. Y.) 292; 17 N. Y. St. Rep. 916.

to such work.¹³ It was so held where the work consisted merely in loading railway-ties upon a hand-car from a pile alongside the track.¹⁴ The same has been held, in substance, in regard to the position of a railway brakeman; so that a railway company does not violate any duty towards its other employes by hiring, as brakeman, one who has not previously had experience in that employment.¹⁵ Nor is it necessary, in the case of an adult applicant for such a position, for the company to examine into his fitness or knowledge of its dangers, or to warn him in respect of them.¹⁶

§ 4050. Continuing Incompetent Servants in the Employment.¹⁷—

If the master becomes aware that the servant has become, for any reason, unfit for the service in which he has employed him, in such a sense as to endanger the safety of his other servants, it will become his duty to discharge the unfit servant; and if, failing in this duty, one of his other servants is injured by the negligence of the unfit servant or to give him instructions with regard to the particular servant, he will have an action for damages against the master. It has been so held where a railroad company continued in its service a conductor known to have been guilty of gross negligence in moving cars in its yard, and to be incompetent and careless in the performance of that service;¹⁸ where a railroad company, after having discharged an engineer for carelessness in causing a wreck of a train, re-employed him, although informed of his unfitness;¹⁹ but a single act of carelessness or recklessness on the part of a servant of a railway company has been held not evidence of negligence on the part of

¹³ *Holland v. Tennessee &c. R. Co.*, 91 Ala. 444; s. c. 12 L. R. A. 232; 8 South. Rep. 524; *post*, § 4079.

¹⁴ *Timm v. Michigan &c. R. Co.*, 98 Mich. 226; s. c. 57 N. W. Rep. 116. See *post*, § 4074.

¹⁵ *Gorman v. Minneapolis &c. R. Co.*, 78 Iowa 509; s. c. 43 N. W. Rep. 303.

¹⁶ *O'Neill v. Chicago &c. R. Co.*, 132 Ind. 110; s. c. 31 N. E. Rep. 669. It has been held that the mere fact that an employer engaged an unlicensed engineer to manage a steam-boiler will not render him liable to another employe injured by the explosion of the boiler: *Birmingham v. Pettit*, 21 D. C. 209; s. c. 21 Wash. L. Rep. 115. Where it appeared that an engineer, before his employment as such, had served as a fireman about two years, occasionally doing the work of the engineer in his absence, which was the usual

and preliminary experience required of engineers in order to fit them for the duties of their position, and after his employment as an engineer had served for some time without any fault being found,—it was held that there was no evidence of negligence in employing him: *Texas &c. R. Co. v. Berry*, 67 Tex. 238; s. c. 5 S. W. Rep. 817. Employing a young boy to run a *hoisting-apparatus* not evidence of negligence: *Aiken v. Smith*, 54 Fed. Rep. 896.

¹⁷ See *post*, § 4713.

¹⁸ *Sutton v. New York &c. R. Co.*, 50 N. Y. St. Rep. 514; s. c. 21 N. Y. Supp. 312; s. c. *aff'd*, 142 N. Y. 623.

¹⁹ *Mexican Nat. R. Co. v. Mussette*, 7 Tex. Civ App. 169; s. c. 24 S. W. Rep. 520; s. c. *aff'd*, 86 Tex. 708; 24 L. R. A. 642; 26 S. W. Rep. 1075.

the company in retaining him in its service.²⁰ Upon the question of the obligation of the master to maintain a continuing inspection over his servants for the purpose of ascertaining whether they continue to be of good habits, it has been held that where the master employs a competent, careful and skillful servant, he may rightfully presume that the servant will continue competent, careful and skillful; so that, when notified that he has become careless, the master is not in general bound to discharge him without an investigation of such charge, unless the notice is accompanied by such evidence as leaves no reasonable doubt of the truth of the charge.²¹ Upon the question of what will affect the master with notice of the unfitness of a servant in his employ, it has been held that, in respect of a servant who has been in his employ for a long time, the master is charged with a knowledge of the common reputation, in the community, of such servant.²² On the other hand, complaints made to other servants of a railway company, who have no authority to employ or discharge the servant against whom the complaint is lodged, and who are under no duty to communicate the complaint to a higher officer, will not be notice to the company. It has accordingly been held that notice to a railway switchman of the incompetency and inexperience of a railway fireman does not affect the company with knowledge of that fact.²³

§ 4051. Cases Exhibiting Evidence of Negligence in this Respect.

—Although, according to the view of some courts,²⁴ a railway company is not negligent, within the meaning of the rule under consideration, in employing an inexperienced person to act as brakeman,—yet it has been held that where a new hand, acting as brakeman, was sent ahead on a dark night to signal an approaching train, and by reason of his want of knowledge of the signals an employé on the other train was killed, there was a question for a jury as to whether there had been negligence in selecting an incompetent servant for that office.²⁵ So, a railroad company has been held liable for the death of a brakeman caused by the improper management of an engine in making a flying switch, while being operated by an inexperienced fireman instead of the engineer, with the knowledge and permission of the conductor, who represented the company.²⁶ In respect of the

²⁰ *Holland v. Southern &c. R. Co.*, 100 Cal. 240; s. c. 34 Pac. Rep. 666; *Dallas City R. Co. v. Beeman*, 74 Tex. 291; s. c. 11 S. W. Rep. 1102.

²¹ *Lake Shore &c. R. Co. v. Stupak*, 123 Ind. 210; s. c. 23 N. E. Rep. 246; 41 Am. & Eng. R. Cas. 382.

²² *St. Louis &c. R. Co. v. Hackett*, 58 Ark. 381; s. c. 24 S. W. Rep. 881.

²³ *Galveston &c. R. Co. v. Eckels*, 7 Tex. Civ. App. 429; s. c. 26 S. W. Rep. 1117.

²⁴ *Ante*, § 4049.

²⁵ *Mann v. Delaware &c. R. Co.*, 91 N. Y. 495.

²⁶ *Norfolk &c. R. Co. v. Thomas*, 90 Va. 205; s. c. 17 S. E. Rep. 884.

selection of competent servants, the duty is an *absolute one*, in the sense of other absolute duties considered in this Title,—that is to say, in the sense that responsibility for the exercise of due care in its performance devolves upon the master personally, so that he cannot absolve himself from liability for failing to perform it by transferring it to some other agent or servant. By whomsoever he performs the duty of selecting servants, he must answer for the negligence of that person in performing it. When, therefore, a master entrusted certain work to a competent superintendent, and furnished him with competent appliances, but the superintendent left the work to be done, in his absence, by employ  s who were incompetent to do it without instructions, in consequence of which an injury resulted to one of such employ  s from the use of an appliance which the superintendent had directed them to use,—it was held that the master was liable.²⁷ It has been well reasoned that a railroad fireman suing for personal injuries alleged to have been caused by the negligence of the conductor, and alleging that the intemperate habits of the latter rendered him unfit for his position, must prove, not only that such habits rendered the conductor unfit for the position, to the knowledge of the company, and that the fireman had no knowledge thereof, but also that by reason of such habits the conductor was guilty of the negligence complained of, and that it was the proximate cause of the injuries.²⁸

   4052. **Cases Exhibiting No Evidence of Negligence in this Respect.**—There may be a *latent defect* in a man as well as in a machine; and hence a railway company will not become liable for an injury happening to one of its servants by reason of the drunkenness of another servant, unless the company knew, or had the means of knowing, that he was liable to fall into this habit.²⁹ The general incompetency, drunkenness or unfitness of a servant will not, of course, charge the master with any liability for an injury to another servant which is not traceable to such incompetency, drunkenness or other unfitness.³⁰ For example, where an action for damages is predicated

²⁷ *McElligott v. Randolph*, 61 Conn. 157; s. c. 22 Atl. Rep. 1094. That the right of an employ   to recover for negligence of a corporation in hiring an incompetent servant over the protest of some of its officers, is not affected by the failure of another employ   to give notice of subsequent neglect and unfitness of such servant,—see *Mexican Nat. R. Co. v. Musette*, 86 Tex. 708; s. c. 24

L. R. A. 642; 26 S. W. Rep. 1075; aff'g s. c. 7 Tex. Civ. App. 169; 24 S. W. Rep. 520.

²⁸ *Campbell v. Wing*, 5 Tex. Civ. App. 431; s. c. 24 S. W. Rep. 360.

²⁹ *Stevens v. San Francisco & C. R. Co.*, 100 Cal. 554; s. c. 35 Pac. Rep. 165.

³⁰ *Cosgrove v. Pitman*, 103 Cal. 268; s. c. 37 Pac. Rep. 232.

upon the unfitness of a person allowed to have charge of an engine, not being an engineer,—yet if, notwithstanding his lack of qualification, he handled the engine carefully and as an engineer of ordinary care and prudence would have done under the same circumstances, there can be no recovery.³¹ So, the intemperate habits of the conductor of a train became immaterial in an action for an injury produced by the act of the engineer in detaching the rear portion of the train without the knowledge, direction or consent of the conductor.³² So, the fact that an employer knows that one employed by him as an engineer had a bad standing among engineers by reason of his reputation for drunkenness, does not charge such employer with negligence in employing him, where he did not in reality have the habit of drinking.³³ So, where an injury happens in consequence of something done or omitted by a servant when sober, the mere fact that he is in the habit of drinking will not exhibit any evidence of negligence upon which to base a recovery, unless it is made to appear that his drinking habit has advanced to such a stage as to render him mentally and physically incompetent to discharge his duties when sober.³⁴

§ 4053. Evidence to Make Out a Case of Incompetency on the Part of an Employé.³⁵—When it becomes material to prove the *character* of a servant by whose negligence an injury has happened,—as, where the contention is that the master has violated his duty in employing a servant unfit for the duties assigned him,—this must be done by evidence of general reputation, and not by evidence of specific acts.³⁶ This is in conformity to the general rule of evidence, that character grows out of special acts, but is not proved by them.³⁷ The reason is, that special acts very often exhibit frailties or vices that are contrary to the character which actually exists; since the very frailties proved against a man may have been subsequently regarded by him in so serious a light as to have produced an amendment of his character in the given particular; besides, ordinary care does not exclude occasional acts of carelessness, such as all men are liable to commit.³⁸ It was not sufficient evidence of notice of the incompetency of an em-

³¹ *Gulf &c. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706.

³² *Campbell v. Wing*, 5 Tex. Civ. App. 431; s. c. 24 S. W. Rep. 360.

³³ *Cosgrove v. Pitman*, 103 Cal. 268; s. c. 37 Pac. Rep. 232.

³⁴ *Englehardt v. Delaware &c. R. Co.*, 78 Hun (N. Y.) 588; s. c. 60 N. Y. St. Rep. 861; 29 N. Y. Supp. 425. Evidence failing to make out the

allegation that the vision of a railway engineer was defective: *Englehardt v. Delaware &c. R. Co.*, *supra*.

³⁵ See also, *post*, § 4906, *et seq.*

³⁶ *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 110.

³⁷ 1 Greenl. on Ev., § 461.

³⁸ *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

ployé to those having authority to hire and discharge the servants of a railroad corporation, that a freight-conductor whose negligence caused the injury in question, on a previous occasion, had by mistake carried a passenger by his stopping-place and had for that reason spoken disparagingly of himself to his employer, where it appeared that, with this exception, he had maintained a good standing during eight months' service as a conductor, and a longer period previously as brakeman.³⁹ It has been held that a master is presumed to have known, in regard to the incompetency of a fellow servant, what was generally known to those among whom such servant worked and lived, and what he might have known by the exercise of due care and diligence.⁴⁰

³⁹ *Michigan &c. R. Co. v. Dolan, Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. 32 Mich. 510.

⁴⁰ *Giordano v. Brandywine Granite*

CHAPTER CXI.

DUTY OF EMPLOYER TO WARN AND INSTRUCT HIS SERVANTS.

- ART. I. General Nature of this Duty, §§ 4055-4086.
 ART. II. Duty to Warn and Instruct Children and Incompetent or Inexperienced Persons, §§ 4091-4103.
 ART. III. Nature and Sufficiency of the Warning or Instruction, §§ 4106-4107.
 ART. IV. Duty to Warn and Instruct in Railway Service, §§ 4109-4112.
 ART. V. Duty to Warn and Instruct in Other Lines than Railway Service, §§ 4114-4126.
 ART. VI. Various Illustrations of the Duty to Warn and Instruct, §§ 4129-4133.

ARTICLE I. GENERAL NATURE OF THIS DUTY.

- | SECTION | SECTION |
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- conduct on the part of the servant himself, or remote or improbable dangers.
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4079. What presumption master may indulge as to the knowledge, discretion, and experience of the servant and his consequent need of instruction.
4080. Effect of unfulfilled promise of master to instruct his servant.
4081. Liability of master for injuries to a third person by his uninstructed servant.
4082. Failure to warn and instruct must have been the proximate cause of the injury.
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4084. Points of evidence in actions grounded on failure to warn and instruct.
4085. Duty to warn and instruct, when a question for a jury.
4086. Instructions to juries with respect to the duty to warn and instruct.

§ 4055. **General Nature of this Duty.**—Generally speaking, an employer is bound to warn and instruct his employés concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are not discoverable by them in the exercise of such ordinary and reasonable care as, in their situation, they may be expected and required to take for their own safety; or concerning such dangers as are not properly appreciated by them, by reason of their lack of experience, their youth, or their general incompetency or ignorance; and unless the servant is so warned or instructed he does not assume the risk of such dangers; but if he receives an injury without fault on his part in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor.¹ Stat-

¹Fort Smith Oil Co. v. Stover, 58 Ark. 168; s. c. 24 S. W. Rep. 106;

ing the doctrine negatively, it has been said that a manufacturer who employs the usual means for the preservation of the life and safety

Elledge v. National City &c. R. Co., 100 Cal 282; s. c. 34 Pac. Rep. 720, 852; Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517; s. c. 47 Pac. Rep. 364, 778 (servant had planed light stuff in a planer, but did not know danger of planing heavy material, and was not instructed or warned; Carter v. Cotter, 88 Ga. 286; s. c. 14 S. E. Rep. 476; Consolidated Coal Co. v. Haenne, 146 Ill. 614; s. c. 35 N. E. Rep. 162; aff'g s. c. 48 Ill. App. 115; Consolidated Coal Co. v. Wombacher, 31 Ill. App. 288; Stearns v. Reidy, 33 Ill. App. 246; s. c. aff'd, 135 Ill. 119; 25 N. E. Rep. 762; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 34 Ill. App. 312; Salem Stone &c. Co. v. Griffin, 139 Ind. 141; s. c. 38 N. E. Rep. 411; Muncie Pulp Co. v. Jones, 11 Ind. App. 110; s. c. 38 N. E. Rep. 547; Grannis v. Chicago &c. R. Co., 81 Iowa 444; s. c. 46 N. W. Rep. 1067; Myhan v. Louisiana Electric Light Co., 41 La. An. 964; s. c. 6 South. Rep. 779; 7 L. R. A. 172; Stucke v. Orleans R. Co., 50 La. An. 172; s. c. 23 South. Rep. 342 (citing Nason v. West, 78 Me. 253) (plaintiff, a street-car conductor, was put to work under a car on the repair-track without warning him of the danger of another car entering on the track should a switch leading to it be negligently left open; master is presumed to know the dangers incident to the employment in which his servants are engaged, and is bound to warn them of hazards not within their knowledge or willingly assumed); Gilbert v. Guild, 144 Mass. 601; s. c. 4 N. Eng. Rep. 648; 12 N. E. Rep. 368; Rice v. King Philip Mills, 144 Mass. 229; s. c. 4 N. Eng. Rep. 59; 11 N. E. Rep. 101; Smith v. Peninsula Car Works, 60 Mich. 501; s. c. 27 N. W. Rep. 662; 1 Am. St. Rep. 542; McDonald v. Chicago &c R. Co., 41 Minn. 439; s. c. 43 N. W. Rep. 380; Guirney v. St. Paul &c. R. Co., 43 Minn. 496; s. c. 46 N. W. Rep. 78 (plaintiff, a foreman of railway repairs and construction for defendant, was ordered to repair tracks at a point where another railway company had cut

them to make a crossing, and was ordered to resist any further attempt on the part of such company, and was arrested for contempt in violating an *injunction* order, of which he was ignorant, prohibiting the defendant company from interfering in any way with such other company in connection with such crossing—order of judgment on the pleadings for defendant reversed, and case remanded for trial); Gray v. Commutator Co., 85 Minn. 463; s. c. 89 N. W. Rep. 322 (plaintiff was operating a machine for shaping and pressing the segments of commutators, called a drawing-machine; by an irregular movement of the machine of which he had not been warned, his hand was caught and crushed); Hysell v. Swift & Co., 78 Mo. App. 39; s. c. 2 Mo. App. Repr. 124 (but danger from bacteria in dried and decayed blood and rust which plaintiff was cleaning from iron rail held to be too remote a danger to require warning being given); Spaulding v. O'Brien, 26 Misc. (N. Y.) 184; s. c. 56 N. Y. Supp. 1095 (boxes in wheel-hub were loose, allowing considerable play to wheel, and part of wagon was so close to spokes that it touched them when the wheel was turned, by reason of which plaintiff's hand was caught between spokes and wagon and injured); Turner v. Goldsboro Lumber Co., 119 N. C. 387; s. c. 2 Chic. L. J. Wkly. 32; 26 S. E. Rep. 23 (inexperienced workman ordered to work at planing-machine while hood in front of knives was temporarily out of place so knives could be adjusted, without warning him of danger of having his foot caught); Roth v. Northern Pac. Lumbering Co., 18 Or. 205; s. c. 22 Pac. Rep. 842; Lebering v. Struthers, 157 Pa. St. 312; s. c. 33 W. N. C. (Pa.) 99; 27 Atl. Rep. 720; Bannon v. Lutz, 158 Pa. St. 166; s. c. 27 Atl. Rep. 890 (failure to provide appliances in common use and necessary to render the opening of stills in an oil refinery reasonably safe; employé burned to death in consequence; recovery allowed); Maguire v. Little

of his employés, and has his machinery set up in the usual way, is not liable for an accident to an adult employé, who was fully instructed as to the manner of using it.² Moreover, to authorize recovery by an uninstructed, inexperienced employé set to work at a dangerous machine whose danger he does not comprehend and who uses ordinary care, the injury must be directly caused by the dangerous character of the machine or employment, and it must appear that the danger was not such as he *ought* to have comprehended.³ Stating the duty in still another way, it is said to be the duty of an employer who undertakes personally to supervise work with or upon machinery or appliances used by him which are to outward appearances safe, to use ordinary care and prudence in ascertaining latent defects therein, and to inform an employé of any defects discovered, and of the probable consequent risk, before he has obeyed an order to use the appliances.⁴

§ 4056. This Duty Absolute in the Sense that it Cannot be Delegated.—This duty, like many others considered in this Title, is an *absolute* duty, in the sense that the master is bound to see that it is performed, and cannot exonerate himself by appointing some one else to see that it is performed; but if such appointee does not perform it, the master is liable for his negligence under the rule of *respondeat superior*.⁵

(R. I.), 13 Atl. Rep. 108; s. c. 5 N. Eng. Rep. 666 (no off. rep.); Missouri Pac. R. Co. v. King, 2 Tex. Civ. App. 122; s. c. 20 S. W. Rep. 1014; Missouri Pac. R. Co. v. Sasse (Tex. Civ. App.), 22 S. W. Rep. 187 (no off. rep.); Galveston & C. R. Co. v. Garrett, 73 Tex. 262; s. c. 13 S. W. Rep. 62; Reynolds v. Boston & C. R. Co., 64 Vt. 66; s. c. 24 Atl. Rep. 134; Hoffman v. Dickinson, 31 W. Va. 142; s. c. 6 S. E. Rep. 53; Nadau v. White River Lumber Co., 76 Wis. 120; s. c. 43 N. W. Rep. 1135; Wolski v. Knapp-Stout & Co., 90 Wis. 178; s. c. 63 N. W. Rep. 87 (danger of being jerked over a rolling log and crushed by it upon attempting to change the direction in which it is rolling down a hill); Rillston v. Mather, 44 Fed. Rep. 743; Gowen v. Bush, 76 Fed. Rep. 349; s. c. 40 U. S. App. 349; 22 C. C. A. 196 (failure to warn miner of gas in mine). Duty of master to instruct and warn servant as to perils of employment,—see the long

note to James v. Rapides Lumber Co., in 44 L. R. A. 33.

²Schultz v. Bear Creek Refining Co., 180 Pa. St. 272; s. c. 36 Atl. Rep. 739 (plaintiff, operating a barrel-machine, properly fastened to floor, pressed friction pulley against belt pulley so hard that belt slipped off shaft pulley, caught on set-screws, pulled machine from its fastenings and tipped it over on plaintiff—considered an accident).

³Craven v. Smith, 89 Wis. 119; s. c. 61 N. W. Rep. 317.

⁴Southwestern Tel. & C. Co. v. Woughter, 56 Ark. 206; s. c. 19 S. W. Rep. 575.

⁵Ingerman v. Moore, 90 Cal. 410; s. c. 25 Am. St. Rep. 138; 27 Pac. Rep. 306; Norton v. Volzke, 158 Ill. 402; s. c. 41 N. E. Rep. 1085; aff'g s. c. 54 Ill. App. 545 (is answerable for the negligence of any person to whom he delegates the duty, in performing it); Stewart v. Patrick, 5 Ind. App. 50; s. c. 30 N. E. Rep. 814; Wheeler v. Wason Man.

§ 4057. Fellow Servant, Selected to Perform this Duty, Becomes a Vice-Principal.—If the master delegates this duty to a *fellow servant*, the latter becomes his *vice-principal*, and he is responsible to the servant needing the instruction for the failure of the fellow servant to give it.⁶ Thus, if a master selects a *fellow servant* to instruct and qualify a servant for a new and more dangerous service, he is liable for the negligence of such fellow servant in performing the duty. In such case the master is bound to provide, for a reasonable length of time, an instructor competent to teach the art of managing the dangerous machinery and appliances, regardless of his own competency.⁷

§ 4058. Servant having Power to Employ and Discharge Bound to Perform this Duty.—As to the servant upon whom this duty is devolved by the master,—if that is at all important,—it has been held that one who has power to hire and discharge laborers and is the foreman in his department has the duty of the master devolved upon him to instruct employés as to the danger of the employment.⁸

§ 4059. Duty to Warn Servant with Respect to Latent Dangers Known to the Master but Not Obvious or Not Known to the Servant.—It is the duty of an employer to warn his servant with respect to latent dangers known to the employer or discoverable by him in the exercise of reasonable care, but not known to the servant or not obvious to him in the exercise of reasonable care for his own safety.⁹

Co., 135 Mass. 294; Felice v. New York & C. R. Co., 14 App. Div. (N. Y.) 345; s. c. 43 N. Y. Supp. 922 (duty to warn workmen in tunnel of approach of trains); Mercantile Trust Co. v. Pittsburgh & C. R. Co., 115 Fed. Rep. 475 (delegation of such duty to any other servant, whether higher or lower in the scale of employment than the one exposed to the peril, cannot relieve master of the responsibility imposed on him by the law).

⁶ Pullman's Palace Car Co. v. Laack, 143 Ill. 242; s. c. 32 N. E. Rep. 285; 18 L. R. A. 215.

⁷ Brennan v. Gordon, 118 N. Y. 489; s. c. 29 N. Y. St. Rep. 829; 8 L. R. A. 818; 23 N. E. Rep. 810.

⁸ Fort Smith Oil Co. v. Slover, 58 Ark. 168; s. c. 24 S. W. Rep. 106.

⁹ Williams v. Walton & Co., 9 Houst. (Del.) 322; s. c. 32 Atl. Rep. 726 (plaintiff was overcome by fumes while cleaning a chamber

used in the manufacture of sulphuric acid); Hysell v. Swift & Co., 78 Mo. App. 39; s. c. 2 Mo. App. Repr. 124 (but danger of injury to employés eye from bacteria arising from decayed animal matter in packing-house, was not such a danger as employer should have known in the exercise of reasonable diligence); Fowler v. Buffalo Furnace Co., 41 App. Div. (N. Y.) 84; s. c. 58 N. Y. Supp. 223; appeal dismissed, 160 N. Y. 665; National Malleable Castings Co. v. Luscombe, 9 Ohio C. C. 680; Toomey v. Avery Stamping Co., 20 Ohio C. C. 183; s. c. 11 Ohio C. D. 216; McCray v. Sterling Varnish Co., 7 Pa. Super. Ct. 610 (plaintiff's health damaged by exposure to certain fumes in a varnish factory, which the superintendent told him would not hurt him, while making repairs on certain machinery); Bannan v. Lutz, 158 Pa. St. 166; s. c. 27 Atl.

§ 4060. **Cases where the Duty to Warn and Instruct does Not Arise.**—The rule, of course, has no application where the servant acquires full knowledge of the danger from other sources—as, for example, from other employés, or from his own observations—before the happening of the injury;¹⁰ nor has it any application where a servant is placed in charge of a machine, or set to work at a business, with which he is entirely familiar, and which it is his trade to operate.¹¹ There is, for example, no duty on the part of a railroad company to instruct a skilled and experienced locomotive-engineer in the dangers of a locomotive which he is required to operate, where it is of the same general character as those to which he has been accustomed;¹² nor has the rule any application to a case where there are

Rep. 890; *Hightower v. Bamberg Cotton Mills*, 48 S. C. 190; s. c. 26 S. E. Rep. 222 (plaintiff attempted to clean inside of machine, not knowing that inside machinery revolved two or three minutes by its own momentum, after all the other machinery had stopped); *Anderson v. Daly Min. Co.*, 15 Utah 22; s. c. 49 Pac. Rep. 126 (failure to warn inexperienced drill-operator in mine of necessity of examining rock and ground for missed holes, before starting the drills, where no report was made by another shift of missed holes); *Shoemaker v. Bryant Lumber & Co.*, 27 Wash. 637; s. c. 68 Pac. Rep. 380; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225; s. c. 28 L. R. A. 439; 63 N. W. Rep. 93 (insecurely fastened saw became separated from shaft and struck plaintiff); *McDougall v. Ashland Sulphite-Fibre Co.*, 97 Wis. 382; s. c. 73 N. W. Rep. 327 (failure to warn inexperienced laborer of danger of shifting belt with a stick). It has been held that a master who fails to inform a servant employed to unfasten the latch holding the lever of a dump-car, whereby its contents of molten slag are dumped, that the appliance has not at all times worked properly, but that the car has several times dumped prematurely by reason of the latch becoming unfastened, is liable for injuries sustained by the servant while in the exercise of due care, and because of such latent defect: *Fowler v. Buffalo Furnace Co.*, 41 App. Div. (N. Y.) 84; s. c. 58 N. Y. Supp. 223; appeal dismissed, 160 N. Y. 665. In an action

against a railroad company to recover for the death of the plaintiff's husband, caused by his being swept off the defendant's tracks by a *landslide*, the evidence disclosed that he was one of defendant's section-men; and with another he had been sent to look out for dangerous places on the track, liable to have been caused by heavy rains which had fallen; and the landslide which swept him into the river occurred while he was working under the direction of the conductor of a delayed train, and, pursuant to a rule of the company requiring him to act under such conductor's direction, was removing a previous slide from the track. The plaintiff claimed that there was a hidden danger in the bank. It was held that it was no part of the conductor's business to warn the deceased of the hidden danger, merely because a rule of the company provided that section-men should, in case of accident or delay to a train, obey the orders of the conductor, especially where it was no part of the conductor's duty to know about the condition of the bluff, but the care thereof was in part entrusted to the decedent: *Slavens v. Northern Pac. R. Co.*, 97 Fed. Rep. 255; s. c. 38 C. C. A. 151.

¹⁰ *Truntle v. North-Star Woolen-Mills Co.*, 57 Minn. 52; s. c. 58 N. W. Rep. 832; *Rooney v. Sewall & Co.*, 161 Mass. 153; s. c. 36 N. E. Rep. 789.

¹¹ *Benfield v. Vacuum Oil Co.*, 75 Hun (N. Y.) 209; s. c. 27 N. Y. Supp. 16; 58 N. Y. St. Rep. 663.

¹² It was accordingly held that a railroad company does not owe any

no appearances indicating the presence of any danger requiring special warning or instruction,—in which case the failure to give instructions cannot be ascribed to the want of ordinary or reasonable care;¹³ nor has it any application where the failure to instruct the servant is not the proximate cause of his injury,—as where he procures employment in the service by falsely representing that he is experienced in such service, and is injured through the negligence of a fellow servant.¹⁴ It has been said that the employer is under no duty to give the employé notice of the “ordinary dangers pertaining to the particular service,” for the reason that all persons engaged in it are presumed to know such dangers.¹⁵ This is not a correct statement of the rule. The rule is, as already stated, that the servant accepts the risks of known and obvious dangers, and not those which are unknown and latent, though known to the master. There is no presumption that one entering a given service is aware of all the dangers attending it; but if, by reason of his experience, he is fully aware of such dangers, then the fact of his having such experience and knowledge must be proved as any other fact, and is not presumed. There is another holding to the effect that, as a general rule, it is not the duty of the master to instruct the servant in regard to the risks, unless information is asked, or unless the servant is known to be ignorant and inexperienced regarding the dangers peculiar to the service.¹⁶ What is here intended is probably the mere statement that it is not the duty of the master to tell the servant what he knows already, or what he can see with his own eyes. If the servant is so experienced in the particular service as to be just as well apprised of the dangers attending it as the master is, then the law does not require the master to go through with the vain performance of telling him what he already knows.¹⁷ But, as we have already seen,¹⁸ although he may be familiar with the service, if there are hidden dangers of which he is not apprised, but of which the master has knowledge, then it is the obvious duty of the master to warn him

duty to an *experienced* engineer familiar with its road, of advising him, in assigning him to the duty of instructing another engineer, that the cab of the engine is six inches wider than that on which he usually runs, so as to make it liable for injuries sustained, in running the engine to relieve his pupil, by his head striking against a bridge because of the swaying motion at a curve and the nearness of the cab to the bridge; since engineers are bound to take notice of changes in the style, size and finish

of their cabs: *Bellows v. Pennsylvania &c. Canal Co.*, 157 Pa. St. 51; s. c. 33 W. N. C. (Pa.) 164; 27 Atl. Rep. 685.

¹³ *Burns v. Pethcal*, 75 Hun (N. Y.) 437; s. c. 57 N. Y. St. Rep. 661; 27 N. Y. Supp. 499.

¹⁴ *Stanley v. Chicago &c. R. Co.*, 101 Mich. 202; s. c. 59 N. W. Rep. 393.

¹⁵ *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619.

¹⁶ *Missouri &c. R. Co. v. Watts*, 63 Tex. 549.

¹⁷ *Post*, § 4061, *et seq.*

as to those dangers. If the servant attempts to repair machinery without orders to do so, where the duty of making such repairs is committed to another servant, and is injured in the task, he cannot make the fact that he has not been warned of the danger attending such an operation a ground of recovering damages against his master.¹⁹ It need not be said that the mere fact that his *work was dangerous* does not entitle an employé to recover for injuries from the *negligence of coemployés*, or from his own lack of ordinary care, though he has not been warned and is ignorant of the dangers of the work.²⁰

§ 4061. No such Duty in Respect of Dangers Obvious to the Comprehension of the Servant.—The master owes no such legal duty to the servant in respect to dangers which are open, visible, and obvious to the comprehension of the servant, considering his years, experience, and understanding.²¹ In the case of an adult servant of sound

¹⁹ *Ante*, § 4059.

²⁰ *McCue v. National Starch Man. Co.*, 142 N. Y. 106; s. c. 58 N. Y. St. Rep. 447; 36 N. E. Rep. 809. To the effect that a servant can not recover damages for an injury from a danger which is obvious and which is outside the duties which the master requires him to perform, the court cite *Crown v. Orr*, 140 N. Y. 450; *Cahill v. Hilton*, 106 N. Y. 512. Case where a carpenter was injured by the starting of machinery without warning, and the majority of the court held that the injury was to be ascribed to the negligence of a fellow servant: *Porter v. Silver Creek & Co. Coal Co.*, 84 Wis. 418; s. c. 54 N. W. Rep. 1019. It has been held that an employé cannot recover for an injury caused by the explosion of potassium and sodium placed by him in water at the direction of the employer, without any information of their explosive character by the latter, although the employé had no actual knowledge of its explosive character, where he *ought* to have known the danger in view of the surrounding circumstances; and an instruction stating, in effect, that only actual knowledge would bar a recovery, was erroneous: *Hill v. Meyer Bros.' Drug Co.*, 140 Mo. 433; s. c. 41 S. W. Rep. 909. These materials were carried out of a burning building with other chemicals, and emptied out of the chest in which they were contained on to the street. There

was evidence that explosions were taking place frequently around the plaintiff by reason of water thrown by the fire department coming in contact with chemicals scattered around the street, and that several bystanders and the defendant's manager gave warning shouts when they saw what the plaintiff intended to do: *Hill v. Meyer Bros.' Drug Co.*, *supra*.

²⁰ *Craven v. Smith*, 89 Wis. 119; s. c. 61 N. W. Rep. 317.

²¹ *Holland v. Tennessee & C. R. Co.*, 91 Ala. 444; s. c. 12 L. R. A. 232; 8 South. Rep. 524; *Commercial Guano Co. v. Neather*, 114 Ga. 416; s. c. 40 S. E. Rep. 299 (a large, heavy, metallic shaft revolving at an exceedingly rapid rate of speed); *Hoyle v. Excelsior Steam Laundry Co.*, 95 Ga. 34; s. c. 21 S. E. Rep. 1001; *Campbell v. Mullen*, 60 Ill. App. 497 (carpenter injured by giving way of some terra-cotta ornaments on which he stepped, knowing the manner in which they had been laid, and that they were not yet permanently fastened in place); *Marsden Co. v. Johnson*, 89 Ill. App. 100 (not negligence to fail to warn a boy of sixteen, of the danger of getting his hand crushed between the rollers of a machine, the danger being obvious); *American Malting Co. v. Lelivelt*, 101 Ill. App. 320 (carpenter working near revolving shaft caught by projecting set-screw in collar on shaft, he not having been warned that the set-

mind, the rule is understood to be that where the dangers of the employment are visible, so that any man of ordinary intelligence, though

screws, which were invisible, were projecting instead of countersunk, but knowing that projecting set-screws were commonly used for such purpose); *Myers v. W. C. DePauw Co.*, 138 Ind. 590; s. c. 38 N. E. Rep. 37 (danger of plate glass breaking while being carried in the ordinary way); *Railsback v. Wayne County Turnp. Co.*, 10 Ind. App. 622; s. c. 38 N. E. Rep. 221 (failure to warn a servant of the loose and brittle character of the soil overhanging a gravel-bank at which he is working for the first time); *Newbury v. Getchell & Co. Lumber Co.*, 100 Iowa 441; s. c. 69 N. W. Rep. 743; *McCormick Harvesting Mach. Co. v. Liter*, 23 Ky. L. Rep. 2154; s. c. 66 S. W. Rep. 761 (no off. rep.) (hand caught between rollers of a machine); *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67; s. c. 47 N. E. Rep. 506 (failure to instruct adult employé of ordinary intelligence that cogwheels in plain sight are uncovered, or that if he gets his hand in the cogs he will be hurt); *Campbell v. Dearborn*, 175 Mass. 183; s. c. 55 N. E. Rep. 1042 (injury from an obvious danger in piling boards); *Buttle v. George G. Page Box Co.*, 175 Mass. 318; s. c. 56 N. E. Rep. 583 (failing to warn servant eighteen years old of the danger of working with a buzz-saw); *Lemoine v. Aldrich*, 177 Mass. 89; s. c. 58 N. E. Rep. 178 (danger of getting clothes caught in a revolving shaft); *Demers v. Marshall*, 178 Mass. 9; s. c. 59 N. E. Rep. 454 (danger of getting sleeve caught in a set-screw on a revolving shaft, plainly visible); *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35; s. c. 59 N. E. Rep. 645 (danger of getting finger squeezed between rollers of a rubber-machine, the distance between them being obvious); *Dene v. Arnold Print Works*, 181 Mass. 560; s. c. 64 N. E. Rep. 203 (danger of getting hand caught in the gearing adjacent to an unlighted passage-way between two machines); *Findlay v. Russell Wheel & Co.*, 108 Mich. 286; s. c. 2 Det. Leg. N. 843; 66 N. W. Rep. 50 (danger of hand being drawn into sheave in

plain sight if hand is not removed from moving rope); *Nugent v. Kauffman Milling Co.*, 131 Mo. 241; s. c. 33 S. W. Rep. 428 (danger to an adult and experienced employé of getting his hand caught between rollers used for crushing wheat); *Bohn v. Havemeyer*, 46 Hun (N. Y.) 557; s. c. 12 N. Y. St. Rep. 589; s. c. aff'd, 114 N. Y. 296; 21 N. E. Rep. 402; *Costello v. Judson*, 21 Hun (N. Y.) 396 (elevator-boy stuck his foot beyond edge of elevator and it was caught underneath arch of one of the doors and crushed); *Vilas v. Vanderbilt*, 20 Misc. (N. Y.) 51; s. c. 44 N. Y. Supp. 267 (no duty to warn against dangers apparent on mere casual observation — danger from buzz-saw); *O'Hare v. Keeler*, 22 App. Div. (N. Y.) 191; s. c. 48 N. Y. Supp. 376 (danger to girl seventeen years old of having her hand caught and injured in the rollers of a mangle, she having worked more or less for two days before the accident,—the evidence showing, moreover, that she *had* been warned); *Gaertner v. Schmitt*, 21 App. Div. (N. Y.) 403; s. c. 47 N. Y. Supp. 521 (washer of beer-kegs, set to work under carpenter, ordered by carpenter to use a rip-saw to shorten a board, instead of a circular saw with which he had been working; saw caused board to jump and throw plaintiff's hand on saw; court thought there was nothing to show that difference in construction of saws rendered further instructions in the slightest degree necessary, ignoring the fact that it was probably this very difference in the construction of the saws that caused the board to jerk, the teeth on such saws being differently shaped and set) [compare *Newbury v. Getchell & Co. Lumber & Co.*, 100 Iowa 441; s. c. 69 N. W. Rep. 743 (where a contrary conclusion was reached under a somewhat similar state of facts)]; *Cunningham v. Fort Pitt Bridge Works*, 197 Pa. St. 625; s. c. 47 Atl. Rep. 846 (danger of moving by hand heavy and unwieldy pieces of iron on their edges); *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; s. c. 47 Atl. Rep. 1128 (danger of getting into a nar-

not an expert, could not fail to see and comprehend them, an employer is under no legal obligation to warn the servant of their existence;²² but in cases of infants, as we shall hereafter see, the rule is to be applied with reference to their inexperience and want of comprehension.²³ An employer has, therefore, been exonerated from liability for failing to notify an adult servant that a circular saw was dangerous, in a case where the latter, while supplying wood to a man in charge of the saw, was injured by being struck by a piece of wood caught in it.²⁴

§ 4062. No Duty to Warn or Instruct Servants who Know and Appreciate the Danger.—The master is under no obligation to warn and instruct servants who are thoroughly familiar with the premises and the work, and with the machinery, tools, and appliances with which they have to prosecute the work; nor is the master required to warn a servant against dangers which are well known to him and which he is fully capable of appreciating.²⁵ But the rule that the failure

row space in the vicinity of cog-wheels); *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; s. c. 23 Atl. Rep. 772; 11 Rail. & Corp. L. J. 212; *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47; s. c. 65 N. W. Rep. 419 (danger of caving in of trench being dug through filled earth); *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236; s. c. 61 S. W. Rep. 53 (injury from hole in the floor in a passageway which was patent and obvious); *Dougherty v. West Superior Iron & Co.*, 88 Wis. 343; s. c. 60 N. W. Rep. 274 (injured while making cores for castings, by having his hand caught in hay which he was putting upon a revolving spindle, driven by steam, but revolving very little faster than a hand-driven spindle on which he had worked for fifteen months); *Groth v. Thomann*, 110 Wis. 488; s. c. 86 N. W. Rep. 178 (where plaintiff, fifteen years old, had her hand caught and burned between the rollers of a steam-mangle, and her testimony showed she was feeding the clothes into it properly, and that she knew the danger of having her hands caught, she could not recover).

²² *Johnson v. Ashland Water Co.*, 77 Wis. 51; s. c. 45 N. W. Rep. 807.

²³ *Post*, § 4091, *et seq.*

²⁴ *Delaware River & Co. v. Nuttall*, 119 Pa. St. 149; s. c. 13 Atl.

Rep. 65; 21 W. N. C. (Pa.) 100. But it has been held that the tendency of a board, when warped, to spring back during the operation of being sawed by a circular saw, is not so obvious that an inexperienced workman must be held necessarily to take cognizance of it, without being warned: *Wheeler v. Wason Man. Co.*, 135 Mass. 294.

²⁵ *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337; s. c. 60 N. W. Rep. 651 (failure of foreman to block appliances used in putting a spring into an engine, by reason of which the appliances slipped and injured the plaintiff, who was thoroughly familiar with the work); *Yeager v. Burlington & C. R. Co.*, 93 Iowa 1; s. c. 61 N. W. Rep. 215 (railroad company not bound to instruct a boy of nineteen, employed as a brakeman, as to how to mount moving cars, or to point out the dangers incident to mounting moving cars, where he knows the whole thing from observation and experience); *Perry v. Old Colony R. Co.*, 164 Mass. 296; s. c. 41 N. E. Rep. 289 (failure to warn fireman or engineer of locomotive in roundhouse that repairer had been sent under engine, where they knew some one would be so sent; and failure to warn repairer that engine would have to be "blown down" before repairs could be made, and that this

to instruct a servant as to the danger of a machine is not negligence, where he possesses a full knowledge of its character, does not apply where he has *no knowledge* of the main sources of danger in operating the machine.²⁶

§ 4063. **No Duty to Warn or Instruct Servants who have had Ample Opportunity to Become Acquainted with the Danger.**—On the same principle, the master is not under any duty to warn or instruct servants who have already enjoyed an ample opportunity to become acquainted with the danger. Servants are expected to keep their eyes open and exercise such a reasonable care for their own safety as their situation permits. The master is therefore under no duty of warning or instructing a servant as to dangers which are discoverable by the exercise of ordinary care on his part, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing that he possesses.²⁷

was as likely to be done in round-house as elsewhere, where repairer knew both these things,—was not negligence toward repairer scalded by engine being blown down while he was under it); *Bence v. New York & C. R. Co.*, 181 Mass. 221; s. c. 63 N. E. Rep. 417 (no duty to warn experienced railroad employé of the danger of being injured, while climbing up the side of a moving car in a yard, by being struck by another car left near a switch, since he already knew it); *Cushman v. Cushman*, 179 Mass. 601; s. c. 61 N. E. Rep. 262 (man who had worked in a factory for forty years, who had been at one time foreman, and who had tended the same machine for twelve years, not entitled to warning as to the danger of attempting to remove a belt from a fixed pulley on a shaft); *Junior v. Missouri Electric Light & C. Co.*, 127 Mo. 79; s. c. 29 S. W. Rep. 988 (failure to warn lineman of obvious fact that ends of two wires he was to connect with others were uninsulated); *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65; s. c. 65 S. W. Rep. 693 (failure to warn employé engaged in feeding oil-cake into a crusher that if the oil-cake, while being pushed, gave way suddenly, his hand might be caught in the rollers, the employé knowing that the platform through a slot in which the cakes were fed,

sagged toward the rollers, and knowing that the same cake might be partly hard and partly soft and liable to give way suddenly); *Groth v. Thomann*, 110 Wis. 488; s. c. 86 N. W. Rep. 178 (state of evidence under which it was error to submit to the jury the issue of the failure of the master to instruct a female servant as to the danger of getting her hand caught in a mangle).

²⁶ *New York Biscuit Co. v. Rouss*, 74 Fed. Rep. 608; s. c. 45 U. S. App. 45; 20 C. C. A. 555 (failure to warn inexperienced servant operating "dough-breaker" to keep his eyes on dough over rollers, and not on dough coming out of machine, and to use his closed fist in pushing dough along the rollers).

²⁷ *Williams v. Hensler*, 38 Ill. App. 584 (machine set in motion by those testing it, injuring plaintiff, who was attempting to remove a piece of Babbitt metal which he had discovered between two cogs; it was a large machine, and plaintiff and the other workmen were engaged on opposite sides of it, but the court said there could be no reasonable pretense that the machine was of such character as to hide the men from each other,—especially as it was broad daylight); *Chicago & C. R. Co. v. Pettigrew*, 82 Ill. App. 33 (the danger from flying chips of metal while cutting bolts from a boiler with pneumatic nippers was

§ 4064. **Extent of Obligation to Instruct Competent and Intelligent Servants.**—Nor is there any obligation on the part of the master to do the vain thing of giving instructions or warning to competent servants who are thoroughly experienced in the business and acquainted with its dangers.²⁸ For example, the failure of a corporation to give warning to the master machinist employed in the establishment, that there was danger that the wall or walls of the gas-room would fall in case fire occurred, where he was not ignorant of the causes which produced the danger, will not make it liable for his death, caused by the fall of such walls while breaking down the door of the gas-room during a fire, under instructions from the superintendent.²⁹ But, al-

obvious, and any one of common sense, as plaintiff was, ought to have known that the direction in which the chips would fly would be determined by the angle at which the cutting-tool was held, especially after having cut sixteen or eighteen bolts with it, and where, during the four months it had been in the shop, at least 5,000 bolts had been cut with it); *Yeager v. Burlington &c. R. Co.*, 93 Iowa 1; s. c. 61 N. W. Rep. 215 (failure to instruct boy nineteen years old how to mount moving cars or to point out the dangers incident thereto, which are known by the employé from observation, is not negligence); *Cunningham v. Bath Iron Works*, 92 Me. 501; s. c. 43 Atl. Rep. 106 (failure to warn boy eighteen years old of danger from cogwheels in plain sight is not negligence); *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; *Coulland v. Tecumseh Mills*, 151 Mass. 85 (boy injured by door of machine being pulled shut by weight attached to it, on his hand slipping from edge of door—no warning necessary); *Ruchinsky v. French*, 168 Mass. 68 (woman thirty years old injured by cogwheels—no warning necessary); *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67 (unguarded cogwheels near starting-lever—plaintiff injured on account of reaching for lever without looking, and not on account of not being warned of danger); *Tinkham v. Sawyer*, 153 Mass. 485 (boy sixteen years old slipped on oily floor and was injured by machine, he knowing the danger—no warning necessary); *Nowakowski v. Detroit Stove Works*, 130 Mich. 308;

s. c. 9 Det. Leg. N. 25; 89 N. W. Rep. 956 (no duty to warn against danger of molten iron sputtering and flying when spilled on the floor, it being a matter of daily occurrence); *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; s. c. 80 N. W. Rep. 821 (employé with several years' experience in work of bottling carbonated waters, etc., not entitled to warning of danger of bottles exploding); *O'Hare v. Cocheco Man. Co.*, 71 N. H. 104; s. c. 51 Atl. Rep. 257 (servant injured by getting finger caught in the cloth in a drying-machine); *Gulf &c. R. Co. v. Wittig* (Tex. Civ. App.), 35 S. W. Rep. 857 (no off. rep.) (car-repairer who has been employed long enough to learn by observation that a flag should be kept on a car undergoing repairs, or that a person of ordinary prudence, in his position, would have kept the flag flying, cannot recover, though he was not informed of the rule requiring a flag to be displayed); *King v. Morgan*, 109 Fed. Rep. 446; s. c. 48 C. C. A. 507. That employé of mature years is presumed to be acquainted with dangers attending the service,—see *Kohn v. McNulta*, 147 U. S. 238; s. c. 37 L. ed. 150; 13 Sup. Ct. Rep. 298; *Peterson v. New Pittsburg Coal &c. Co.*, 149 Ind. 260; s. c. 49 N. E. Rep. 8; *Fletcher v. Philadelphia Traction Co.*, 190 Pa. St. 117; s. c. 42 Atl. Rep. 527.

²⁸ *Burns v. Washburn*, 160 Mass. 457; s. c. 36 N. E. Rep. 199; *O'Neill v. Chicago &c. R. Co.*, 132 Ind. 110; s. c. 31 N. E. Rep. 669.

²⁹ *Allen v. Augusta Factory*, 82 Ga. 76; s. c. 8 S. E. Rep. 68.

though the servant may be thoroughly experienced in a particular line of service, there may be hidden dangers known to the master and unknown to him; and in respect of these dangers the principle applies that it is the duty of the master to give him warning. This duty is not, then, confined to servants who are inexperienced or not of the average grade of intelligence.³⁰

§ 4065. Ordering Servant into Danger without Warning or Instruction.³¹—A master who orders his servant into new dangers, with respect to which he is inexperienced, is bound to give him suitable warning or instruction as to those dangers, to the end that he may guard himself against injury from them.³² For instance, if he orders

³⁰ *Atkins v. Merrick Thread Co.*, 142 Mass. 431.

³¹ See *ante*, §§ 3814, 3818; *post*, §§ 4094, 4630, 4676.

³² *Giordano v. Brandywine Granite Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332; *Camp v. Hall*, 39 Fla. 535; s. c. 22 South. Rep. 792 (boy fourteen years old employed in a saw-mill, ordered to engage in the work of pushing lumber-cars on a side-track—entitled to special warning and instruction); *Hess v. Rosenthal*, 160 Ill. 621; s. c. 43 N. E. Rep. 743; *aff'g* s. c. 55 Ill. App. 324 (servant employed to salt hides was set at work cleaning rendering-kettles on top of a greasy and slippery vat, adjoining an uncovered vat full of hot grease, into which he slipped); *Mallen v. Waldowski*, 101 Ill. App. 367 (where a master undertakes to aid an unskilled servant by referring him to another servant who is skilled in such employment, and such servant fails to render the required aid as directed, such failure will be imputed to the master); *Pittsburgh & C. R. Co. v. Adams*, 105 Ind. 151; *Newbury v. Getchel & C. Lumber & C. Co.*, 100 Iowa 441; s. c. 69 N. W. Rep. 743 (foreman ordered plaintiff to use circular rip-saw for work which should have been done with circular cut-off or cross-cut saw, and failed to inform him of the extra danger, of which the plaintiff was ignorant); *James v. Rapides Lumber Co.*, 50 La. An. 717; s. c. 23 South. Rep. 469; 44 L. R. A. 33; *La Fortune v. Jolly*, 167 Mass. 170; s. c. 45 N. E. Rep. 83 (servant directed to start a fire in a furnace

without instruction—an explosion in the furnace blew open the fire-box door and burned the plaintiff, the evidence tending to show that the explosion was the result of his putting in too much fuel, thereby stopping the draft and allowing the gases of combustion to accumulate); *Bowes v. New York & C. R. Co.*, 181 Mass. 89; s. c. 62 N. E. Rep. 949; *Mannion v. Hagan*, 9 App. Div. (N. Y.) 98; s. c. 41 N. Y. Supp. 86 (plaintiff was holding red-hot rivets while they were being driven into a boiler, and a portion of a rivet broke off and entered his eye; but judgment for plaintiff reversed for error in admitting evidence which was incompetent and prejudicial to defendant); *Coffee v. Phillips*, 21 Misc. (N. Y.) 663; s. c. 47 N. Y. Supp. 1105 (plaintiff, employed to get handkerchief-boxes and mark them, was directed, without being instructed, to feed handkerchiefs into an ironing-machine, and was injured by the rollers,—such facts constituting a *prima facie* case of negligence on the part of the master); *Hillsboro Oil Co. v. White* (Tex. Civ. App.), 54 S. W. Rep. 432 (no off. rep.); *Texarkana & C. R. Co. v. Preacher* (Tex. Civ. App.), 59 S. W. Rep. 593 (no off. rep.); *Gulf & C. R. Co. v. Newman*, 27 Tex. Civ. App. 77; s. c. 64 S. W. Rep. 790; *Texas & C. R. Co. v. Utley*, 27 Tex. Civ. App. 472; s. c. 66 S. W. Rep. 311; *Michael v. Roanoke Mach. Works*, 90 Va. 492; s. c. 19 S. E. Rep. 261; *Mather v. Rillston*, 156 U. S. 391; s. c. 39 L. ed. 464; 15 Sup. Ct. Rep. 464 (storing powder and caps in an engine-house with-

a servant to go to work upon machinery of which the servant is ignorant, he is bound to warn him of the dangers connected with such work, especially where to work upon such machinery is no part of the work which the servant has agreed to perform.³³

§ 4066. **Making Changes Imposing Increased Danger upon Servants without Suitable Warning or Instruction.**—If the master makes any change in his business, or in the structure of his premises, which exposes the servant to *increased danger*, of the nature and extent of which the servant is not aware, the master is bound, in the exercise of the same duty, to instruct the servant as to the character of the new risks to be run, unless they are open and visible, or such as by the exercise of ordinary care the servant will see.³⁴

out informing an inexperienced employé, engaged in the house in attending to certain machinery, of the increased danger of his employment by reason of the liability of an explosion being caused by the heat and the jarring of machinery); *The Pioneer*, 78 Fed. Rep. 600 (shipwright, coming up from hold in course of his duties, struck by a barrel which was being swung on board just as his head got above deck, no warning having been given by mate, who was superintending loading); *Nyback v. Champagne Lumber Co.*, 109 Fed. Rep. 732; s. c. 48 C. C. A. 632 (workmen who had been employed for but one hour fell into unguarded hole, of which he had not been warned).

³³ *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338. In one case it appeared that the plaintiff had been firing the boilers of a stationary engine for a year. Against his protestations that he knew nothing about running the engine, his foreman instructed him that he must take charge of the engine at night. The foreman did not instruct him how to run the engine, or warn him of the danger. The plaintiff had seen other employes start the engine by lifting the balance-wheel off its balance with an iron rod, and knew no other way to start it. While so starting it he was injured. It was held that the evidence supported a verdict for the plaintiff, on the ground of the foreman's failure to instruct him: *Gulf & C. R. Co. v. Newman*, 27 Tex. Civ. App. 77; s. c. 64 S. W. Rep. 790.

³⁴ *Pullman's Palace Car Co. v. Laack*, 143 Ill. 242; s. c. 32 N. E. Rep. 285; 18 L. R. A. 215; *Hawkins v. Johnson*, 105 Ind. 29; s. c. 55 Am. Rep. 169. Thus, where an employer, engaged in burning brick with crude-oil burners, allowed some new burners to be put in, but without the usual stop-cock between the supply-tank and the burners; and upon some of the rubber tubing catching fire and allowing the oil to escape and ignite, as it frequently did, the injured employé went to the place where the stop-cock would ordinarily have been, and always had been before, and found none, which was the first notice he or the other employes had of the change; after which he uncoupled the supply-pipe from the tank, believing that the tank-valve had been closed, and the oil gushed over him and became ignited,—it was held that the master was guilty of negligence in failing to warn plaintiff of the change, so that he could quit the employment if he did not wish to assume the increased risk: *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; s. c. 18 L. R. A. 215; aff'd s. c. 41 Ill. App. 34. In another case the plaintiff, while employed in removing the cut pieces from a pair of shears worked by steam-power, was struck by a flying piece of metal and severely injured. The machine was perfect of its kind, and it was not shown that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger was greater when steel was being cut

§ 4067. **Distinction Between Duty to Give Warning and Instruction as to the Dangers of a Service, and to Give Signals of Particular Dangers Arising in the Progress of the Work.**—A class of cases which relate to the duty of *giving signals* to servants who are in situations of danger,—as, in repairing cars or in being between cars in coupling or uncoupling,—must not be confused with the general duty of the master to give suitable warning and instruction. In the absence of statute the duty of giving such signals may be regarded as the duty of a fellow servant, for the neglect to perform which the master will not be liable. But statutes have very considerably impinged upon this rule.³⁵

§ 4068. **No Duty to Give Warning of Dangers Arising in the Progress of the Work.**—In the absence of statute the general rule is that the master is under no duty to warn his servants of dangers arising in the progress of the work, and especially of those which are ascribable to the negligence of fellow servants. The distinction, as pointed out in the preceding paragraph, arises between permanent or general risks, and temporary or transitory risks which may or may not arise in the progress of the work or be created by the workmen themselves. It has been reasoned that the duty of supervision and warning cannot be extended to every transitory risk, when the only thing the employé does not know is the *precise time* when the danger may arise.³⁶ One statement of this doctrine is to say that a master is not required to keep special watch over his employé, and warn him of ordinary dangers to which he may be subjected in the performance

than when iron was being cut. The accident happened when steel was being cut. It was held that there should have been some warning that steel was about to be cut, and that this means of reducing the possible danger not having been adopted, the defendants were liable in damages at common law. It was held also, per MacLennan, J. A., that, as the foreman had been in the habit of warning the workmen when steel was to be cut, and had neglected to do so on this occasion, there was liability under the Workman's Compensation Act: *Choate v. Ontario Rolling Mill Co.*, 20 Ont. Rep. 200; s. c. 27 Ont. App. 155.

³⁵ Thus, the plaintiff, a brakeman, was directed by the conductor in charge of the train to go between certain cars and repair a coupling. While so engaged, and without re-

ceiving any warning, the train was moved, and he was injured. The conductor signalled the engineer to move the train, though knowing, or having good reason to know, that the plaintiff was between the cars, working as directed. It was held that the evidence warranted a finding that the conductor was negligent in signalling the engineer to move the train without warning the plaintiff; and the railway company was liable under the Employers' Liability Act, the negligence being that of a person in charge of a train: *Bowes v. New York & C. R. Co.*, 181 Mass. 89; s. c. 62 N. E. Rep. 949.

³⁶ *McCann v. Kennedy*, 167 Mass. 23; s. c. 44 N. E. Rep. 1055. See also, *Beique v. Hosmer*, 169 Mass. 541; s. c. 48 N. E. Rep. 338.

of his ordinary duties.³⁷ This principle has been applied so as to exonerate the master where his foreman failed to warn a laborer when a car-load of earth and stone was about to be dumped into a deep trench where he was at work, it not appearing that the master had undertaken to provide any warning.³⁸ It was also applied in a case where a gang of men, including the deceased, were ordered by the foreman to assist in putting out a fire which endangered the master's property, and deceased was killed by the falling of a burning stump. The foreman had been informed that the stump had burnt at the bottom so that it was likely to fall, but neglected to warn the men. The stump and vicinity were enveloped in smoke and steam, and there was much noise and confusion. The deceased had passed the stump several times while it was burning, and the danger from it was as obvious to him as to the foreman. It was a matter of individual opinion as to *when* it would fall. It was held that, if the work were considered as a new employment, its dangers were obvious and the risks were assumed. On the other hand, if the effort to save their master's property were regarded as a mere detail of their work, it was not the *master's* duty to warn them of an obvious peril developing during the progress of the fire, so that the negligence, if any, of the foreman in this respect was that of a fellow servant. Under neither view could there be a recovery against the master.³⁹ It was so applied as to hold that a master was not liable for the negligence of the fellow servants of a *deaf mute*, engaged in felling trees, in failing to warn him when a particular tree was falling, as they should have done.⁴⁰ Another application of this doctrine resulted in the conclusion that an employer is not bound to warn an experienced workman engaged in the construction of a building, of temporary conditions incident to the construction, and against which such workman should be on his guard.⁴¹

³⁷ Ring v. Missouri Pac. R. Co., 112 Mo. 220 (no recovery for failure of section-foreman to warn section-man of approach of train, no rule being shown requiring him to do so, and the deceased appearing to have been standing far enough from the track to need no warning).

³⁸ McLaine v. Head & Co., 71 N. H. 294; s. c. 52 Atl. Rep. 545 (could not be construed as a breach of duty on the part of the master, in failing to provide a safe place to work).

³⁹ Maltbie v. Belden, 167 N. Y. 307; rev'g s. c. *sub nom.* Maltby v. Belden, 45 App. Div. (N. Y.) 384; 60 N. Y. Supp. 824.

⁴⁰ Melton v. E. E. Jackson Lumber Co., 133 Ala. 580; s. c. 31 South. Rep. 848.

⁴¹ Beique v. Hosmer, 169 Mass. 541; s. c. 48 N. E. Rep. 338 (carpenter fell in the night-time through a hole cut in the floor for the purpose of lowering materials for concretizing the basement, such hole having been cut several weeks before by another subcontractor, and being known to the plaintiff's employer, who was subcontractor for the carpentry-work—no recovery). Similarly, see McCann v. Kennedy, 167 Mass. 23; s. c. 44 N. E. Rep. 1055 (so far as appeared, the plaintiff

§ 4069. Master Bound to Warn Servant Concerning Perils Arising from the Doing of Other Work Pertaining to the Master's Business.—

A master is bound to give a servant working in a place which may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the servant is engaged, such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them, and such duty cannot be delegated so as to render the master free from liability for negligence in its performance.⁴²

§ 4070. Failing to Instruct as to the Conduct to be Pursued in Unexpected Emergencies.—The proprietor of a factory is not bound, in the discharge of his duty to his employés, to instruct an ordinary employé in regard to the conduct which she should pursue in so unexpected an emergency as the discovery of a *fire*. Thus, where the operator of a rag-dusting machine in a paper mill, upon discovering a fire in the machine, ran to give the alarm without disconnecting the machine from the power, and the superintendent shut down *all* the machinery, and afterwards, not knowing the plaintiff was inside the machine examining it, started up the power again, thus putting the particular machine in motion, neither he nor the plaintiff knowing that it had not been disconnected by the operator,—a question to the operator whether she had ever been instructed concerning the running of it was rightly excluded, where there was nothing to show that she needed any instructions for the proper performance of her *regular duties*, but, on the contrary, it was shown that she frequently shifted the belt when running the machine, and was competent to do so.⁴³

knew where the well-hole would be, and he knew the customary way of constructing well-holes, such method being followed in this case); *Stewart v. Philadelphia & C. R. Co.*, 8 *Houst. (Del.)* 450; *s. c.* 17 *Atl. Rep.* 639 (charge to jury—plaintiff was at work on top of passenger-car in defendant's car-shop, when one of defendant's officers ordered it to be set in motion, whereby plaintiff was crushed between car-roof and a girder crossing the shop—evidence as to warning being conflicting, question was for jury).

⁴²*Felice v. New York & C. R. Co.*, 14 *App. Div. (N. Y.)* 345; *s. c.* 43 *N. Y. Supp.* 922 (duty to warn workmen in tunnel of approach of trains).

⁴³*Gilmore v. Mittineague Paper Co.*, 169 *Mass.* 471; *s. c.* 48 *N. E. Rep.* 623. Where a complaint alleged that plaintiff was injured by the falling of a tree, lodged against another one which he was chopping, because of his foreman's failure to warn him as he had promised to do, and it appeared that the foreman from his position might have seen the standing tree swaying before plaintiff had notice of any movement, the fact that plaintiff heard the lodged tree slipping and attempted to escape, but in the wrong direction, did not show that the promised warning was unnecessary; since the jury might have found that the foreman could have seen the standing tree swaying in

§ 4071. **Master Not Exonerated from the Duty to Warn and Instruct by the Fact that the Machine or Appliance which Furnishes the Source of Danger is in Perfect Order.**—It is scarcely necessary to add that this duty to warn and instruct is not dispensed with by the mere circumstance that the machinery which furnishes the source of danger is in *perfect order*, where the danger attending it is not open and obvious.⁴⁴

§ 4072. **Master, instead of Warning Servant, Lulling him into Sense of Security.**⁴⁵—For stronger reasons, “if the master, having knowledge of a danger of which the servant is ignorant, by his *conduct, actions, or words, lulls the servant into a sense of security*, in consequence of which he is injured, the master is answerable in damages.”⁴⁶

§ 4073. **Giving Erroneous Instructions.**—It must also be apparent that the master will be liable for the giving of *erroneous instructions* to his servant, whereby the servant is required to perform a particular duty in a more *dangerous manner* than would have been consistent with the proper conduct of the master’s business, in consequence of which the servant is injured.⁴⁷ In like manner, an employer who tells a young and inexperienced boy whose clothing has become saturated with dangerous and inflammable oils and gases in the course of his employment, to warm himself by a hot stove, without instructing him as to the hazards arising therefrom, and who assures him that his clothes so saturated are no more liable to take fire than if wet with water,—is liable for the death of such boy from his clothes taking fire from such stove.⁴⁸

§ 4074. **No Duty to Instruct Adult Servant as to the Use of Simple Tools, Devices and Appliances.**—A master may be allowed to presume, in the absence of knowledge or of some warning to the contrary, that an adult servant has sufficient knowledge to operate simple tools and devices, and to conduct or participate in simple operations without special warning or instruction. For example, when he

time to save plaintiff, and before the leaning tree began to fall: *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444; s. c. 31 South. Rep. 527.

⁴⁴ *May v. Smith*, 92 Ga. 95; s. c. 18 S. E. Rep. 360.

⁴⁵ See *ante*, § 4008; *post*, § 4664.

⁴⁶ *Hoffman v. Dickinson*, 31 W. Va. 142, 152; s. c. 6 S. E. Rep. 53.

⁴⁷ *Owens v. Ernst*, 49 N. Y. St.

Rep. 640; s. c. 1 Misc. (N. Y.) 388; 21 N. Y. Supp. 426; s. c. *aff’d*, 142 N. Y. 661; 60 N. Y. St. Rep. 869; *Royer v. Tinkler*, 16 Pa. Super. Ct. 457.

⁴⁸ *Wallace v. Standard Oil Co.*, 66 Fed. Rep. 260 (he was told to do this by the agent of the company in charge of the premises on which the boy was working).

superintends the handling of a heavy stone, he is not imputable with negligence because he fails to give specific instructions to experienced workmen to be careful not to get their hands or feet under the stone as it is let down.⁴⁹ So, the failure of a master to instruct an adult servant of average intelligence as to the manner in which he should use a wrench in screwing nuts on a rod so as to avoid falling in case the wrench should break, was not negligence.⁵⁰ So, it is necessarily one of the natural incidents of the handling of glass, in the process of manufacture, that it will be broken without violence from, or fault of, those who handle it. When, therefore, plate glass was broken while being carried from the grinding-table while manufacturing it, cutting the wrist of a servant, his complaint in an action against the master, grounded on the failure of the master to give him warning of the danger attending the carrying of plate glass, did not state a cause of action.⁵¹

§ 4075. Duty to Warn and Instruct with Respect to Dangers Attending Changes in Appliances and Devices.—If a change in a machine is merely an ordinary adaptation of the machine to the purpose for which it was made, which a skilled operator must be presumed to

⁴⁹ *La Belle v. Montague*, 174 Mass. 453; s. c. 54 N. E. Rep. 859.

⁵⁰ *Garnett v. Phenix Bridge Co.*, 98 Fed. Rep. 192 (servant standing on a trestle eight feet high and five inches wide at the top).

⁵¹ *Myers v. W. C. DePauw Co.*, 138 Ind. 590; s. c. 38 N. E. Rep. 37. The evidence in this case is not given. The complaint charged that glass was liable to break from "causes within itself," and that the glass the plaintiff was carrying broke from such causes. The court held that if the phrase "causes within itself" was intended to suggest a latent imperfection, the facts were not so pleaded as to show that it was the result of the master's negligence. The court did not think that the phrase necessarily implied causes not perceptible to ordinary observation; but considered that, glass being transparent, its ordinary imperfections are patent. The character of the defect was not disclosed, nor whether it was such a one as the plaintiff should have been notified of; namely, a latent one: *Myers v. W. C. DePauw Co.*, *supra*. So, an employer was not lia-

ble to his packing and shipping clerk, who was twenty-four years old, for injuries sustained by him in falling from the unguarded side of a platform four feet high, in endeavoring to save himself from injury by being run upon by a barrel weighing 400 pounds, which he was assisting in unloading from a car by means of a skid eighteen inches long and two feet wide, with a fall of ten inches, extending from the car to the platform, although he was ignorant of the usual way of handling such barrels, by catching the barrel at its ends by the chime and placing the knee against it, and was not informed thereof by the foreman under whose direction he was working, but was trying to hold the barrel back by placing his hands on the top of it. The court held that "a careful and cautious foreman could not reasonably anticipate that a full-grown man twenty-four years old, and of ordinary discernment and gumption," would require instructions for such ordinary work: *Manley v. Minneapolis Paint Co.*, 76 Minn. 169; s. c. 78 N. W. Rep. 1050.

anticipate,—such, for instance, as the slight change necessary to keep the felt bands in a paper-drying machine at the proper tension,—the risk of injury is one assumed by the operator as one incident to his employment. On the other hand, if the change is one unknown in the ordinary use of the machine, made to adapt it temporarily to a special and unusual purpose, calling for a difference in operation and greatly increasing the danger,—such, for instance, as making a change in the *location and function* of some of the rolls on such machine,—then it is the duty of the master to notify a servant before requiring him to operate the machine in its altered condition.⁵²

§ 4076. Master Not Necessarily Negligent in Failing to Warn Servant of Each Particular Defect or Danger.—An employer who gives such general instructions and cautions as will enable the employé by the use of his intelligence to comprehend the dangers which threaten him in his work, discharges his duty, although he does not anticipate in advance every possible risk or accident.⁵³ Stated differently, it may be said that it is not necessary that a servant should be warned of every possible manner in which injury may occur: he must examine his surroundings and take notice of obvious dangers and the operation of familiar natural laws.⁵⁴ One of the reasons given for this conclusion is that the duty to warn a servant of any particular danger or defect arising in the course of an employment is a duty necessarily devolving upon fellow servants, for whose particular acts

⁵² *Ryan v. Chelsea Paper Man. Co.*, 69 Conn. 454; s. c. 37 Atl. Rep. 1062. In another case illustrating this doctrine, the employer was held liable where it appeared that while the plaintiff was busy hoeing the mud off the street, to do which he was obliged to move backward, the foreman, without warning the plaintiff, removed the cover of a catch-basin in the locality over which the plaintiff had to work, and the plaintiff fell into it and injured himself: *Walsh v. Chicago*, 94 Ill. App. 311. In another case it appeared that the receiver of a railroad substituted a new and different switch for one formerly used in a switch-yard. The new switch was a reasonably safe appliance, and properly constructed, but it operated in a different manner from the former one, and, under very probable conditions, was dangerous to those using it, and not acquainted with its opera-

tion, but no regulations as to its use or other instructions were given the employés in the yard. Within two or three days after the switch was put in a car was derailed in attempting to pass over it, and a yard-foreman who was riding thereon was killed, under circumstances clearly indicating that if he had known the manner in which the switch was operated, the accident would not have occurred. It was held that the receiver was liable for having failed in his duty to give proper instructions: *Cincinnati & C. R. Co. v. Gray*, 101 Fed. Rep. 623; s. c. 41 C. C. A. 535.

⁵³ *Thompson v. Edward P. Allis Co.*, 89 Wis. 523; s. c. 62 N. W. Rep. 527 (error to refuse so to charge in an action for injuries from uncovered cogwheels).

⁵⁴ *Mississippi River Logging Co. v. Schneider*, 74 Fed. Rep. 195; s. c. 20 C. C. A. 390; 34 U. S. App. 743.

or omissions the master is not responsible.⁵⁵ This is a very inconclusive reason. The duty *does not* necessarily devolve upon fellow servants. It may in some cases devolve upon fellow servants, but in other cases whatever servant it devolves upon is the vice-principal of the master.⁵⁶

§ 4077. Master Not Bound to Anticipate or Warn against Rash Conduct on the Part of the Servant Himself, or Remote or Improbable Dangers.—An employer is not bound to give warning and instructions to a young and inexperienced servant concerning dangers of the employment, where they are of such a nature as to render injury very improbable, and only come from negligence of a fellow servant which the master has no reason to expect.⁵⁷ But he is bound to notify his servant of risks which the latter has no reason to believe, from the nature of his employment, he will have to encounter, and which arise from hidden causes or such as would reasonably escape his observation, if the master knows, or by the exercise of ordinary care ought to know, of them.⁵⁸

⁵⁵ *Chesapeake &c. R. Co. v. Hennessey*, 96 Fed. Rep. 713; s. c. 38 C. C. A. 307.

⁵⁶ *Ante*, § 4056. In conformity with the principle of the text, it has been held that a master owes no duty to give a servant, who knows of the existence of a trap-door eight inches from the door opening into the room, and that it is liable to be opened from time to time, notice or warning that it is opened at any particular time: *Young v. Miller*, 167 Mass. 224; s. c. 45 N. E. Rep. 628. The trap-door was used to give access to a pit in which was a blower, and the accident was caused by the engineer leaving the trap-door open so that he could have light while cleaning the pit. Holmes, J., says: "A majority of the court are of opinion, although I share the doubts of the minority, that the defendant's duty did not extend to giving notice or warning that the doors were open to one who knew that they were liable to be so at any time."

⁵⁷ *Siddall v. Pacific Mills*, 162 Mass. 378; s. c. 38 N. E. Rep. 969 (fellow servant admitted caustic-soda solution into tank either before or after he had sent plaintiff into the tank to arrange the cloth to be bleached).

⁵⁸ *Wood v. Heiges*, 83 Md. 257; s.

c. 34 Atl. Rep. 872 (a heavy iron ball was dropped on castings to break them; a fragment of iron flew an unprecedented distance and struck the plaintiff, who thought he was far enough away, as he was familiar with the business and had never seen the iron fly as far before. In this case the master was no more bound to anticipate the danger than the plaintiff was, and he was not liable). In an action for personal injuries while operating a machine for cleaning cotton, it appeared that the plaintiff was an adult, but knew nothing about machinery, except what she had learned in a few days while in the defendant's employ. She was told to clean the back of the machine, and had a brush for the purpose. While performing this work, she reached into a recess of the machine with her hand to remove some cotton-lint, and was injured by a revolving cylinder. The top of the cylinder could be seen, and the machinery was in motion, making a great deal of noise. It was held that the plaintiff could not recover, as the defendant was not bound to anticipate or warn against such conduct: *Robinska v. Lyman Mills*, 174 Mass. 432; s. c. 54 N. E. Rep. 873.

§ 4078. Duty to Warn and Instruct Concerning Defects Due to Negligence of Coemployés.—An employer owes an inexperienced employé the duty of warning him as to danger arising from the defective condition of a machine used by him, which is not obvious, although the defect is due to the fault of a coemployé.⁵⁹

§ 4079. What Presumption Master may Indulge as to the Knowledge, Discretion, and Experience of the Servant and his Consequent Need of Instruction.—A servant who, from the length or character of previous service or experience, may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of, or inexperienced in, the particular work. This doctrine was applied in a case where a boy nineteen or twenty years old had been in the employ of the defendant in the bottling business for nearly five years, and knew that soda-water and mineral-water bottles would occasionally explode under ordinary pressure; and it was scarcely possible that he did not know that carbonated-cider bottles would also explode under high pressure.⁶⁰ In the absence of knowledge to the contrary, the master may assume that the servant has the knowledge, discretion, and experience of the average servant of his years and intelligence.⁶¹ But it is plain that the master cannot assume without evidence that the servant has any knowledge or any experience in the business in which he is employed, in the absence of a representation of the servant to that effect.⁶²

§ 4080. Effect of Unfulfilled Promise of Master to Instruct his Servant.—A servant is not bound to assume the risks of his employ-

⁵⁹ *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214; s. c. 41 N. E. Rep. 265; 28 Chic. Leg. N. 34; 2 Am. & Eng. Corp. Cas. (N. S.) 620 (fellow workman separated revolving cylinders of rubber-compounding machine to oil them and neglected to readjust them; the plaintiff, an adult foreigner, unfamiliar with machinery and not knowing of the change, fed a piece of rubber into the machine; the rubber slipped through suddenly and the plaintiff turned to the foreman with an inquiring look; the foreman laughed, and the plaintiff, interpreting the laugh as a direction to do as before, attempted to feed an-

other piece of rubber into the machine; the rubber again went through suddenly, and the plaintiff's arms were drawn between the cylinders and injured—evidence held to justify a finding that the defendant was negligent, through its foreman, in not further instructing the plaintiff, since the fact of the cylinders being too far apart was not obvious to him).

⁶⁰ *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; s. c. 80 N. W. Rep. 821.

⁶¹ So says the case of *Chielinsky v. Hoopes & Co.*, 1 Marv. (Del.) 273; s. c. 40 Atl. Rep. 1127.

⁶² As to which see *post*, § 4885, *et seq.*

ment where he enters upon a hazardous employment under the promise of the master, which is not fulfilled, that he shall thereafter be instructed in his duties.⁶³

§ 4081. Liability of Master for Injuries to a Third Person by his Uninstructed Servant.—A master is just as liable for injuries to a *third person* caused by his negligence in not informing his servant of danger known to the master and not known by the servant, as he is for injuries caused by the personal negligence of the servant.⁶⁴

§ 4082. Failure to Warn and Instruct must have been the Proximate Cause of the Injury.—It is not necessary to say that damages cannot be recovered from the master on the ground of his failure properly to warn and instruct his servant where such failure was not the proximate cause of the injury, but where something else was the cause of it.⁶⁵ Thus, the negligence of the master in putting a common laborer at work about a machine, without instructing him as to its operation, does not render him liable for an injury to the latter which does not result from his unskillfulness.⁶⁶ So, the negligence of a master in failing to sufficiently caution a youth as to the proper method of operating a planer, and in instructing him to operate it in a particularly hazardous manner, does not render the master liable for injuries to the servant while so employed, where the real cause of his injury was his contributory negligence in allowing his attention to be diverted to some *girls* who were passing, and leaning on the machine at the same time.⁶⁷

⁶³ McCormick Harvesting Mach. Co. v. Burandt, 136 Ill. 170; s. c. 26 N. E. Rep. 588; aff'g s. c. 37 Ill. App. 165.

⁶⁴ Mitchell v. Boston & C. R. Co., 68 N. H. 96; s. c. 34 Atl. Rep. 674 (railroad company which knew that the public used a foot-path crossing the tracks in its yards was liable for an injury to a person crossing the tracks resulting from its failure to impart such knowledge to its engineer).

⁶⁵ Boelter v. Ross Lumber Co., 103 Wis. 324; s. c. 79 N. W. Rep. 243 (error to charge that if a wagon was unsafe for the purpose required, and the defendant knew or should have known of it, and failed to repair it or notify the plaintiff, "then the defendant was guilty of negligence").

⁶⁶ Arizona Lumber & Co. v.

Mooney (Ariz.), 42 Pac. Rep. 952 (no off. rep.) (holding that where plaintiff, while operating a "resaw," was struck by a splinter from a board which had gone through the machine, the splinter being caught by the saw and thrown back, he could not recover on the ground that he had not been instructed as to how to operate the machine—on the theory, evidently, that the same accident would have happened to a skilled operator).

⁶⁷ Adams v. Clymer, 1 Marv. (Del.) 80; s. c. 36 Atl. Rep. 1104. But the negligence of a fellow servant in not warning the plaintiff of the existence of a trapdoor in a way over which the plaintiff was instructed by the foreman to pass, did not relieve the defendant employer from its liability, on the

§ 4083. **A Point of Pleading in an Action Grounded on Failure to Warn and Instruct.**—Where an employé, injured in cleaning between certain vats, alleges in his complaint that it was necessary for him to assume a cramped position, and to worm in underneath the vats, he cannot complain that he had no notice of the smallness and irregularity of the space.⁶⁸

§ 4084. **Points of Evidence in Actions Grounded on Failure to Warn and Instruct.**—Where, in an action for injuries, the proof establishes an allegation of failure to provide any means of warning for plaintiff when machinery he was operating was about to be put in motion, failure to establish a further allegation, that the machinery on the occasion that the injury was inflicted was started at a time when it was unusual or not customary to start it, is not ground for reversal, since such further averment may be regarded as immaterial.⁶⁹

§ 4085. **Duty to Warn and Instruct, when a Question for a Jury.**—In an action by an employé seventeen years old for personal injuries received while coupling cars, it was held a question for the jury whether the service was so dangerous and its dangers so obscure, or whether the plaintiff's information was so limited or his mind so immature, as to render it necessary that instructions should have been given before the injury.⁷⁰ The question whether an employé was properly instructed as to the manner of operating a machine, and its danger, and whether the danger was apparent, and whether he exercised due care and caution, is for the jury upon evidence admitting of different inferences.⁷¹

theory that such negligence was alone the proximate cause of the injury; since it was the employer's duty to have the trapdoor properly guarded under such circumstances: *Hayes v. Stearns*, 130 Mich. 287; s. c. 9 Det. Leg. N. 15; 89 N. W. Rep. 947.

⁶⁸*Baumler v. Naragansett Brewing Co.*, 23 R. I. 430; s. c. 50 Atl. Rep. 841; s. c. on second appeal, 23 R. I. 611; 51 Atl. Rep. 203.

⁶⁹*Chicago & C. R. Co. v. Spurney*, 197 Ill. 471; s. c. 64 N. E. Rep. 302; aff'g s. c. 97 Ill. App. 570. In the same action, the negligence declared was the failure to provide any means of warning the plaintiff when machinery he was operating was put in motion, and the evidence established, without contradiction, the truth of such allega-

tion. Testimony was admitted that the foreman or caller generally called out that work was about to begin, or that the machinery was about to be started, and on the occasion of the injury, no one so called out to the workmen. It was held that it was not a material variance, since the charge of negligence was broad enough to include a charge that the defendant did not provide *on the day of the injury* any means for giving the plaintiff any such notice, and the proof tended to establish the gist of the negligence charged: *Chicago & C. R. Co. v. Spurney*, *supra*.

⁷⁰*Atlanta & C. R. Co. v. Smith*, 94 Ga. 107; s. c. 20 S. E. Rep. 763.

⁷¹*Kochman v. Chase*, 32 App. Div. (N. Y.) 630; s. c. 52 N. Y. Supp. 740.

§ 4086. **Instructions to Juries with Respect to the Duty to Warn and Instruct.**—An instruction that it is the duty of the master to inform the servant of any sudden danger of which he has knowledge or should be informed, but of which the servant is ignorant, and that the employé may rely on the warning and signals usually given in the conduct of the business, and, if the master fails to give these, he is negligent, was not erroneous.⁷² Where an injured servant had worked about three months at the same kind of work, and was hence chargeable with the common knowledge of the perils incident to it, it is error to charge the jury that the duty of knowing and informing the servant of a hazard that he knew as well as the foreman did, was incumbent on the master, without the exercise of any correlative duty or care upon the part of the servant.⁷³ In an action by a servant for personal injuries sustained while working under the orders of the defendant's foreman at the bottom of a quarry, through earth falling upon him from the bank above, it was proper to refuse an instruction that if the plaintiff went to work after examining the bank, or after opportunity to do so, then the defendant did owe to the plaintiff the duty of warning him of danger; the defendant being required to exercise reasonable diligence in seeing that the place where the plaintiff worked was safe.⁷⁴ A charge that the risk resulting in the injury to a deceased servant was a transitory risk, of which defendant was not required to notify deceased, was properly refused, where the risk was not one incident to, and ordinarily to be expected to occur in, the prosecution of the work in which deceased was engaged. More-

⁷² Hough v. Grants Pass Power Co., 41 Or. 531; s. c. 69 Pac. Rep. 655.

⁷³ McArthur Bros. Co. v. Nordstrom, 87 Ill. App. 554 (employé engaged in clearing away piles of blasted rock was chargeable with notice that a large rock might slide down from the top of the pile if the lower part of the pile was disturbed). It was error to charge that if a servant was informed, just before he undertook to oil certain pumps, what the danger was, and shown how to do it, no further instruction, "perhaps," would be required, as the use of the word "perhaps" left the jury in doubt as to whether or not the master had done his duty: La Flam v. Missisquoi Pulp Co., 74 Vt. 125; s. c. 52 Atl. Rep. 526. An instruction that "if the jury find from the evidence that in the use of this planer

or jointer there were, because of knots or irregularities in the grain of the material, or from the swaying back and forth of a long narrow strip, or from any other cause, dangers to which a person having little or no experience in the use of such machines might be exposed unknown to himself, or which an ordinary man under like circumstances would not be expected to know, and you find that plaintiff was inexperienced in the use of such machines, and that defendant failed to inform plaintiff of such dangers, then defendant was guilty of negligence as to this plaintiff," was erroneous: National Malleable Castings Co. v. Luscomb, 19 Ohio C. C. 673.

⁷⁴ Western Stone Co. v. Muscial, 196 Ill. 382; s. c. 63 N. E. Rep. 664; aff'g s. c. 96 Ill. App. 288.

over, the action was not based upon the absence of a warning, to which the rule of transitory risks especially applies.⁷⁵

ARTICLE II. DUTY TO WARN AND INSTRUCT CHILDREN AND INCOMPETENT OR INEXPERIENCED SERVANTS.

SECTION	SECTION
4091. Duty to warn and instruct children.	4098. Circumstances under which the question whether there is a duty to warn and instruct minors and inexperienced servants is a question for a jury.
4092. Duty to warn and instruct children as to open and obvious dangers.	4099. Illustrative cases of failure to warn and instruct minors where the employer was exonerated.
4093. Such instruction must be graduated to the youth, the want of knowledge, and the inexperience of the minor.	4100. Duty to warn and instruct persons of impaired faculties.
4094. Ordering minor servant into a situation of increased danger without giving him suitable warning and instruction.	4101. Duty to instruct inexperienced servants as to the safe way of doing their work.
4095. No duty to warn or instruct where the child understands and appreciates the danger.	4102. Duty to warn and instruct unskilled servants assigned to new duties.
4096. Instances of liability for failing to warn or instruct minor employés.	4103. Master bound to instruct servant known to be inexperienced although servant does not request it.
4097. Circumstances under which a minor employé has been held to need no warning or instruction.	

§ 4091. **Duty to Warn and Instruct Children.**—In respect of children, who are deficient in intelligence and experience, and who are liable to act quickly and rashly by reason of their childish impulses, this duty to warn and instruct is of a much more imperative nature than in the case of adults.¹ A master is therefore liable to an infant

⁷⁵ Knight v. Overman Wheel Co., 174 Mass. 455; s. c. 54 N. E. Rep. 890 (mill-hand injured by fall of piece of shafting which he and others were engaged in taking down—action for negligence of foreman in adopting improper plan and in failing to discover that a “cat’s-paw hitch” was improperly tied).

¹ Williams v. South & Co. R. Co., 91 Ala. 635; s. c. 9 South. Rep. 77; St. Louis & Co. R. Co. v. Davis, 55 Ark.

462; s. c. 18 S. W. Rep. 628; May v. Smith, 92 Ga. 95; s. c. 18 S. E. Rep. 360; Haynes v. Erk, 6 Ind. App. 332; s. c. 33 N. E. Rep. 637; Patnode v. Warren Cotton Mills, 157 Mass. 283; s. c. 32 N. E. Rep. 161; Reisert v. Williams, 51 Mo. App. 13; Smith v. Irwin, 51 N. J. L. 507; s. c. 18 Atl. Rep. 852; Hickey v. Taaffe, 105 N. Y. 26; s. c. 12 N. E. Rep. 286; Tagg v. McGeorge, 155 Pa. St. 368; s. c. 32 W. N. C. (Pa.)

servant who has been injured in his service in consequence of being exposed to a danger which, on account of his youth and want of experience, he did not fully understand and appreciate, and with respect to which he was not suitably warned and instructed.²

317; 24 Pitts. L. J. (N. S.) 4; 26 Atl. Rep. 671; International &c. R. Co. v. Moore (Tex. Civ. App.), 22 S. W. Rep. 272 (no off. rep.); Neilon v. Marinette &c. Paper Co., 75 Wis. 579; s. c. 44 N. W. Rep. 772.

²Strattner v. Wilmington City Electric Co., 3 Pen. (Del.) 245; s. c. 50 Atl. Rep. 57; Lindsey v. Tioga Lumber Co., 108 La. 468; s. c. 32 South. Rep. 464; Levy v. Clark, 90 Md. 146; s. c. 44 Atl. Rep. 990; Armstrong v. Forg, 162 Mass. 544; s. c. 39 N. E. Rep. 190; Jarvis v. Coes Wrench Co., 177 Mass. 170; s. c. 58 N. E. Rep. 587; Allen v. Jakel, 115 Mich. 484; s. c. 73 N. W. Rep. 555; 4 Det. Leg. N. 937; Ertz v. Pierson, 130 Mich. 160; s. c. 8 Det. Leg. N. 1177; 89 N. W. Rep. 680; Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162; s. c. 76 N. W. Rep. 566; Omaha Bottling Co. v. Theiler, 59 Neb. 257; s. c. 80 N. W. Rep. 821; Addicks v. Christoph, 62 N. J. L. 786; s. c. 6 Am. Neg. Rep. 117; 43 Atl. Rep. 196; Latorre v. Central Stamping Co., 9 App. Div. (N. Y.) 145; s. c. 41 N. Y. Supp. 99; Neilson v. Hillside Coal &c. Co., 168 Pa. St. 256; s. c. 31 Atl. Rep. 1091 (boy thirteen years old originally employed as a slate-picker in a mine, and subsequently directed to unfasten cars from an endless chain, a work shown by the evidence to be dangerous); Welsh v. Butz, 202 Pa. St. 59; s. c. 51 Atl. Rep. 591; Royer v. Tinkler, 16 Pa. Super. Ct. 457 (uninstructed girl put at work at ironing-machine for a week got her hand caught between rolls and badly cut by knife—negligence of employer a question for the jury); Waxahachie Oil Co. v. McLain, 27 Tex. Civ. App. 334; s. c. 66 S. W. Rep. 226; La Flam v. Missisquoi Pulp Co., 74 Vt. 125; s. c. 52 Atl. Rep. 526; Boyer v. Northern Pac. Coal Co., 27 Wash. 707; s. c. 68 Pac. Rep. 348; Wolski v. Knapp-Stout &c. Co., 90 Wis. 178; s. c. 63 N. W. Rep. 87; Wallace v. Standard Oil Co., 66

Fed. Rep. 260; McCarthy v. Thomas Davidson Man. Co., Rap. Jud. Que. 18 C. S. 272 (in French). In one case the plaintiff, thirteen years old, while at work in a saw-mill keeping a conveyor-trough clear of refuse lumber, was pushed or fell against a near-by shaft, which was unguarded, and was severely injured. There was evidence that he had been warned on several occasions that the shaft was dangerous, but it did not appear that he had been warned of any danger from it while attending to his work, which consisted of pushing the slabs in the conveyor with a long pole, standing meanwhile on a narrow platform on which, in the course of his duties, he might approach within four feet of the shaft, but with his back turned toward it. The evidence was held sufficient to support a verdict against the defendant: King v. Ford River Lumber Co., 93 Mich. 172; s. c. 53 N. W. Rep. 10. The danger that cider bottles would explode while being filled with cider charged with carbonic-acid gas under a pressure of eighty pounds to the square inch, is not one obviously beyond the comprehension of a boy of average intelligence, nineteen or twenty years old, who had worked at the business for years, and who had recently been charged with control and supervision of the bottling department of the defendant's establishment, and who knew that *soda-water* and *mineral-water bottles* would occasionally explode while being filled: Omaha Bottling Co. v. Theiler, 59 Neb. 257; s. c. 80 N. W. Rep. 821. Negligence may be imputed to an employer for putting a new employé fifteen or sixteen years old at work on a dangerous machine without warning her of the danger attending its operation: O'Connor v. Barker, 25 App. Div. (N. Y.) 121; s. c. 49 N. Y. Supp. 211. An intelligent boy fifteen years old who knows that when a pasting-machine upon which he has

§ 4092. **Duty to Warn and Instruct Children as to Open and Obvious Dangers.**—Contrary to the rule in respect of adults,³ this duty exists, in the case of children, even in regard to *open* and *apparent* dangers, which they would not be likely to appreciate by reason of the immaturity of their faculties or their lack of experience;⁴ though it is also to be noted that there is on this subject a class of decisions which put this duty, in respect of children, substantially on the same plane as that in respect of adults, and which hold that the master is not bound to point out patent dangers, obvious to the comprehension of a child of the years and experience of the one in question, or discoverable by the exercise of reasonable and ordinary care on his part, and which instruction or warning would not make more plain.⁵

§ 4093. **Such Instruction must be Graduated to the Youth, the Want of Knowledge, and the Inexperience of the Minor.**—The master is here, as in every other case, bound to act reasonably and justly; and this rule requires him to give suitable warning and instructions to a minor employé in regard to any danger, whether open or concealed, where the danger is not sufficiently obvious to the intelligence or experience of the employé, in the exercise of ordinary care on his part,—this care being measured by the maturity of his faculties and the amount of his experience.⁶ These instructions, it has been justly said, should be graduated to the youth, the ignorance and the inexperience of the minor employé, so as to enable him fully to under-

worked for more than a month is in motion, it catches and draws in the paper, and that a cylinder in the same is hot, has sufficient knowledge of the danger without any instruction from the employer, although he is able to put his hand between the cylinder and a belt of felting when the machine is at rest: *Lowcock v. Franklin Paper Co.*, 169 Mass. 313; s. c. 47 N. E. Rep. 1000 (he was injured by having his hand caught in the machine and burned by the cylinder).
³ *Ante*, § 4061.

⁴ *Fisk v. Central Pac. R. Co.*, 72 Cal. 38; s. c. 13 Pac. Rep. 144; *Steller v. Hart*, 65 Mich. 614; s. c. 9 West. Rep. 309; 32 N. W. Rep. 875; *Goins v. Chicago & C. R. Co.*, 37 Mo. App. 221; *Dowling v. Allen*, 74 Mo. 13; s. c. 41 Am. Rep. 298; *Haynes v. Erk*, 6 Ind. App. 332; s. c. 33 N. E. Rep. 637.

⁵ *Fones v. Philipps*, 39 Ark. 17;

s. c. 43 Am. Rep. 264; *Costello v. Judson*, 21 Hun (N. Y.) 396.

⁶ *Dowling v. Allen*, 102 Mo. 213; s. c. 14 S. W. Rep. 751; *Welsh v. Butz*, 202 Pa. St. 59; s. c. 51 Atl. Rep. 591 (master bound to give infant servant suitable instructions as to the manner in which the service of operating a dangerous machine may be safely performed, the risks incident to it, and how they may be avoided, as well as an admonition against the dangers of carelessness); *Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 162; s. c. 76 N. W. Rep. 566 (must warn him of the hazards of the work, and caution him against dangers which, from his youth, inexperience, ignorance, or want of mental capacity, he may fail to appreciate); *Breckenridge v. Reagan*, 22 Ohio C. C. 71; s. c. 12 Ohio C. D. 50 (such instructions should be of a more specific character than would be required for a grown person of mature judgment).

stand and appreciate the dangers surrounding him, and to place him as nearly as possible in the same relation thereto as if he were an adult.⁷

§ 4094. Ordering Minor Servant into a Situation of Increased Danger Without Giving him Suitable Warning and Instruction.—This rule applies not only so far as to require the employer to give general warnings and instructions to minor employes as to the dangers attending the duties they are expected to perform, but there is also a special duty resting upon the employer of giving instructions as to any new dangers whenever he orders the minor employe into a *new situation* which, without such warning and instruction, may be dangerous to him.⁸ If, therefore, a superior servant or boss, whom the minor servant is required to obey, orders him to go and work at a dangerous point, without proper warning or caution, and in consequence the boy is injured, the employer is liable although he had placed him at work in an unexposed place.⁹ Where a jury found an employe was only thirteen years of age, and was working under an agreement with his mother that he should not operate any machinery, and he was placed at work at a certain machine, and had no previous knowledge of its character, and no warning or instruction was given to him, and he was injured thereby without fault on his part,—a verdict in his favor was justified.¹⁰

⁷ Taylor v. Wootan, 1 Ind. App. 188; s. c. 27 N. E. Rep. 502. This is the substance, if not the judicial expression, to be met with in many of the cases: Glover v. Dwight Man. Co., 148 Mass. 22; s. c. 18 N. E. Rep. 597; Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283; s. c. 3 L. R. A. 385; 21 Ohio L. J. 217; 6 Rail. & Corp. L. J. 31; 20 N. E. Rep. 466; Ogley v. Miles, 28 N. Y. St. Rep. 893; s. c. 8 N. Y. Supp. 270; s. c. rev'd, 139 N. Y. 458; 34 N. E. Rep. 1059 (the Court of Appeals holding that the boy needed no instruction because he knew and understood the danger, and that the refusal to grant a nonsuit was therefore error); Chicago Anderson Pressed Brick Co. v. Reinneiger, 140 Ill. 334; s. c. 29 N. E. Rep. 1106; aff'g s. c. 41 Ill. App. 324; Honlahan v. New American File Co., 17 R. I. 141; Sullivan v. India Man. Co., 113 Mass. 396; Parkhurst v. Johnson, 50 Mich. 70; and especially the language of Gray, J., in Coombs v. New Bedford Cordage

Co., 102 Mass. 572, 596, which contains a clear and excellent statement of the nature of this obligation.

⁸ Bohn Man. Co. v. Erickson, 55 Fed. Rep. 943; Keller v. Gaskill, 9 Ind. App. 670; s. c. 36 N. E. Rep. 303.

⁹ Evans v. American Iron & Co., 42 Fed. Rep. 519; s. c. 24 Ohio L. J. 140; Waxahachie Oil Co. v. McLain, 27 Tex. Civ. App. 334; s. c. 66 S. W. Rep. 226; Neilson v. Hillside Coal & Co., 168 Pa. St. 256; s. c. 31 Atl. Rep. 1091 (boy thirteen years old originally employed as a slate-picker in a mine, and subsequently directed to unfasten cars from an endless chain, a work shown by the evidence to be dangerous). See also, *ante*, §§ 3814, 3818, 4065.

¹⁰ National Enameling & Co. v. Brady, 93 Md. 646; s. c. 49 Atl. Rep. 845. Condition of fact under which the court properly instructed the jury that it is the duty of a master who puts an inexperienced

§ 4095. **No Duty to Warn or Instruct where the Child Understands and Appreciates the Danger.**—Negligence cannot be predicated of a master's employment of a boy about a dangerous machine, or of his failure to warn him against the danger thereof, where the boy *appreciated* the danger connected with the use of the machine.¹¹

§ 4096. **Instances of Liability for Failing to Warn or Instruct Minor Employés.**—In one illustrative case it appeared that the deceased, a minor, was killed while helping to roll logs down a hillside, the employés catching and straightening them when they began to roll crooked. Deceased had been at work five days, when he was run down and killed by a rolling log. The evidence tended to show that there was danger of being jerked over a rolling log if the attempt were made to straighten it when rolling too fast, but that this danger was not obvious to the inexperienced, and that the deceased had not been properly warned. It was held to be error to direct a verdict for the defendant.¹² An employer is not relieved from liability for an injury to an ignorant boy fourteen years old engaged in cleaning spoons, to whom no instructions had been given, caused by dipping heated spoons into turpentine, by the fact that no previous accident had happened, since such an accident might reasonably have been expected to occur by one having the technical knowledge the employer must have possessed. The plaintiff should not only have been instructed to wait until the spoons were cool enough, but he should have been given some practical standard whereby to determine when they were cool enough, or some rule or regulation on the subject.¹³ An owner of a paper-mill who employs an inexperienced girl fourteen years old to take paper from a mangle consisting of a large roller heated by steam, and three smaller rollers, between which and the larger roller the paper passes, without giving her any other caution than not to get her hands in the rollers, but she having observed for two weeks how her predecessor did the work, may be imputable with negligence, where the girl's hand is caught and seriously injured while she is attempting, as she has seen other employés do, to insert a sheet of paper which has come out between such rollers, without stopping

minor at work more dangerous than that which he was engaged to perform, to warn him of the danger: *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334; s. c. 66 S. W. Rep. 226.

¹¹*Hettchen v. Chipman*, 87 Md. 729; s. c. 41 Atl. Rep. 65 (boy fourteen years old, injured while using circular saw, testified himself that

he knew precisely what the risks were).

¹²*Wolski v. Knapp-Stout & Co.*, 90 Wis. 178; s. c. 63 N. W. Rep. 87.

¹³*Latorre v. Central Stamping Co.*, 9 App. Div. (N. Y.) 145; s. c. 41 N. Y. Supp. 99 (turpentine took fire, the evidence justifying conclusion that fire was caused by the heat of the spoons).

the machine.¹⁴ It has been held that one who employs a boy between fourteen and fifteen years of age at a steam-power punching-machine is guilty of negligence in failing to notify him that if he keeps his foot on the treadle the press will keep coming down and going up, and in failing to tell him how to take his work from the press after it is punched, and in failing to fix the machine so that the work will not stick to the punch, after being notified thereof; and is liable for an injury caused by the boy using his finger to remove the work.¹⁵ The owner of a blacksmith-shop was negligent in failing to instruct a boy fifteen years old how to operate the bellows properly, and in failing to warn him of the danger of gases being drawn back into the bellows from the fire and exploding, unless the bellows were properly operated, or if the fire were overheated with fresh or green coal, where the owner had no reason to think the employé knew or ought to have known the danger.¹⁶

§ 4097. **Circumstances under which a Minor Employé has been held to Need No Warning or Instruction.**—We meet with confusing and contradictory ideas growing out of the opposing tendencies of the minds of judges. For example, one court correctly holds that there is no presumption of law that a minor more than fourteen years of age, who applies for a position involving dangerous service, is aware of the danger and needs no instruction, but that the question is one for a jury.¹⁷ Another court, perhaps with equal propriety, reasons that an employer has a right to presume that a youth applying to him for employment is possessed of the average capacity of youths of his age, and of a competent knowledge of the employment he seeks if it is such as is usually followed by such youths, and owes him no duty to caution him against dangers incident to the employment which would be obvious to a youth of such capacity and knowledge.¹⁸

¹⁴ *Allen v. Jakel*, 115 Mich. 484; s. c. 73 N. W. Rep. 555; 4 Det. Leg. N. 937.

¹⁵ *Armstrong v. Forg*, 162 Mass. 544; s. c. 39 N. E. Rep. 190.

¹⁶ *Reisert v. Williams*, 51 Mo. App. 13.

¹⁷ *Atlanta &c. R. Co. v. Smith*, 94 Ga. 107; s. c. 20 S. E. Rep. 763. Another court has held that the fact that a boy of immature years, who had been employed in a factory to do such work as should be within his capacity, had been so employed about two years, and had a general knowledge of the machin-

ery in the factory, and of the movement of a shaft, and its effect on a belt, raises no presumption, as matter of law, that he had such knowledge of the danger of holding a belt free from a moving shaft while the belt was being mended, that he was not entitled to be cautioned and instructed in regard thereto: *Hayes v. Colchester Mills*, 69 Vt. 1; s. c. 37 Atl. Rep. 269.

¹⁸ *Adams v. Clymer*, 1 Marv. (Del.) 80; s. c. 36 Atl. Rep. 1104. In the view of another court, the failure of a master to caution a boy sixteen years old operating a

§ 4098. **Circumstances under which the Question whether there is a Duty to Warn and Instruct Minors and Inexperienced Servants is a Question for a Jury.**—Conditions of fact will often arise in which the question whether it is the duty of the employer to warn and instruct his infant servant will depend upon conclusions as to the immaturity of the servant, his want of acquaintance with the special source of the danger, or his inability to appreciate the same. These will obviously present questions of fact to be solved by the jury, under a proper system of jury trial.¹⁹ Let us examine some cases illustrating this principle:—A boy of fourteen had been employed in a coal mine for about six months, opening and closing doors leading from one room to another, when he was set at work holding down the brakes on cars drawn by mules. On one occasion he was obliged to take a position between the rear car and the next one, when the mule, known to be a wild one, became unmanageable, and pulled the first car from the track, so that the plaintiff was caught between the bumpers of the two rear cars. It was held that the question whether the plain-

machine, against the danger from the slippery condition of the floor, did not render him liable for injuries to the boy's hand from coming in contact with the machinery as he attempted to save himself from falling, when his stool, which he had placed in a tilted position, slipped on the floor, where the condition of the floor and the danger from slipping were perfectly apparent: *Koehler v. Syracuse Specialty Man. Co.*, 12 App. Div. (N. Y.) 50; s. c. 42 N. Y. Supp. 182, 1106. In another case it appeared that the plaintiff, seventeen years and two months old, and of ordinary intelligence, had been employed in the defendant's mill off and on for two years, first in the card-room, then as a spinner, and lastly, for four weeks, in the dye-room, where he was, while at work, accidentally injured by slipping on the wet floor and falling into a vat of hot dye over which he was leaning to couple a hook to some wool that was being dyed. Before this he had noticed how the work in the dye-room had been carried on by other employés. The floor was normally in a wet condition. It was held that the plaintiff was not entitled to recover on the ground that he was not sufficiently instructed in the hazards of the employment:

Bessey v. Newichawanick Co., 94 Me. 61; s. c. 46 Atl. Rep. 806. In the following cases the master was exonerated from the imputation of negligence in failing to warn or instruct his minor employé, on the ground that the employé was of sufficient age and comprehension to understand and appreciate the danger: *Wagner v. Plano Man. Co.*, 110 Wis. 48; s. c. 85 N. W. Rep. 643 (boy of fourteen injured in helping to put trucks under a harvesting-machine called a binder); *Worthington v. Goforth*, 124 Ala. 656; s. c. 26 South. Rep. 531 (boy of sixteen injured while attempting to mount moving ore-car to set the brakes); *Hesse v. National Casket Co.*, 66 N. J. L. 652; s. c. 52 Atl. Rep. 384 (minor assumes risk of obvious dangers). In an action for personal injuries caused by a chip flying from a hammer, an *instruction* that, if boys of plaintiff's age would not appreciate the danger of using such a hammer, the defendant owed the duty of giving warning, but if the danger was such as would naturally be apprehended by boys of the plaintiff's age, he assumed the risk, was proper: *Dompier v. Lewis*, 131 Mich. 144; s. c. 91 N. W. Rep. 152.

¹⁹*Atlanta &c. R. Co. v. Smith*, 94 Ga. 107; s. c. 20 S. E. Rep. 763.

tiff's intelligence and appreciation of the danger of going between the cars under the circumstances was such that it was negligence for the master not to have warned him of the danger, was for the jury.²⁰ In another case the evidence tended to show that the plaintiff was ignorant of machinery such as the pumps he was required to oil; that he had worked in the defendant's mill only two nights; that there were dangers connected with the oiling of the pumps that an inexperienced workman might fail to perceive; that the defendants knew of the plaintiff's inexperience, and that the defendants knew or should have known the danger to which the plaintiff would be exposed in oiling the pumps, but called upon him suddenly to do the work, without warning him or giving him any instructions; that the wheels were revolving so rapidly that the plaintiff could not see the cogs by which he was injured. The defendants' evidence tended to show that there was a way to oil the pumps that was reasonably safe, which way was known to the defendants, but which, as plaintiff claimed, was unknown to him. It was held that the question whether the master was negligent in failing to instruct the servant was properly left to the jury.²¹ Where a boy less than sixteen years old, while operating a feed-cutter for the first time, had his hand cut off, in attempting to shove away from the machine straw which had got clogged in the bin, the question whether he should have been instructed how to do the work with safety was for the jury, though he knew there were knives in the machine, and that if he got his hand in far enough he would be injured.²²

²⁰ *Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707; s. c. 68 Pac. Rep. 348.

²¹ *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125; s. c. 52 Atl. Rep. 526.

²² *Ertz v. Pierson*, 130 Mich. 160; s. c. 8 Det. Leg. N. 1177; 89 N. W. Rep. 680. In another case the plaintiff, a boy of fifteen, was at work in the defendant's factory, sawing blocks at a circular saw, without a gauge or saw-rest, by placing his hands on either side of the saw and pushing the block against it, when a block bounded back and forced his hand under the saw. The defendant's servant in charge of the department had told the plaintiff how to do the work, but had not instructed him that the block might bound back from the saw if it was not pushed squarely against it, although he knew it would do so. He cautioned the plaintiff against danger, but not against any particu-

lar danger. It was held in an action against the master for the injury, that it was proper to submit the case to the jury, the plaintiff not having been warned of the peculiar danger: *Jarvis v. Coes Wrench Co.*, 177 Mass. 170; s. c. 58 N. E. Rep. 587. In another case the plaintiff's hand was injured while he was operating a rip-saw in defendant's box factory. He was nineteen years old, and, though he had worked in the factory fifteen months, had had little experience with the saw. There was evidence that the plaintiff received *no instructions* in regard to the operation of the saw, and there was expert testimony that the usual and safe way to operate such saw was to use a stick in pushing the boards being ripped, instead of pushing them with the hands, as the plaintiff was doing when he was hurt. It was held that the evidence was

§ 4099. **Illustrative Cases of Failure to Warn and Instruct Minors where the Employer was Exonerated.**—In the following illustrative cases, some of which are believed not to have been well decided, the employer was exonerated; some of them proceeding on the principle that the employer is under no duty of giving instructions to a youthful employé concerning dangers with which he is familiar by reason of his experience and observation;²³ and others upon the principle that there is no such duty in respect of dangers which are patent and obvious to a youth of the age and intelligence and experience of the one receiving the injury:—Where a girl fourteen years old was employed to feed collars to an ironing-machine without being instructed as to the danger, which was visible and obvious, and after being so employed for six weeks, caught her fingers in a button-hole so that her hand was drawn between the rollers;²⁴ where a boy sixteen years old who had operated a buzz-saw long enough to know the dangerous nature of the machine and the dangers attending its use, was put to work without special instructions and was injured;²⁵ where a boy eighteen years old was put to work at a buzz-planer without being instructed to keep his fingers away from the knives, the danger resulting from a failure to do so being obvious;²⁶ where a boy nineteen years of age, who had seen a planing-machine in operation, was directed to hang the hood in place in front of the knives without instructions as to the danger,—especially in view of the fact that he asked for no such instruction, and gave no sign that he was not entirely familiar with the method by which the order could be properly and safely obeyed;²⁷ where a boy seventeen years old had worked for some time on a machine, the operation of which was simple, and was injured by putting his fingers between a roller and a cylinder in order to smooth the cloth, having received no instructions as to the danger of allowing his hands to be caught in that way;²⁸ where a boy had been fully instructed as to the nature of a machine, and while engaged in cleaning it when it was not in motion, it suddenly started from some unexplained cause, catching his hand in the steel teeth

sufficient to take the case to the jury: *Mansfield v. Eagle Box &c. Co.*, 136 Cal. 622; s. c. 69 Pac. Rep. 425.

²³ *White v. Witteman Lithographic Co.*, 131 N. Y. 631; s. c. 43 N. Y. St. Rep. 312; 30 N. E. Rep. 236.

²⁴ *Hickey v. Taafe*, 105 N. Y. 26.

²⁵ *Ogley v. Miles*, 139 N. Y. 458; s. c. 54 N. Y. St. Rep. 711; 34 N. E. Rep. 1059.

²⁶ *Mackin v. Alaska Refrigerator*

Co., 100 Mich. 276; s. c. 58 N. W. Rep. 999. Similarly, see *Bohn Man. Co. v. Erickson*, 55 Fed. Rep. 943, where the boy was fifteen years old.

²⁷ *Crown v. Orr*, 140 N. Y. 450; s. c. 55 N. Y. St. Rep. 834; 35 N. E. Rep. 648; rev'g s. c. 54 N. Y. St. Rep. 308; 24 N. Y. Supp. 620.

²⁸ *Crowley v. Pacific Mills*, 148 Mass. 228; s. c. 19 N. E. Rep. 344.

that projected from iron rollers, the machine being of safe and proper construction and such as was used in other like factories, and not being out of repair;²⁹ where a boy had been required to go with a push-car after railroad-ties, down a grade,—this not being an intricate or hazardous undertaking such as required the immediate supervision and direction of a foreman, or special instructions as to the danger;³⁰ where a boy seventeen years old was put to work piling lumber of uniform length and thickness in parallel tiers upon an open flat-car, without special instructions, and was injured by some of the lumber falling upon him; since this is not a dangerous business or one which requires special skill or antecedent training;³¹ where a father hired out his son for the work of piling lumber, with which business the son had had some experience, and the employer gave him no instructions as to any danger attending it; since such work is not inherently dangerous, and the employer might well assume that the boy's father had given him suitable instructions as to it;³² where a boy was put to work in the vicinity of machinery which was not boxed or covered, but which was in plain sight, without his attention having been called to that fact.³³

§ 4100. Duty to Warn and Instruct Persons of Impaired Faculties.

—A foreman of a gang of men engaged in clearing trees from a railroad right of way, and in constructing a road-bed thereon, was not required to warn one of the employés, who was a *deaf mute*, but whose sight was unimpaired, of the danger incident to the felling of trees.³⁴

²⁹ *Ash v. Verlenden*, 154 Pa. St. 246; s. c. 32 W. N. C. (Pa.) 198; 26 Atl. Rep. 374.

³⁰ *York v. Kansas City & C. R. Co.*, 117 Mo. 405; s. c. 22 S. W. Rep. 1081 (car was unprovided with brakes and was meant to be pushed by hand; but servant who was injured, notwithstanding warning of fellow servant, got on car and rode; injured in jumping to avoid collision).

³¹ *Sims v. East & C. R. Co.*, 84 Ga. 152; s. c. 10 S. E. Rep. 543.

³² *East & C. R. Co. v. Sims*, 80 Ga. 807; s. c. 6 S. E. Rep. 595.

³³ *Murphy v. American Rubber Co.*, 159 Mass. 546; s. c. 34 N. E. Rep. 268. Similarly, see *Buckley v. Gutta Percha & C. Co.*, 113 N. Y. 540; s. c. 23 N. Y. St. Rep. 618; 21 N. E. Rep. 717. Even in case of a boy twelve years old: *Ciriack v.*

Merchants Woolen Co., 151 Mass. 152; s. c. 23 N. E. Rep. 829; 6 L. R. A. 733. See *ante*, § 4017, *et seq.* An electric company is, as matter of law, not negligent in employing an eighteen-year-old boy in testing armatures at his own request, where he has been in the employ as messenger for several years and received about four weeks' instruction and had about three weeks' experience, previously to which experience he had been engaged for four weeks in winding armatures, though he had no education as an electrician: *Tague v. Westinghouse Electric & C. Co.*, 30 Pitts. L. J. (N. S.) (Pa.) 67 (machine dangerous on account of high voltage, but in common use).

³⁴ *Melton v. E. E. Jackson Lumber Co.*, 133 Ala. 580; s. c. 31 South. Rep. 848.

§ 4101. Duty to Instruct Inexperienced Servants as to the Safe Way of Doing their Work.—Where the work which a servant is set to do may be done in different ways, one of which is dangerous while the other is safe, an employer is under the duty of instructing his servant as to the safe method of doing the work.³⁵ Upon this subject it has been reasoned that although a servant is as fully conscious of the danger incident to the discharge of a duty in a *particular way*, as if he had been expressly warned of the danger, it does not necessarily follow that his employer is relieved of the duty to instruct him further. There may be two modes in which the duty can be discharged, one safe and the other dangerous, and if the servant be young and inexperienced, and be not instructed, it cannot be declared as matter of law that the risk of making a wrong choice is one of the incidental risks which he assumes upon entering into the employment.³⁶

§ 4102. Duty to Warn and Instruct Unskilled Servants Assigned to New Duties.—A foreman who knows an employé is unskilled in the work which he is directed to perform is bound to instruct him with reference to the danger incident thereto, unless the same is obvious to an unskilled person; and if the servant is injured in consequence of a failure to give such instruction the master must indemnify him.³⁷

³⁵ *Brislin v. Kingston Coal Co.*, 20 Pa. Super. Ct. 234; *Lindsey v. Tioga Lumber Co.*, 108 La. 468; s. c. 32 South. Rep. 464; *Lapelle v. International Paper Co.*, 71 N. H. 346; s. c. 51 Atl. Rep. 1068; *Bowers v. Star Logging & Co.*, 41 Or. 301; s. c. 68 Pac. Rep. 516 (evidence sufficient to sustain a finding that the defendant was negligent in failing to instruct an inexperienced servant how to perform his work of brakeman of a logging-train); *Welsh v. Butz*, 202 Pa. St. 59; s. c. 51 Atl. Rep. 591 (young and inexperienced person, employed to operate a dangerous machine, should be instructed as to the manner in which the service may be safely performed, and the risk incident to it and how it may be avoided, and admonished against the dangers of carelessness).

³⁶ *Sheetram v. Trexler Stave & Co.*, 13 Pa. Super. Ct. 219 (question for jury where there is evidence tending to show a safer mode, commonly followed, of placing billets on saw carriage). In a case illustrating this doctrine, it appeared

that the defendant, knowing that the plaintiff was inexperienced, ordered him to attend a pulp-machine, without instructing him that when the roller of the machine became clogged the pulp should be removed only by turning water on it; and the plaintiff was injured while attempting to remove the pulp with a stick, as he had seen others do. The superintendent had previously seen a servant using a stick, and stated that he showed the plaintiff how to clean the roller, but did not tell him of the danger of using other means. It was held that the failure of the superintendent to warn the plaintiff of the danger of such other means was imputable to the defendant as negligence: *Lapelle v. International Paper Co.*, 71 N. H. 346; s. c. 51 Atl. Rep. 1068.

³⁷ *Lemser v. St. Joseph Furniture Man. Co.*, 70 Mo. App. 209 (failure to warn inexperienced laborer twenty-two years old of danger of small pieces of wood being jarred into contact with rapidly-revolving saw, and being picked up by the

§ 4103. **Master Bound to Instruct Servant Known to be Inexperienced although Servant Does Not Request it.**—In all these cases it will be no excuse on the part of the master, for a failure to perform this duty of warning and instructing his servant, that the servant did not solicit information, unless the servant has in some way led the master to understand that he is familiar with the dangers to be encountered.³⁸

ARTICLE III. NATURE AND SUFFICIENCY OF THE WARNING OR INSTRUCTION.

SECTION

4106. Distinctness and sufficiency of warning.

SECTION

4107. Nature of the instruction—How explicit.

§ 4106. **Distinctness and Sufficiency of Warning.**—The warning must be given in such a tone of voice and with such distinctness as to be heard and understood. If the servant is a youth, the warning must be couched in such plain language as to make it sure that the servant understands and appreciates the danger.¹ It has been well held that an employer who undertakes to give his employé warning of the approach of an engine and cars into a shed where the latter is at work is bound to give such warning as may be heard by a person of ordinary hearing, considering the distance between the person giving the warning and the employé; and a warning not given so as to be heard under such circumstances is of no avail to the defendant.²

saw and thrown toward the sawyer, was properly found to be negligence, such laborer having lost his eye by reason thereof).

³⁸ Missouri &c. R. Co. v. Watts, 64 Tex. 568; Galveston &c. R. Co. v. Hughes, 22 Tex. Civ. App. 134; s. c. 54 S. W. Rep. 264 (knew guard-rails and frogs were unblocked, but did not know danger of their use).

¹ Addicks v. Christoph, 62 N. J. L. 786; s. c. 6 Am. Neg. Rep. 117; 43 Atl. Rep. 196 (the plaintiff, a foreigner, injured while attempting to push clay into the cylinder of a steam-press for molding terra-cotta, the clay having become clogged, and in regard to which he had been instructed by signs, he being unable to understand English,—the question as to the adequacy of the instructions and warning being for the jury).

² Mississippi Cotton Oil Co v. El-

lis, 72 Miss. 191; s. c. 17 South. Rep. 214. There is a barbarous decision to the effect that repeated and distinct warnings to an employé eight years old, of ordinary intelligence and capacity, of the danger from a machine upon which he was at work, consisting in part of rapidly-revolving cogwheels, and that his finger or hand would be cut off if caught in them, the danger from which would be obvious even to such a child, were not, as a matter of law, insufficient because the employé was not told exactly where in the danger consisted, or shown how his hand would be injured by the cogwheels: Bibb Man. Co. v. Taylor, 95 Ga. 615; s. c. 23 S. E. Rep. 188. In reading this decision one is tempted to inquire what kind of a civilization it is in which the judges can condone the act of an employer in setting a child

§ 4107. **Nature of the Instruction—How Explicit.**—In the case of an adult the instructions and cautions ought to be such as will enable him to do his work, by the exercise of reasonable care and prudence, with as much safety as the nature of the employment will admit.³ In the case of an infant, as already seen,⁴ the instructions ought to be such “as to enable a person of his youth and inexperience in the business, intelligently to appreciate the nature of the danger attending its performance.”⁵ If the danger is extraordinary and of a nature not likely to be known to his employés, the employer, it has been said, is bound to notify them specially and unequivocally so that the dangers shall be clearly understood by them.⁶ For an employer merely to go through the form of warning his employés as to the dangers of their employment, will not exonerate him from liability in case they are injured by reason of their not being adequately warned.⁷ In short, this duty has been well summed up by saying, that the obligation of the master is not discharged by informing the servant generally that the service engaged in is dangerous,—especially where the servant is a person who, neither by experience nor education, has or would be likely to have, any knowledge of the perils of the business, either latent or patent. But in such a case the servant should be informed, not only that the service is dangerous, and of the perils of a particular place, but of the places where extraordinary risks are or may be encountered, if known to the master, or if he

eight years old at work among dangerous cogwheels. — — — It has been held that notice to a brakeman that digging is being done between the ties at a certain place, with warning that he look out for it and avoid injury, is sufficient, without mentioning the danger from the *unblocked frogs*, especially where the work has been for two weeks within his daily view and observation while passing on his train: *Hauss v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 733 (the notice, though it did not call attention to all possible or probable dangers at that point, sufficiently called the attention of the trainmen to the work being done there, which was the construction of new switches, and during which it would be impossible to block the frogs). In a unique case it was held that the plaintiff could not recover for injuries caused by a *kick from his master's mule*, on the ground of the master's failure to warn him of its

vicious disposition, where he admitted that he was told on the morning of the accident that if he was not careful the mule would kill him, and that when driving along the mule would stop and go to kicking: *Bessemer Land &c. Co. v. Dubose*, 125 Ala. 442; s. c. 28 South. Rep. 380.

³ *Reynolds v. Boston &c. R. Co.*, 64 Vt. 66; s. c. 24 Atl. Rep. 134.

⁴ *Ante*, § 4093.

⁵ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596, per Mr. Justice Gray; quoted with approval in *Honlahan v. New American File Co.*, 17 R. I. 141, 143. See also, *Sullivan v. India Man. Co.*, 113 Mass. 376; *Parkhurst v. Johnson*, 50 Mich. 70; *Hickey v. Taaffe*, 105 N. Y. 26; s. c. 12 N. E. Rep. 286; 7 Cent. Rep. 75.

⁶ *Myhan v. Louisiana Electric Light Co.*, 41 La. An. 964; s. c. 6 South. Rep. 779; 7 L. R. A. 172.

⁷ *Hickey v. Taaffe*, 105 N. Y. 26; s. c. 12 N. E. Rep. 286; 7 Cent. Rep. 75.

ought to know them. The servant should be warned of these, their character, and extent, so far as possible.⁸ On the other hand, speaking generally, the duty of the master is discharged, either in the case of a minor or an adult, when he gives the servant such instructions as are reasonably necessary to enable him to comprehend the perils of his employment.⁹

ARTICLE IV. DUTY TO WARN AND INSTRUCT IN RAILWAY SERVICE.

SECTION	SECTION
4109. Illustrations of this duty in railway service.	4111. Other illustrations where there was no duty to warn or instruct.
4110. Other such illustrations— Duty to warn or instruct affirmed.	4112. Failing to warn track-repairers, bridgemen, stationmen, switchmen, etc., of the approach of trains.

§ 4109. **Illustrations of this Duty in Railway Service.**—It has been held to be the duty of a railway company, upon temporarily employing a brakeman to do the coupling in the absence of the regular coupler, to inform him of a *rule* requiring the use of a *stick in coupling*, where he is a stranger to the service and not familiar with its rules and regulations;¹ to caution an inexperienced brakeman against the increased dangers arising from coupling “foreign” cars, on account of the unusual construction of their coupling-apparatus;² to warn a brakeman of the dangers likely to arise from the use of a car of an unusual and more than ordinarily dangerous construction;³ to give

⁸ *Smith v. Peninsula Car Works*, 60 Mich. 501, 505; s. c. 27 N. W. Rep. 662; 7 Am. St. Rep. 542.

⁹ *Ciriack v. Merchants Woolen Co.*, 146 Mass. 182; s. c. 5 N. Eng. Rep. 728; 15 N. E. Rep. 579. A brakeman twenty-six years of age and of average intelligence is sufficiently warned of the increased danger, which is open to ordinary observation, in coupling cars with double deadwoods or double buffers which sometimes pass over the road, by a caution that railroading is dangerous and that coupling cars is especially so, requiring very great care, where he is further notified that cars with different coupling-apparatus are hauled over the line: *Louisville & C. R. Co. v. Boland*, 96 Ala. 625; s. c. 18 L. R. A. 260; 53

Am. & Eng. R. Cas. 169; 11 South. Rep. 667. It is not the duty of a manufacturer of Paris green or other poisons to inform employés of the particular ingredients or the formulæ used in the manufacture thereof, if he notifies them of their poisonous character and the precautions to be used against the dangers of working at the vats in which they are dissolved by boiling: *Fox v. Peninsular & C. Works*, 84 Mich. 676; s. c. 48 N. W. Rep. 203.

¹ *East Tennessee & C. R. Co. v. Turvaville*, 97 Ala. 122; s. c. 12 South. Rep. 63.

² *Missouri Pac. R. Co. v. White*, 76 Tex. 102; s. c. 13 S. W. Rep. 65.

³ *Fordyce v. Yarbrough*, 1 Tex. Civ. App. 260; s. c. 21 S. W. Rep. 421.

special warning to its brakemen where it uses a car of a kind generally abandoned by it and by other companies on account of its known dangerous character as to its coupling-apparatus;⁴ to warn a switchman who has been in the employ of the company but a short time, upon sending him to a place in the night-time, over a cattle-guard, that the cattle-guard is there and of the danger which he assumes;⁵ to warn a brakeman of the existence of an *overhead bridge*, so low as to strike his head when standing on the top of a box-car without stooping.⁶ It has been held to be negligence for which the master was liable, for a street-car company to employ in its service a team, of bad and vicious habits, without warning its driver of their character;⁷ for a railway company to require a gang of men to arrange themselves in line along a train of moving cars, and pick up from the ground and throw on a car rails weighing from 600 to 700 pounds each, running from one to another fast enough to be in position as the train passes, without notifying a new and inexperienced man of the great hazard of the work;⁸ to fail to notify a locomotive-engineer by the customary warning signals or otherwise, that a switch, long abandoned, has been reopened for use by the company;⁹ to fail to give warning of the approach of trains to employes working on a railroad-track, whether the workmen are in the employment of the company or in that of its contractor.¹⁰

§ 4110. **Other such Illustrations—Duty to Warn or Instruct Affirmed.**—It has been held to be the duty of a railroad company which employs hand-brakes, some of which have stiff and others limber staffs, differing only in the size of the staffs, the limber ones being inherently dangerous in the hands of inexperienced brakemen,—to warn such brakemen of the increased danger of using the more dangerous kind;¹¹ to warn an inexperienced brakeman of the peculiar

⁴ *Crane v. Missouri & C. R. Co.*, 87 Mo. 588. Circumstances under which the failure of a conductor to communicate to an experienced brakeman information received from another brakeman of the defective condition of a drawhead, was held not to charge the company with liability: *Louisville & C. R. Co. v. Law*, 14 Ky. L. Rep. 850; s. c. 21 S. W. Rep. 648 (no off. rep.).

⁵ *Fredenburg v. Northern & C. R. Co.*, 114 N. Y. 582; s. c. 21 N. E. Rep. 1049.

⁶ *Baltimore & C. R. Co. v. Rowan*, 104 Ind. 88; *Louisville & C. R. Co. v. Hall*, 87 Ala. 708; s. c. 4 L. R. A. 710; 6 South. Rep. 277. See also,

Fort Worth & C. R. Co. v. Kime, 21 Tex. Civ. App. 271; s. c. 51 S. W. Rep. 558; s. c. aff'd, 94 Tex. 649 (*mem.*); 54 S. W. Rep. 240 (in full); *Wainright v. Lake Shore & C. R. Co.*, 11 Ohio C. D. 530.

⁷ *Leigh v. Omaha St. R. Co.*, 36 Neb. 131; s. c. 54 N. W. Rep. 134.

⁸ *Palmer v. Michigan & C. R. Co.*, 93 Mich. 363; s. c. 17 L. R. A. 636; 53 N. W. Rep. 397.

⁹ *Town v. Michigan & C. R. Co.*, 84 Mich. 214; s. c. 47 N. W. Rep. 665.

¹⁰ *Erickson v. St. Paul & C. R. Co.*, 41 Minn. 500; s. c. 43 N. W. Rep. 332; 5 L. R. A. 786.

¹¹ *Louisville & C. R. Co. v. Binion*, 107 Ala. 645; s. c. 18 South. Rep. 75.

character of the cars of another company which he is required to couple, and which, owing to double bumpers and the peculiar coupling-apparatus, require more care to make a coupling safely than is the case with ordinary cars;¹² to instruct an inexperienced switchman as to the proper mode of making a coupling of two "foreign" cars supplied with appliances unlike its own, and in the use of which the danger is greater than in using its own, before calling upon him to make such coupling, where the danger is not apparent to the switchman.¹³ So, the following acts have been held to constitute actionable negligence on the part of railroad companies:—For a railroad company which employs a minor and appoints him to the performance of a dangerous service, knowing that he is of immature judgment and inexperienced in such service,—to fail to instruct him as to the dangers of the employment;¹⁴ to put a switchman at work in a yard with which he is not acquainted, and to fail to warn him of particular dangers of the yard, and this although he does not request any warning or instruction;¹⁵ to put an inexperienced brakeman at work in a yard where there is an automatic switch, intended to be ordinarily set by hand, and depended upon to act automatically only in emergencies, the yardmaster informing the brakemen and switchmen that it would act automatically at all times, whereas a train attempted to run across the switch when it was not set and became derailed,—with the conclusion that the failure of the company through its yardmaster to communicate the proper use of the switch to its employes was a breach of duty for which it was liable;¹⁶ to direct a boilermaker and repairer of ironwork on locomotives to stand upon a running-board for the purpose of making repairs to a locomotive, knowing that it was in an unsafe condition and failing to inform him of that fact, such act being regarded as a breach of the master's duty to furnish the injured servant with a reasonably safe place in which to work;¹⁷ and so in the other cases noted in the margin.¹⁸

¹² Louisville &c. R. Co. v. Veach, 20 Ky. L. Rep. 403; s. c. 46 S. W. Rep. 493; 11 Am. & Eng. R. Cas. (N. S.) 24 (no off. rep.).

¹³ Illinois &c. R. Co. v. Price, 72 Miss. 862; s. c. 18 South. Rep. 415.

¹⁴ Missouri &c. R. Co. v. Evans, 16 Tex. Civ. App. 68; s. c. 41 S. W. Rep. 80 (boy seventeen years old, employed as a brakeman, killed while attempting to get on the brake-beam of a moving car).

¹⁵ Galveston &c. R. Co. v. Hughes, 22 Tex. Civ. App. 134; s. c. 54 S. W. Rep. 264 (failure to warn switchman of danger from guard-rails and

frogs which he knew were unblocked—recovery).

¹⁶ Thomas v. Cincinnati &c. R. Co., 97 Fed. Rep. 245.

¹⁷ Ellis v. Northern Pac. R. Co., 103 Fed. Rep. 416.

¹⁸ The question of negligence of the employes of the defendant railroad company in starting a train, which caused the injury to the plaintiff, who was at work on the tracks sealing a car, without giving him notice thereof, is a question for the jury, where there is evidence showing that the conductor of the train had asked the depot-agent to

§ 4111. **Other Illustrations where there was No Duty to Warn or Instruct.**—A railroad company is under no duty to give warning of

have the car sealed, and had seen the plaintiff start in the direction of the car with his sealing-iron; but the evidence is conflicting as to whether the conductor and other trainmen knew or should have known that the plaintiff was still at work on the car at the time of the accident: *DeWalt v. Houston &c. R. Co.*, 22 Tex. Civ. App. 403; s. c. 55 S. W. Rep. 534. In an action for the death of a newly-employed brakeman, caused by coming in contact with an overhead bridge, the yardmaster testified that he informed the deceased of the location of bridges on the road, and told him they would not clear a man standing on a high car, and to look out for them; and also to look out for the bridge that caused the accident; that it would not clear a man standing on a low car; and that it was just at the west end of the yard-limits. The conductor, however, testified that he notified the deceased that the bridge in question "would not clear a man on a high box-car," but, according to his testimony, it would clear a man on a low or ordinary car, and he evidently so believed when he warned deceased. A brakeman testified that he told deceased that there was a low bridge about two blocks from where they were, and that it would hit a man on a high car, and to look out for it. Deceased said: "You say about two miles?" and the brakeman replied: "No; two blocks." This was early in the morning, while yet dark, and they passed safely under on this trip; and deceased returned on the pilot of the engine; but on the next trip he struck the bridge and was killed, and the evidence tended to show that he was standing on a car of ordinary height at the time. It did not appear that it was the duty of the yardmaster, any more than of the conductor or brakeman, to warn deceased. The superintendent of transportation, who employed him, did not testify, which was held to warrant the inference that he gave no warning. No warning was given of the near approach to the bridge by means of suspended cords,

as was the general custom of railroads having low bridges. Under these circumstances, and the inquiry made of the brakeman having a tendency to rebut the testimony of the yardmaster, whose testimony was also in conflict with that of the conductor as to the height of this and other bridges on the road,—the jury were not required to accept as an uncontroverted fact the statement of the yardmaster that he warned deceased of the danger of passing under the bridge in question on an ordinary car as well as on a high car; or at least they were not required to find that deceased had been adequately warned of the danger which resulted in his death: *Fort Worth &c. R. Co. v. Kime*, 21 Tex. Civ. App. 271; s. c. 51 S. W. Rep. 558; s. c. *aff'd*, 94 Tex. 649 (*mem.*); 54 S. W. Rep. 240 (in full). It is negligence for a railroad company to put in its train a box-car considerably higher than ordinary cars of that class, and on which, in order safely to pass through a certain tunnel, a person on the top of such car would be required to take a recumbent position (not lying down, but lower than a sitting position), without giving specific warning, to a brakeman who has been in the employ of the company only a few days, and who has been over the line only three times, and never on a train with such car, and who may go on such car in the performance of his duties,—that he must not go on that car, or, if he does, that it will be necessary, in passing through such tunnel, for him to lie down or get into a position lower than that which he would be in by sitting on the car: *Wainwright v. Lake Shore &c. R. Co.*, 11 Ohio C. D. 530. In another case, the plaintiff, a street-car driver, in crossing an excavation dug for some distance underneath the track, was obliged to unhitch his team, and leave the car, under the control of the conductor, to come down the grade of its own weight, past the excavation; and, in driving the team alongside the excavation, plaintiff stumbled and fell across the track, and the con-

the enhanced risk due to the presence in its train of cars having *double deadwoods*, received from other companies, to an *experienced brakeman* who has been in service, either as brakeman or conductor, for seventeen years, where numerous like cars daily pass over the road, and such cars are in use by other well-managed roads;¹⁹ nor to maintain a "tell-tale" over one of two parallel tracks passing under a low bridge, so as to make it liable to a brakeman coming in contact with the bridge while riding on the top of a freight-train learning the road,

ductor, who had just been hired, and had received no instructions as to the use of the brake, turned it the wrong way, whereby the car ran over the plaintiff and injured him. It was held that the defendant company was guilty of negligence in not instructing the conductor in the use of the brake. The court refused to allow the defendant to raise the point for the first time on appeal, that it was not the conductor's duty to take charge of the car while passing over the excavation: *Sullivan v. Metropolitan St. R. Co.*, 53 App. Div. (N. Y.) 89; s. c. 65 N. Y. Supp. 842. It has been held that the fact that the construction of a switch device complained of is similar to that of like devices maintained upon other first-class railroads, does not establish freedom from negligence unless the railroad company further shows that it had given an employé injured thereby notice of the attendant danger, or that he had such an opportunity of observing it as would have put a reasonably prudent person on guard. Besides, the test is not what other first-class roads have done,—perhaps in exceptional instances,—but what the general usage is in this regard: *Indiana & C. R. Co. v. Bundy*, 152 Ind. 590; s. c. 1 Repr. (Ind.) 735; 5 Am. Neg. Rep. 569; 14 Am. & Eng. Cas. (N. S.) 660; 53 N. E. Rep. 175 (brakeman on a freight-train injured while coupling cars at night in defendant's yard, by stumbling over uncovered signal wires forming part of an interlocking switch, plaintiff never having done any switching at this point before, or seen the uncovered wires, or been informed of them, and believing they were all boxed. He had been on the station platform sev-

eral times, and had seen that the wires were boxed near the station, but he did not notice and was not informed that the boxing ceased 300 feet from the station. The testimony tended to prove that while the general custom in constructing interlocking-switch devices is to leave the wires uncovered from the derail to the distant signals, as was done in this case, yet it also tended to prove that in switch-yards, and places where a large amount of car-handling is required, the generally approved and usual method of first-class roads is to box the wires at such places.—Judgment for plaintiff affirmed). A brakeman on the second section of a fast freight-train on a railroad operated by a receiver was killed in a wreck at night, caused by a landslide. There had been heavy rains during the day along that portion of the road, and a storm in the evening of unusual, if not unprecedented violence, causing a number of landslides and washouts, which were known to the train-dispatcher; and he notified the conductor and engineer of the first section of the train, on leaving the last station, to look out for slides at various places specified, but which did not include the place where the wreck subsequently occurred. Those in charge of the second section, which left twenty minutes later, received no notice or warning at all. It was held that the failure to give such notice of the general dangerous condition of the track was culpable negligence which was a proximate cause of the accident, and rendered the receiver liable for the death: *Mercantile Trust Co. v. Pittsburgh & C. R. Co.*, 115 Fed. Rep. 475.

¹⁹ *Northern Pac. R. Co. v. Blake*, 63 Fed. Rep. 45; s. c. 11 C. C. A. 93.

who had been warned to look out for low bridges, and who knew of the existence of the particular bridge and its dangerous character, having passed under it twice before in doing some switching work, and who climbed upon the top of the car at a point between the bridge and the point where a "tell-tale" would have been; and who, in the exercise of ordinary care, would have known there was no "tell-tale";²⁰ nor to build a fence from a line fence to a cattle-guard plainly visible and located at a place where, by common experience, it may well be expected, it being a place where the ordinary right of way joins the station-grounds, so that the fence may notify brakemen of the presence of the cattle-guard;²¹ nor to warn a brakeman of danger in coupling cars having double deadwoods, where such danger is obvious, and the brakeman, on seeking employment from such company, represented himself as having had twenty-seven days' experience in such work;²² nor to instruct a boy of nineteen years employed as a brakeman, as to the dangers of mounting moving cars, where he knows from observation the manner of mounting and the dangers attending it;²³ nor, in setting at work on a hay-cutter an employé over twenty

²⁰ *Allen v. Boston &c. R. Co.*, 69 N. H. 271; s. c. 39 Atl. Rep. 978.

²¹ *Fuller v. Lake Shore &c. R. Co.*, 108 Mich. 690; s. c. 2 Det. Leg. N. 986; 3 Am. & Eng. R. Cas. (N. S.) 589; 66 N. W. Rep. 593.

²² *Fenlon v. Duluth &c. R. Co.*, 108 Mich. 284; s. c. 2 Det. Leg. N. 860; 66 N. W. Rep. 51.

²³ *Yeager v. Burlington &c. R. Co.*, 93 Iowa 1; s. c. 61 N. W. Rep. 215. One employed by a railroad company as a superintendent or foreman cannot be charged with negligence, while in the discharge of his duties of superintendence, in failing to warn an engineer, who was under his direction and control, of the location of posts along the line of the railroad, when the circumstances of the situation would justify the reasonable conclusion that the engineer was aware of the presence of the posts, or when the possibility of injury resulting to the engineer while upon his engine from the proximity of the posts to the tracks is so remote that it would not occur to a man of ordinary care and prudence to warn him of the location of the posts. The posts were on one side of the track, and twenty-three inches from the engine-cab, and were being put up in the process of changing the road

to an electric one. The engineer had come in over the road in the daytime, on which trip the posts were on the other side of the engine from the one he was sitting on, and on the return trip he was hauling a construction-train loaded with poles for use along the line, and the poles that had been erected were plainly visible. The engineer heard a knocking of the machinery under his seat, and stuck his body through the window to investigate, instead of stopping the train—all in broad daylight: *North Birmingham St. R. Co. v. Wright*, 130 Ala. 419; s. c. 30 South. Rep. 360. That one employed as a laborer for all purposes connected with the construction of a tram-car track from a mill, who, being at work within thirty yards of the end of the track, while moving along beside a construction-car, trying to brake it with a crow-bar, was injured by the bar striking a post four feet high and two feet from the rail, cannot hold the employer for damages on the ground that the erection of the post on the preceding day as part of a temporary cattle-gap, without notifying him thereof, was negligence,—was held in *Robinson Land &c. Co. v. Gage* (Miss.), 27 South. Rep. 998 (no off. rep.). In an action

years old, of ordinary intelligence, to warn him of the danger and instruct him how to avoid it, where the cutter is the best possible device, and the danger of permitting one's fingers to be caught in a tuft of hay about to pass between the knives is perfectly apparent, the knives being open to view;²⁴ nor, where an employé is sent into a room in which a fly-wheel has exploded, to clear away rubbish, to notify him in formal words, that no one has as yet examined the room to see that nothing is likely to fall upon him; nor may such employé assume that he is not the first who has been in the room; nor is it a natural inference on the part of one so sent that the room has been inspected and is safe.²⁵

against a railroad company to recover for the death of plaintiff's husband, caused by his being swept off defendant's tracks into a river by a landslide, the evidence disclosed that he was one of the defendant's section-men; that, with another, he had been sent out to look for dangerous places in the track, liable to have been caused by the heavy rains which had fallen; that the landslide which swept him into the river occurred while he, under the direction of the conductor of a delayed train, and pursuant to a rule of the company requiring him to act under such conductor's direction, was removing a previous slide from the track. The plaintiff claimed that there was a hidden danger in the bank. It was held that it was no part of the conductor's business to warn the deceased of the hidden danger, merely because a rule of the company provided that section-men should, in case of accident or delay to a train, obey the orders of a conductor, especially where it was no part of the conductor's duty to know about the condition of the bluff, but the care thereof was in part entrusted to the decedent: *Slavens v. Northern Pac. R. Co.*, 97 Fed. Rep. 255; s. c. 38 C. C. A. 151. That a foreman of a gang of section-hands is under no duty to warn each of them of the danger from each passing train, where they are experienced, there is no unusual danger, and no rule exists imposing upon him such duty,—see *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220; s. c. 20 S. W. Rep. 436.

²⁴ *Stuart v. West End St. R. Co.*,

163 Mass. 391; s. c. 40 N. E. Rep. 180 (jury should have been directed to find for the defendant).

²⁵ *Kanz v. Page*, 168 Mass. 217; s. c. 46 N. E. Rep. 620 (portion of fly-wheel had become imbedded in ceiling, and fell and injured the plaintiff). It was not negligence for which the employer was liable for the superintendent of a factory to fail to notify an employé that soda-ash had been used for cleaning purposes, where the employé, in ignorance of that fact, slipped from a beam that had been so cleaned, and which, in consequence of the use of soda-ash in cleaning it, had been rendered more slippery, when he was about to step to a ladder to descend into a vat, the place being light, and the use of soda-ash in the mill being common, to the knowledge of the injured servant, and he might have stepped to the ladder at once and avoided the beam,—and this, although he testified that he did not know that soda-ash had been used to clean the vat: *Thompson v. Norman Paper Co.*, 169 Mass. 416; s. c. 48 N. E. Rep. 757. It is within the scope of the employment of one employed in a car-shop to do general work,—such as lifting, carrying timber, painting, etc.,—to assist in lifting a car upon its trucks with a steam-winch, so as to render the employer liable for injuries sustained from the operation of the machinery, on the ground of failure to warn him of the danger where not obvious, especially where the like service has been rendered on other prior occasions by him and his fellows when called upon to do so; but in this

§ 4112. **Failing to Warn Track-Repairers, Bridgemen, Stationmen, Switchmen, etc., of the Approach of Trains.**²⁶—A railway conductor

case the danger that his hand, if held on a rope, would be drawn into a sheave, was so obvious as to require no warning, as matter of law: *Findlay v. Russel Wheel & Co.*, 108 Mich. 286; s. c. 2 Det. Leg. N. 843; 66 N. W. Rep. 50. The failure of an employer to warn an employé of the danger of stepping upon a grating consisting of bars four and one-fourth inches apart, beneath which there was machinery, will not render him liable for an injury caused to such employé by his stepping upon the grating and his leg going through into the machinery, where the employé knew that the openings were large enough to let his foot through, and that there was machinery beneath the grating, although he did not know how far beneath: *Cmielewski v. Mollenhauer Sugar Ref. Co.*, 11 App. Div. (N. Y.) 111; s. c. 42 N. Y. Supp. 936. An employé twenty-four years old who had been employed for two years in a laundry and worked for several weeks at an ironing-machine similar to the one at which she was injured, and who told her employer at the time of her employment what knowledge and experience she had, cannot recover for an injury received while operating the ironing-machine, on the ground that she had not been instructed as to the danger, where the person in charge of such machine questioned her as to her familiarity with it before starting it, and watched her operate it until satisfied that she was a skilled laundress, and that her statement as to her knowledge and experience was correct: *Keenan v. Waters*, 181 Pa. St. 247; s. c. 40 W. N. C. (Pa.) 241; 37 Atl. Rep. 342. In another case it appeared that the foreman in the defendant's brewery directed the plaintiff to clean out an open space of about thirteen inches underneath certain vats, around which he had never worked, without giving him any warning of any danger. The plaintiff was very heavy, so that when he crawled under a vat with a hose to clean the place, and his clothing became saturated with water, he stuck between the vat

and the floor, and extricated himself, after vainly calling for help, only with great difficulty, and after sustaining injuries. It was held that the defendant was not negligent in failing to warn the plaintiff that his clothing, on becoming saturated with water, would be more apt to adhere to the vat and floor: *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430; s. c. 50 Atl. Rep. 841; s. c. on second appeal, 23 R. I. 611; 51 Atl. Rep. 203. In another case the plaintiff, while employed by the defendant company, was ordered by a vice-principal of the defendant to paint a hot boiler with coal-tar. While painting the boiler, some of the tar popped into his eye, eventually causing its loss. The plaintiff was ignorant of such work, and was not told of such danger by the vice-principal. Coal-tar was a proper material to paint boilers with, and commonly used for such purpose, and no such accident was shown to have occurred before, and the vice-principal was not aware of any such danger that might arise from its use, though there was evidence that tar might be expected to sputter under such circumstances. It was held that the master was not guilty of negligence in not instructing the servant of the danger, as it was not such a danger as would require special precautions to avoid, being no greater than every cook incurs in using hot grease or water, or every laborer incurs in using the simple tools of his business: *San Antonio Gas Co. v. Robertson*, 93 Tex. 503; s. c. 56 S. W. Rep. 323; rev'g s. c. (Tex. Civ. App.), 55 S. W. Rep. 347 (no off. rep.). See *Manley v. Minneapolis Paint Co.*, 76 Minn. 169 (failure to instruct adult employé as to safest way of handling barrels on an inclined skid—no recovery). It has been held that the owner of a saw-mill is not chargeable with negligence for failing to direct one employed as sawyer, by special rules, to observe care towards an off-bearer engaged in certain work with him, and injured by his negli-

²⁶ See also, *post*, § 4475, *et seq.*

in charge of an independent train being a vice-principal as toward brakemen on the train, under the common law of North Carolina, he is guilty of negligence rendering the railway company liable for an injury resulting to a brakeman, in ordering a movement of a train without warning such brakeman, if he has reasonable grounds to apprehend that without such warning the latter, acting within the scope of his ordinary duties, may be subjected to danger from such movement.²⁷ It cannot be said, as a matter of law, that a railroad company did not owe a railroad station-agent who was engaged, with the knowledge and direction of the company, in unloading a car on a side-track, requiring his presence on the main track, the duty of giving warning of the approach of a freight-train on the main track, where it may have been that strict attention to the work he was engaged in was inconsistent with constant watchfulness for approaching trains.²⁸ The blowing of a whistle by the engineer of a railroad-train fifty yards or more before reaching a place where the track is obscured by dense smoke from coke-ovens near by for 250 or 300 yards, is not as a matter of law a sufficient exercise of care to other employes who may be coming on the track from the opposite direction; but such a case presents a question for a jury.²⁹ An engineer on a locomotive is not guilty of negligence in failing to stop the train, or warn of danger a section-hand, where he stands in a safe position, several feet from the track, until after the engine passes.³⁰

gence, where the work was not complex, and there was no evidence that it was customary in saw-mills to direct employes by special rules: *Olsen v. North. Pac. Lumber Co.*, 100 Fed. Rep. 384; s. c. 40 C. C. A. 427 (not negligent in not having rules requiring sawyer to give notice to off-bearer when certain machinery was about to be put in motion).

²⁷ *Purcell v. Southern R. Co.*, 119 N. C. 728; s. c. 26 S. E. Rep. 161 (brakeman was standing on rear end of car preparing to uncouple it from the following car, not knowing that the conductor had already uncoupled it).

²⁸ *Snyder v. Cleveland & C. R. Co.*, 60 Ohio St. 487; s. c. 42 Ohio L. J. 112; 54 N. E. Rep. 475.

²⁹ *Woodward Iron Co. v. Herndon*, 114 Ala. 191; s. c. 21 South. Rep. 430; 7 Am. & Eng. R. Cas. (N. S.) 124.

³⁰ *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220; s. c. 20 S. W. Rep. 436.

That a railroad company operating a side-track where cars are stored, and where employes are frequently required to cross between the cars, must give warning of a purpose to move such cars,—see *Pennsylvania Co. v. Mahoney*, 22 Ohio C. C. 469; s. c. 12 Ohio C. D. 366. The foreman of a switching-gang in a railroad-yard whose duty it is to direct on which track a train shall be put while it is being made up, is not negligent as to an employe engaged in making up a train at one end of the yard, in failing to give special warning or notice as to cars at the other end of the yard entering on the same track, where the custom of making up trains in that manner (from both ends of the track) is well known: *Caron v. Boston & C. R. Co.*, 164 Mass. 523; s. c. 42 N. E. Rep. 112. The failure of a railroad company to observe a custom to have a brakeman stationed on the rear of a train which is being backed, for the protection of em-

ARTICLE V. DUTY TO WARN AND INSTRUCT IN OTHER LINES THAN RAILWAY SERVICE.

SECTION

- 4114. Duty to warn and instruct servants engaged in a coal mine.
- 4115. Duty to warn and instruct as to dangers arising in the process of tearing down buildings and other structures.
- 4116. Duty to warn and instruct men engaged in loading and unloading vessels
- 4117. Duty to warn concerning the dangerous propensities of animals.
- 4118. Duty to warn and instruct servants engaged about electrical appliances.
- 4119. Duty to warn and instruct concerning dangerous explosives.

SECTION

- 4120. Duty to warn of dangers arising from fires.
- 4121. Duty to warn and instruct concerning dangers in excavating.
- 4122. Duty to warn and instruct concerning the dangers attending circular saws and the operations of sawmills.
- 4123. Duty to warn and instruct concerning poisons and other noxious substances.
- 4124. Duty to warn and instruct concerning the dangers of revolving set-screws.
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- 4126. Illustrations in various other lines of service.

§ 4114. **Duty to Warn and Instruct Servants Engaged in a Coal Mine.**—The law which renders it incumbent upon a master to exercise reasonable care to the end that the place in which his servant is

ployés on the track and to warn them of danger, does not render it liable for the death of an employé killed on the track, where smoke on the track from another train was so dense at the time that such an employé could not have been seen by a brakeman if one had been on the train: *Moore v. Great Northern R. Co.*, 67 Minn. 394; s. c. 69 N. W. Rep. 1103. The failure of a railroad company to give an employé at work on its tracks notice of the approach of a train, and the running of the train at a prohibited rate of speed, do not render the company liable for the death of such employé, where he at first got out of the way, and afterwards accidentally got in front of the engine when it was only a few feet distant: *East St. Louis & C. R. Co. v. Eggmann*, 58 Ill. App. 69. The foreman in charge of the repairs of

an engine in a roundhouse is not negligent in failing to notify the engineer or fireman that some one has been sent under the engine to make the repairs, where such notice is not customary and they know that some one will be sent; nor is he negligent in failing to notify the repairer that the engine will have to be "blown down" before the repair is made, and that this is as likely to be done in the roundhouse as anywhere,—the repairer being aware of both of these things; so that the repairer cannot recover under the Employers' Liability Act for injuries from being scalded with steam and hot water while making the repair: *Perry v. Old Colony R. Co.*, 164 Mass. 296; s. c. 41 N. E. Rep. 289. A railroad company is not negligent in failing to place signals to warn members of a bridge-gang running hand-cars to

required to work is reasonably safe, applies to a coal mine; so that where a day crew of an under-cutting machine were allowed to go to work without any warning as to the dangerous condition of the face of the mine where they were to work, which condition rendered a fall of coal likely, and the evidence tended to show that the employer knew that the place was not reasonably safe, it was held that he was liable for an injury visited upon a miner in consequence of a fall of coal.¹

§ 4115. Duty to Warn and Instruct as to Dangers Arising in the Process of Tearing Down Buildings and Other Structures.—It has been held that an employer does not undertake and is not required to make a building in process of destruction safe at all times for workmen, who are expressly employed to make it insecure by tearing it down; but it is nevertheless his duty to notify them of any latent defect or danger existing at the place where they are employed to work, which increases the ordinary risk of their employment.²

look out for section-men working on the track: *Brunell v. Southern Pac. Co.*, 34 Or. 256; s. c. 56 Pac. Rep. 129; 5 Am. Neg. Rep. 711 (plain case of contributory negligence on the part of the injured section-man, who expected the hand-car to come along when it did come, but failed to watch out for it). That the foreman of a gang of section-hands is under no duty to warn each of them of the danger from each passing train, where they are experienced, there is no unusual danger, and no rule exists imposing upon him such duty,—see *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220; s. c. 20 S. W. Rep. 436.

¹ *Consolidated Coal Co. v. Gruber*, 188 Ill. 584; s. c. 59 N. E. Rep. 254; aff'g s. c. 91 Ill. App. 15.

² *McFarland v. Edmunds Man. Co.*, 97 Ill. App. 629 (rafters had previously been cut to allow the insertion of posts, and were held in place only by being nailed to roof boards, of which the plaintiff might not have known when he stepped on such a rafter—error to direct verdict for defendant). In another case the defendant placed the work of demolishing a blast-furnace stack with dynamite in charge of M., an experienced employé, and directed the plaintiff's intestate, an inexperience

servant, but who knew that dynamite was being used, to assist. Plaintiff's intestate was not warned as to the dangerous character of the work, and was injured by a premature explosion of dynamite, caused by the negligence of M. in tamping the same with an iron rod instead of a wooden one, which he might have had. It was held that, the defendant having entrusted the work to a competent servant, he was not liable for injuries to plaintiff's intestate, resulting from such servant's negligence, by reason of his failure to warn the plaintiff's intestate of the risks of the employment; and the fact that the master's superintendent saw that an iron rod was being used, and negligently permitted the servant to continue to use it, did not render the master liable; as the superintendent's negligence related to a detail of the work, as to which he and plaintiff's intestate were coservants. The theory of the court was, that even had deceased known that the work was dangerous, or been so informed, he would not have objected to the use of the iron rod, because he had no knowledge that its use was improper: *O'Brien v. Buffalo Furnace Co.*, 68 App. Div. (N. Y.) 451; s. c. 73 N. Y. Supp. 830.

§ 4116. Duty to Warn and Instruct Men Engaged in Loading and Unloading Vessels.—Men employed to load and unload vessels are generally employed to work upon premises which are unfamiliar to them. It is therefore the obvious duty of the owner of a vessel to acquaint them with anything peculiar in its construction and with any concealed dangers. Thus, where several rungs of a stationary ladder on a ship projected beyond the side of the ladder, so that the loading-appliances were liable to catch on them, and endanger the gangway-man handling the whip, and he had no knowledge of the danger, it was the owner's duty to give him notice, so that he could refrain from exposing himself to the peril if he so wished.³

§ 4117. Duty to Warn Concerning the Dangerous Propensities of Animals.⁴—An employer who knows that an animal is dangerous is negligent in failing to inform an employé of such fact, on directing him to remove it to another place.⁵

§ 4118. Duty to Warn and Instruct Servants Engaged about Electrical Appliances.⁶—There is nothing peculiar in the law with respect to this subject. The obligation rests upon the employer, in the exercise of reasonable care for the safety of his servant, to warn and instruct him as to any peculiar dangers unknown to the servant and known to the employer, or which the employer ought to know in the exercise of reasonable care. The nature of the employment is such that the servant at best is exposed to extraordinary risk; and it is

³The *Anchoria*, 113 Fed. Rep. 982. In another case the plaintiff was employed as a common laborer by a ship-builder, who ordered the plaintiff to assist in the launching of a scow, by helping with the snubbing-rope, but did not warn him that such work was dangerous. There was testimony that there was a space of only twelve or fifteen feet, in which four men worked with this rope, between a pile of lumber and the "Sampson post" around which a turn of the rope was taken; that there was danger of the rope kinking as it was first rapidly pulled in and then let out, and catching any one who did not know and guard against the danger; that the danger was one not observable to one not experienced; that the plaintiff knew nothing of the danger; and that his foot was caught in a kink of the rope and

crushed against the post around which the rope passed. It was held that the court did not err in refusing to instruct that no fault or failure of duty on the part of the defendant was shown, and that the verdict must be for him: *Skinner v. McLaughlin*, 94 Md. 524; s. c. 51 Atl. Rep. 98.

⁴See also, *ante*, § 4041

⁵*International &c. R. Co. v. Smith* (Tex. Civ. App.), 30 S. W. Rep. 501 (no off. rep.) (plaintiff, employed as a truckman, was temporarily placed under the orders of the foreman of defendant's stockyards to assist in putting into a pen a steer which the foreman knew was vicious, but concerning which the plaintiff had no knowledge and was not warned by the foreman).

⁶See *ante*, §§ 3980, 4036, *et seq.*

hence the duty of the master not to increase those risks, but to protect the servant against unnecessary risks through latent dangers of which the servant ought to be warned. The extent of this duty is well illustrated by the cases referred to in the marginal note.⁷ On the other hand, in order to charge the master for responsibility for an injury alleged to have resulted from his failure to warn his servant, it must be shown, not only that a warning was necessary, but that such fact was known or should have been known to the master; and the master may presume that the servant is acquainted with a danger which is generally known in the community with respect to electric wires.⁸ It need not be said that here, as in other relations, the failure of a foreman, being the representative of the master, to warn a servant of a danger which is as well known to the servant as to the foreman, does not render the master liable.⁹

⁷The plaintiff, while stringing some telegraph-wires on a pole carrying only such wires, in the ordinary use of which there is not enough electricity to injure a man, received a heavy charge of electricity. It appeared that on certain poles of the company, near where the plaintiff was working, were heavily charged electric-light wires in close proximity to the telegraph-wires on the same poles. The company never warned the plaintiff of the danger occasioned to him thereby, and he had worked for the company but a little over a month. The evidence was held sufficient to support a finding that such electric-light wires were the proximate cause of the injury; and that, as to the plaintiff, the danger was a latent one, in failing to warn him of which the company was negligent: *Western U. Tel. Co. v. McMullen*, 58 N. J. L. 155; s. c. 32 L. R. A. 351; 2 Am. & Eng. Corp. Cas. (N. S.) 588; 33 Atl. Rep. 384. The plaintiff, an unskilled workman, was employed by the defendant electric company to dig post-holes and assist in the general street-work. Without any instruction or warning as to the danger of handling the wires, the plaintiff, at the direction of a superior fellow servant, climbed a pole, and began scraping an electric wire, when he received an electric shock, which caused him to fall to the ground, a distance of eighteen feet, thereby sustaining serious injuries.

It was held that the defendant was negligent in failing to instruct the plaintiff of the hidden danger, such duty being personal to the employer, and incapable of being delegated to another servant; and hence the negligence of the foreman in failing to instruct the workman was the negligence of the master, and did not bar a recovery: *Tedford v. Los Angeles Electric Co.*, 134 Cal. 76; s. c. 66 Pac. Rep. 76; 54 L. R. A. 85.

⁸*Owings v. Moneynick Oil Mill*, 55 S. C. 483; s. c. 33 S. E. Rep. 511 (plaintiff admitted on the witness-stand that he was aware of the danger; hence a nonsuit should have been granted).

⁹*Junior v. Missouri Electric Light & Co.*, 127 Mo. 79, s. c. 29 S. W. Rep. 988 (experienced employé neglected to use rubber gloves to handle wires which were obviously not insulated at their ends). A servant employed as a helper in the defendant's machine shop, about two months prior to his death was selected to assist in wiring the building for electric lights, and to look after and care for such wires and lights in the absence of the man regularly employed in such work; and thereafter, whatever was to be done in the way of wiring or looking after the lamps, either of such persons attended to. The servant, while assisting in stringing a wire for connecting an electric bell from a certain point outside the shops to the office, came in contact with a live wire which was open to

§ 4119. Duty to Warn and Instruct Concerning Dangerous Explosives.—We may extract from one decision the proposition that it is the duty of an employer, before using a highly dangerous explosive, to ascertain and make known to his employé the dangers to be reasonably apprehended from its use, and the proper method of handling it with reasonable safety; and his ignorance of knowledge which can be obtained by the exercise of reasonable diligence is no excuse,—assuming, of course, that they do not understand and appreciate the danger as well as he does.¹⁰ But it has been held that the danger that cider-bottles would explode while being filled under pressure, is not one obviously beyond the comprehension of a boy of average intelligence, nineteen or twenty years old, who had worked at the business for years, and had recently been charged with the control and supervision of the bottling department of the defendant's establishment.¹¹

§ 4120. Duty to Warn of Dangers Arising from Fires.—A gang of men were ordered by the foreman to assist in putting out a fire which endangered the master's property, and one of them was killed by the falling of a burning stump. The foreman had been informed that the stump had burned at the bottom so that it was likely to fall, but neglected to warn the men. The deceased had passed the tree a number of times while it was burning. The stump and vicinity were enveloped in smoke and steam, and there was much noise and confusion. It was held that the defendant was under no duty to warn

his observation, and actually seen by him, and of the dangerous character of which he had been informed, and was killed. It was held that the decedent, in stringing the wire, was acting within the scope of his employment, and that the defendant's duty as to warning him of the dangers of live wires had been performed: *Davis v. Port Huron Engine &c. Co.*, 126 Mich. 429; s. c. 85 N. W. Rep. 1125 (he assumed risk of slipping on wet roof and coming in contact with the wire while so engaged). A lamp-trimmer of an electric-lighting company had been employed at such work for a considerable time, and was fully instructed as to his duties, and told that the first thing to do was to turn a switch at the top of the lamp, to cut the lamp out of the circuit. On a rainy morning he climbed a pole to trim

a lamp, and, while reaching to turn off the switch, touched the lamp, which was alive by reason of wires of his master coming in contact with those of another company. It was held that the master was not negligent in failing to instruct the plaintiff as to increased danger in working on pole-lamps in wet weather, it not being shown that such dampness caused the injury: *Carr v. Manchester Electric Co.*, 70 N. H. 308; s. c. 48 Atl. Rep. 286.

¹⁰*Bertha Zinc Co. v. Martin*, 93 Va. 791; s. c. 22 S. E. Rep. 869; 2 Va. L. Reg. 838 (question for jury whether master was negligent in thawing dynamite before open fire in open air, instead of using appliances for that purpose which were shown to be in existence).

¹¹*Omaha Bottling Co. v. Theiler*, 59 Neb. 257; s. c. 80 N. W. Rep. 821.

the deceased of the danger, which was equally obvious to all; and the negligence, if any, of the foreman, was that of a fellow servant.¹²

§ 4121. **Duty to Warn and Instruct Concerning Dangers in Excavating.**—There is nothing in this relation calling into existence any new rule or principle. It is the duty of the master to warn and instruct his servant employed in excavating as to any danger attending the employment which the master knows or of which he should know, and which the servant does not know or of which he would not know in the exercise of such care for his safety as his situation admits of. For example, where a servant had never worked in a gravel-pit before, but was put to work in a pit which was being excavated with a steam-shovel, without being warned of the danger of the perpendicular bank, twenty feet high, caving in during the progress of the work, and the caving in was reasonably to be apprehended by the master, as it usually happened several times a day,—the master was liable.¹³ So, where the plaintiff was injured while working in a gravel-pit under a street commissioner's direction, such street commissioner's failure to inform him of the existence of a crack in the wall of the pit, of which he had been informed, and to make an inspection, was negligence, rendering the town liable.¹⁴ But the failure of a gas company to ask how long a trench dug by the city had been dug, and to tell its employé the length of time, before sending such employé into the same to remove its gas-pipe therefrom, did not render it liable for an injury to the employé caused by the caving in of the trench.¹⁵

¹² *Maltbie v. Belden*, 167 N. Y. 307; rev'g s. c. *sub nom.* *Maltby v. Belden*, 45 App. Div. (N. Y.) 384; 60 N. Y. Supp. 824 (deceased could know as well as foreman that a burning tree was likely to fall; and foreman could not tell *when* it would fall any better than deceased could).

¹³ *Daly v. Kiel*, 106 La. 170; s. c. 30 South. Rep. 254.

¹⁴ *Colorado City v. Liafe*, 28 Colo. 468; s. c. 65 Pac. Rep. 630.

¹⁵ *Hughes v. Malden & C. Gas Light Co.*, 168 Mass. 395; s. c. 47 N. E. Rep. 125. So, a master was not chargeable with negligence on account of the failure of a foreman to warn an employé, who had reported that morning for work, against the danger of working in a sewer at a point eight or ten feet deep on which, under his orders work had ceased the previous day to afford an opportunity for curbing, the or-

der for which was given at the time, where the foreman did not direct the employé where to work, but merely gave a general order to all the men to go to work, and did not see decedent working at that point, and the foreman had again directed the curbers to get their tools and curb the place at the same time he ordered the rest of the men to work, after which he walked off in the opposite direction; but before giving the order he had gone to the trench at the point where it afterward caved in, in order to get some tools, and did not see any indication that it was unsafe; and, though decedent was not present the day before, when the order to curb was given, he was experienced enough in that kind of work to have seen that the place was ready for it; since a foreman having fifty men under him cannot be expected to keep his eye con-

§ 4122. **Duty to Warn and Instruct Concerning the Dangers Attending Circular Saws and the Operations of Sawmills.**—It has been held that an employer is liable:—For placing an inexperienced employé at work at a machine which has a saw defectively and insecurely fastened to its shaft, which is known to the employer but not to the employé, without giving him any instructions in respect to the danger, if the employé himself is free from fault;¹⁶ for failing to warn an inexperienced employé fifteen or sixteen years old of the danger from a rapidly revolving circular saw before sending him to work in the immediate vicinity thereof, it being a question for a jury;¹⁷ for directing a young and inexperienced employé to tie in a loose bolt attached to a machine having revolving saws near the bolt, without warning him that it is dangerous to do so without stopping the machine, so that the motion of winding the string around the bolt brings the employé's hand in contact with the saws, although the employé knows that the saws will cut him if he comes in contact with them;¹⁸ but, of course, negligence cannot be imputed to one who employs another to work in a sawmill without warning him of the dangerous character of the work, unless he knew or ought to have known that a warning was necessary.¹⁹

stantly on every man, and see that he does not step into a place of danger; nor, having the care of so many, can he be expected momentarily to think of every danger that may befall them, and guard against it; hence a nonsuit was properly granted: *Burns v. Matthews*, 146 N. Y. 386; s. c. 40 N. E. Rep. 731; 71 N. Y. St. Rep. 333; aff'g s. c. 66 N. Y. St. Rep. 866 (*mem.*). Bartlett, J., dissented on the ground that the evidence was conflicting as to whether the foreman, as a vice-principal, had discharged the duties owing to decedent looking to his safety and protection; and he was of opinion that the case should have gone to the jury.

¹⁶*Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225; s. c. 28 L. R. A. 439; 63 N. W. Rep. 93 (saw escaped from shaft and struck plaintiff).

¹⁷*Barg v. Bousfield*, 65 Minn. 355; s. c. 68 N. W. Rep. 45 (plaintiff, while attempting to remove tub of refuse, sawdust, etc., from under the saw, got his hand between the pile of refuse in the tub and the under side of the saw, and had several fingers cut off).

¹⁸*Greenville Oil & Co. v. Harkney*, 20 Tex. Civ. App. 225; s. c. 48 S. W. Rep. 1005.

¹⁹*Sladky v. Marinette Lumber Co.*, 107 Wis. 250; s. c. 83 N. W. Rep. 514 (adult employé—conditions about the same as in other sawmills). The question whether a master ought to have warned a servant seventeen years old of the danger to be apprehended from allowing objects to touch a circular saw in the rear is *for the jury*, where the servant testifies that he was not aware of the peculiar danger although he had had sufficient experience to appreciate the more plain and obvious dangers: *Hanson v. Ludlow Man. Co.*, 162 Mass. 187; s. c. 38 N. E. Rep. 363 (log which plaintiff was removing from behind the saw came in contact with the saw and was thrown up and forward, carrying plaintiff's hand on to the saw). Condoning negligent carelessness, it has been held that there is no necessity of a signal being given to an offbearer in a sawmill of the starting of the saw-carriage, where it is uniformly started as soon as the hooks are removed from the cants, and the car-

§ 4123. **Duty to Warn and Instruct Concerning Poisons and Other Noxious Substances.**—Where an unwarned and uninstructed servant was killed by inhaling *noxious gases* arising from the sediment in a chamber used for the manufacture of sulphuric acid, which chamber the deceased had been ordered to enter and clean, and it appeared that some men had been overcome by the gases the day before in the same chamber, but that the deceased did not know of this, and was not warned of it,—it was held that the employer was liable in damages for the death of the servant, on the principle that he had sent the servant to work without warning him of a latent danger of which he, the master, had knowledge, but of which the servant was ignorant.²⁰

riage has been so operated hundreds of times during the few days he has worked at it. It was the plaintiff's duty to remove the hooks from timbers, after they had been raised to the saw-carriage by means of a derrick, and it is true that the custom was to start the carriage *as soon as the hooks were removed*, and in such a case the plaintiff did not need a signal; but in this case the carriage was started *before* the hooks were removed, and injured the plaintiff. The accident could have been avoided in all probability had a warning-signal been uniformly required when all was ready: *Olsen v. North Pac. Lumber Co.*, 106 Fed. Rep. 298, per Bellenger, J. Another court has held that an employer may put an employé nearly twenty-one years old at work on a circular saw, without other instruction than running through one or two sticks, and then watching while the employé runs through two or three sticks, where the employé states that he has run a circular saw a very little, but is not an experienced hand, but makes no direct request for further instructions, and informs no one that he needs instructions: *Wilson v. Steel Edge Stamping & Co.*, 163 Mass. 315, s. c. 39 N. E. Rep. 1039 (proper to direct a verdict for defendant). In another case the plaintiff, experienced in work in sawmills, was injured while assisting to operate a cut-off table and circular saw in the defendant's mill. It appeared that, if sawdust and bark were allowed to accumulate at the bottom of the machine, it would prevent the table from operating so as to clear the

saw properly, and the saw would project through the slot in the table. The machine was of simple construction. The accident was caused by the plaintiff pushing a shingle-bolt on to the table while an obstacle was lodged between the top timbers and the base of the legs of the table, so that the table did not operate properly and was not clear of the saw. The movements of the machine were apparent to the operators. The table swung back from the saw on a pivot, and it could be easily determined by the position of the table, without looking at the saw, whether it was clear of the latter. It was held, in an action for damages, that the liability of sawdust and bark to accumulate at the base of the table, thereby hindering the operation of the machine, and the probable effect thereof, were open to ordinary observation, and the defendant was not guilty of negligence in allowing the plaintiff to work without instructions as to the danger: *Willis v. Besser-Churchill Co.*, 126 Mich. 659; s. c. 8 Det. Leg. N. 199; 86 N. W. Rep. 133 (judgment for plaintiff reversed).

²⁰ *Williams v. Walton & Co.*, 9 Houst. (Del.) 322; s. c. 32 Atl. Rep. 726. In a decision which seemingly ignores this salutary duty of the master, it was held that a master is not chargeable with negligence in failing to inform an employé nineteen years old of the danger incident to the task of steaming colored paper, so that it might be more easily folded, from the presence of certain poisonous compounds in the paper, where steam-

§ 4124. Duty to Warn and Instruct Concerning the Dangers of Revolving Set-Screws.²¹—A set-screw projecting beyond a revolving shaft or pulley is a dangerous contrivance, which has in many instances been the cause of cruel injuries to employés. Nevertheless the courts have condoned the wickedness of maintaining such contrivances in so many cases that the legislatures have been obliged to step in and prohibit the use of them. We now come to decisions which go so far as to hold that it is not negligence in an employer to fail to warn his servant against injury from this contrivance, on such flimsy pretexts as that the servant might have performed his work without danger by another method;²² or that a workman who was injured was on an errand of his own to a part of the mill where his duties did not require him to go, and that, knowing the danger of stepping over a revolving shaft, he wore an apron which he raised only enough to clear the shaft, where the apron was caught in the key and he was injured, although he did not know of the additional danger of the projecting key.²³

§ 4125. Duty to Warn and Instruct Concerning the Danger of Getting Caught in Cogwheels, Rollers, etc.—It has been held that a master is not negligent in failing to instruct a female employé thirty years of age and of ordinary intelligence, as to the danger of getting her hand caught in cogwheels on the machine at which she is put at work, where such wheels are in plain sight and the danger therefrom is obvious, even though such employé is unfamiliar with machinery; since the master has a right to assume that she has that knowledge which is acquired by common experience.²⁴ It has been held that negligence is not imputable to a master for failing to tell a seventeen-year-old boy of more than usual enterprise and intelligence, employed on a machine for five or six weeks in guiding the cloth through it,

ing the paper was not a usual process in the factory, and the master did not know of the poisonous compounds, and the servant has as good means of determining whether they existed or not as the master, if the task was within the scope of the servant's employment. Baldwin, J., says: "The court may properly take judicial notice that some colored paper is dyed with poisonous substances; but it is equally bound to take judicial notice that this is not true of all colored paper." Again he says that "the volatilization of poison by the action of steam is a matter of common knowledge":

O'Keefe v. National Folding Box &c. Co., 66 Conn. 38; s. c. 33 Atl. Rep. 587. If these things are so commonly known that a court can take judicial notice of them, why may an employer wait until he has "tried it on a dog" before he is chargeable with notice of it?

²¹ See also, *ante*, § 4022.

²² *Keats v. National Heeling Mach. Co.*, 65 Fed. Rep. 940; s. c. 13 C. C. A. 221.

²³ *Anderson v. Berlin Mills Co.*, 88 Fed. Rep. 944; s. c. 50 U. S. App. 413.

²⁴ *Ruchinsky v. French*, 168 Mass. 68; s. c. 46 N. E. Rep. 417.

who understands the danger of getting his hands drawn in the machine, and knows that if they are drawn in they will be burned, and that the cloth passing through the machine is made up of different pieces sewed together, in which there are tears of various sizes and shapes,—that there are liable to be holes also in the cloth, although he testifies that he had seen no holes in the cloth, and that his hand was caught in a hole in a seam where two pieces of cloth were stitched together, and drawn into the machine, where others testify that such holes frequently occur; since, if he needed no instruction concerning tears, he did not, except for an extremely refined reason, need any for holes.²⁵

§ 4126. **Illustrations in Various Other Lines of Service.**—Employers have been held liable for failing to warn and instruct their employés under the following circumstances:—Where giant powder was used for ordinary blasting purposes, without instructing the servant of the proper mode of using it, although the employer had in his possession printed directions as to that mode, in consequence of which the employé was injured;²⁶ where a common laborer was put to work at a dangerous machine, without being instructed as to the dangers attending it, and was injured before he had worked at it long enough to become familiar with it;²⁷ where an employé was ordered to dig a trench for the purpose of shifting a telegraph-pole, without being warned of the danger, and was injured by the pole falling in consequence of the props for holding it in an upright position not being supplied by his employer;²⁸ where the master placed in the hands of a servant a vicious horse and failed to warn him of the nature of the animal;²⁹ where an employé was put to work shovelling coal and removing materials from a dock beneath a trestle, and was injured by the work of tearing down the trestle, which had been commenced without giving him any notice of it;³⁰ where an employé is injured while feeding a circular saw known as a “*resaw*,” by reason of his inexperience in its use and in the proper method of feeding it, his employer having given him no instructions, although he knew of his

²⁵ *Shine v. Cocheco Man. Co.*, 173 Mass. 558; s. c. 54 N. E. Rep. 245.

²⁶ *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; s. c. 36 Am. Rep. 535.

²⁷ *Chicago &c. Pressed-Brick Co. v. Rembarz*, 51 Ill. App. 543; s. c. aff'd *sub nom.* *Barnes v. Rembarz*, 150 Ill. 192; s. c. 37 N. E. Rep. 239. Similarly, see *Brennan v. Gordon*, 118 N. Y. 489; s. c. 29 N. Y. St. Rep. 829; 8 L. R. A. 818; 23 N. E. Rep. 810.

²⁸ *East St. Louis &c. R. Co. v. Enright*, 47 Ill. App. 494.

²⁹ *George H. Hammond Co. v. Johnson*, 38 Neb. 44; s. c. 56 N. W. Rep. 967; *Helmke v. Stetler*, 69 Hun (N. Y.) 107; s. c. 52 N. Y. St. Rep. 528; 23 N. Y. Supp. 392.

³⁰ *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915; s. c. 6 C. A. 636.

ignorance;³¹ where a mine-owner failed to warn his employé of the dangers which might arise from an unexploded blast, in the vicinity of which he was working, of which the foreman of the mine knew, or might by reasonable diligence have known;³² where an employer failed to notify its employé of the danger of flying molten iron when a boiler of iron was punctured, such employé working in a trench into which the iron would flow;³³ where an employer directed his employé to clean off the snow from a roof without notifying him of the existence of a skylight in another roof suddenly covered by a fall of snow;³⁴ where an employer failed to notify his employé that an elevator, which he would have occasion to use, was undergoing repairs which were not completed;³⁵ where a superintendent of a foundry, about to order an extra-hazardous piece of work to be done, failed to warn the workmen not then present, but whose duties might at any moment call them into the vicinity, of the danger;³⁶ where an inexperienced employé was put in charge of machinery and was directed by the superintendent to wipe a plate without any caution of the danger of doing so, the same not being apparent, and was injured;³⁷ where there was an unguarded opening in the floor of the premises where the servant was put to work, unknown to him but known to the master, who neglected to give the servant any caution concerning it;³⁸ where the proprietor of a lime-kiln failed to inform an inexperienced laborer of the danger of falling into the fire by the removal of a stone at the base and the consequent subsidence of the mass above;³⁹ where an "inside helper" in a smelting-furnace was injured in consequence of not being warned of the certainty of a powerful explosion in case the hot slag should come in contact with water;⁴⁰ where the employé was compelled to drive under a revolving shaft, which, without his knowledge, was so repaired between two of his trips that there was not room to drive under it without injury, and he was not warned of the change.⁴¹

³¹ *Arizona Lumber &c. Co. v. Mooney* (Ariz), 33 Pac. Rep. 590 (no off. rep.).

³² *Kelley v. Cable Co.*, 7 Mont. 70; s. c. 14 Pac. Rep. 633.

³³ *Holland v. Tennessee &c. R. Co.*, 91 Ala. 444; s. c. 12 L. R. A. 232; 8 South. Rep. 524.

³⁴ *Reinig v. Broadway R. Co.*, 49 Hun (N. Y.) 269; s. c. 17 N. Y. St. Rep. 622.

³⁵ *Dervin v. Herman*, 31 N. Y. St. Rep. 179; s. c. 9 N. Y. Supp. 722.

³⁶ *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 79.

³⁷ *Howard Oil Co. v. Farmer*, 56

Tex. 301. It was held that the employé was not precluded from recovering damages by reason of not having discovered the danger, it not being apparent: *Howard Oil Co. v. Farmer*, *supra*.

³⁸ *Maguire v. Little* (R. I.), 5 N. Eng. Rep. 666; s. c. 13 Atl. Rep. 108 (no off. rep.).

³⁹ *Parkhurst v. Johnson*, 50 Mich. 70; s. c. 45 Am. Rep. 28.

⁴⁰ *McGowan v. La Plata Min. &c. Co.*, 3 McCrary (U. S.) 393.

⁴¹ *Hawkins v. Johnson*, 105 Ind. 27; s. c. 55 Am. Rep. 169.

ARTICLE VI. VARIOUS ILLUSTRATIONS OF THE DUTY TO WARN
AND INSTRUCT.

SECTION	SECTION
4129. Instances of a failure to warn and instruct where the master was held liable.	4131. Still further illustrative cases—Master liable.
4130. Other illustrative cases—Master liable.	4132. Illustrative cases continued—Master liable.
	4133. Other illustrative cases—Master exonerated.

§ 4129. **Instances of a Failure to Warn and Instruct where the Master was held Liable.**—It has been well held that an employer does not discharge his full duty in keeping a place reasonably safe by giving warnings of threatened or impending danger, where the employé charged with the duty of giving the warnings is so engrossed and busy with his other duties that he cannot properly and efficiently give the necessary warnings.¹ It is negligence for which the master is responsible, for the foreman of a steam sawmill to call on one of its employés suddenly and on the spur of the moment, to take a position in the mill that is dangerous, without giving him any instructions or explanation whatever of the movements of the machinery or the risk and hazard of the employment, with which the employé has neither a previous knowledge nor acquaintance; it being the duty of the master to give warning of danger to an inexperienced employé, not aware of the danger, who is placed in charge of dangerous machinery.² A railroad company which knowingly directs a minor, who is employed as a messenger in its office, and who has had no experience as a brakeman, to act in the latter capacity, and fails to instruct him as to the dangers incident to the employment, is guilty of negligence, which will warrant a recovery by the minor for an injury received while in such employment; namely, having his hand crushed while coupling cars.³ The plaintiff, while employed by the defendant railroad company in crushing rock, was ordered by his foreman to assist in placing a derailed car on the track. While so engaged, the car lurched, and threw the plaintiff down, injuring him. He knew nothing of the hazards of such work, and received no warning from the foreman,

¹ The Pioneer, 78 Fed. Rep. 600 (shipwright, coming up from hold in course of his duties, struck by a barrel which was being swung on board just as his head got above deck, no warning having been given by mate, who was superintending loading).

² James v. Rapides Lumber Co., 50 La. An. 717; s. c. 23 South. Rep. 469; 44 L. R. A. 33.

³ Texarkana & C. R. Co. v. Preacher (Tex. Civ. App.), 59 S. W. Rep. 593 (no off. rep.).

who knew of his ignorance. It was held that the defendant's foreman was negligent in failing to give warning to the plaintiff, such work being extra-hazardous as to him, and the master was liable.* The defendant, which owned and operated a sawmill, contracted with a third person to work up the slabs into laths and pickets, using machines in the mill, which were run, kept in order, and lighted by the defendant. The defendant owned the products, paid the wages of the workmen employed by such third person, and paid him the remainder, if any, due, computed at a stipulated price per 1,000 laths and pickets made. It was held that such person was not an independent contractor, but a servant of the defendant, put in charge of particular machines, and paid upon the terms stated, and that whatever duty there was to instruct an inexperienced workman employed in the operation of such machines as to the dangers of the employment remained a duty of the defendant.⁵

§ 4130. **Other Illustrative Cases—Master Liable.**—A very apt illustration of this rule is found in a decision to the effect that if an employé of immature years—here a female of fourteen years—has no instructions as to the danger of a machine at which she is set to work, and has never worked at any machinery before, and is injured by such machine within a short time of her employment, because of her unfamiliarity with, and lack of appreciation of, the dangers attendant upon the working of the machine, the employer will be liable.⁶ Under the operation of this rule, an employer has been held liable where a girl thirteen years of age, in consequence of not being suitably instructed, did not know how far a wheel would revolve, and was injured while attempting to pick off a piece of waste from the spoke of the wheel;⁷ where a boy twelve years old, possessing less than the average intelligence, which fact the master ought to have known, was sent without warning, on an errand requiring haste, to a dimly lighted place, between machinery, the gearing of which was so arranged as to be liable to catch his clothing and draw him into it, and nothing in his previous employment justified the conclusion that he had considered the danger of an accident happening to him in that way;⁸

**Texas &c. R. Co. v. Utley*, 27 Tex. Civ. App. 472; s. c. 66 S. W. Rep. 311. The fact that the workman went voluntarily on request did not release the company's foreman of the duty of giving warning as to the hazards, as he was not a mere intruder: *Texas &c. R. Co. v. Utley*, *supra*.

⁵*Nyback v. Champagne Lumber Co.*, 109 Fed. Rep. 732, s. c. 48 C.

C. A. 632 (workman who had been employed for but one hour fell into unguarded hole, of which he had not been warned).

⁶*Hickey v. Taaffe*, 105 N. Y. 26; s. c. 12 N. E. Rep. 286.

⁷*Glover v. Dwight Man. Co.*, 148 Mass. 22; s. c. 18 N. E. Rep. 597.

⁸*Ciriack v. Merchants Woolen Co.*, 151 Mass. 152; s. c. 23 N. E. Rep. 829; 6 L. R. A. 733.

where a boy seventeen years of age was required to operate a defective car-coupling, consisting of a bent pin and a misshapen link fastened in the drawhead, without being warned of the danger, although in point of fact he knew of the existence of the defect;⁹ where a boy nineteen years of age, who had been engaged in coupling cars having single deadwoods, was set at the extra-hazardous work of coupling cars having *double deadwoods*, without being warned of the increased danger;¹⁰ where the master failed to advise an inexperienced and youthful employé as to the time at which his tools might be expected to get out of repair and as to the dangers attending their condition when out of repair;¹¹ where a boy was required to move cars along a descending tramway from a coal mine to a place where the cars were to be emptied by machinery, without being warned that the cars might become uncontrollable from the steepness of the grade;¹² where a blacksmith failed to warn an apprentice of the danger arising from heaping fresh coal on the furnace without the precaution of taking measures to prevent the gases thereby generated from escaping into the bellows, and he was injured from the bursting of the bellows by an explosion of such gas;¹³ where a boy fifteen years old was sent into a mine without warning as to the danger from falling stones, in consequence of which he was injured by such a stone,—and this although the immediate cause of his injury was the negligence of a fellow servant causing the stone to fall.¹⁴ It may be added that the mere fact that a child of tender years, who is put to work in a dangerous place and given instructions as to the manner of doing the work, deviates from the instructions given him, in consequence of which he receives an injury, which he would probably not have received if he had been suitably instructed as to the dangers of the employment,—will not prevent his recovery of damages; since a child of tender years is not to be expected to adhere closely to instructions as to the method of doing work when one way seems as good to his comprehension as another.¹⁵

⁹ *Goins v. Chicago & C. R. Co.*, 37 Mo. App. 221.

¹⁰ *Louisville & C. R. Co. v. Frawley*, 110 Ind. 18; s. c. 9 N. E. Rep. 594.

¹¹ *Heavey v. Hudson River & C. Co.*, 32 N. Y. St. Rep. 565; s. c. 57 Hun (N. Y.) 339; 10 N. Y. Supp. 585.

¹² *Alabama Connellsville Coal & C. Co. v. Pitts*, 98 Ala. 285; s. c. 13 South. Rep. 135. But it was held, on the other hand, that if a fellow servant gave the boy sufficient warning as to the danger, and the

boy disregarded it, this would prevent a recovery for his death, although the master had given him no such warning: *Alabama Connellsville Coal & C. Co. v. Pitts*, *supra*.

¹³ *Reisert v. Williams*, 51 Mo. App. 13.

¹⁴ *Jones v. Florence Min. Co.*, 66 Wis. 268; s. c. 57 Am. Rep. 269.

¹⁵ *Honlahan v. New American File Co.*, 17 R. I. 141; s. c. 20 Atl. Rep. 268.

§ 4131. **Still Further Illustrative Cases—Master Liable.**—Employers have also been held liable for injuries brought upon their servants in consequence of the failure to give them suitable warning and instruction, in the following instances:—Where an employer had a large hole in a third-story floor of his establishment where his employés were set at work, which hole was covered with rotten canvas, without any guard about it, and failed to warn his employés of its existence;¹⁶ where an employer failed to warn his servant, who had been asked to repair a specific part of the mechanism of a machine, of a danger which was not apparent and which was due to the improper working of a part of the machine distinct from that which the servant was requested to repair;¹⁷ where an experienced molder, after completing his regular work, went, under the direction of the superintendent and foreman, who were experienced molders, to where they had arranged defective *castings*, and started to fill the holes therein with molten metal, when an explosion occurred, caused by rust or damp in the holes, injuring the molder, who had never done or seen such work before, and did not know of the effect of rust or damp thereon, though the superintendent and foreman did know, and were entirely familiar with the work down to the smallest detail, and where the proper preparation of the castings for filling the holes in them would have required an examination of them for rust or damp, and the rust should have been chopped off, and the damp, if found, should have been dried;¹⁸ where an employer, in furnishing poles to employés to be used in starting cars or baskets for carrying parcels hung on an overhead structure, failed to inform them of a fact known to him, that if the cars were pushed backward, they were likely to leave the track and fall;¹⁹ and in the other cases referred to in the marginal note.²⁰

¹⁶ *Muncie Pulp Co. v. Jones*, 11 Ind. App. 110; s. c. 38 N. E. Rep. 547. But the court further held that the plaintiff was negligently ignorant of the fact that the hole was there, he having been ordered to lay boards across it to walk on, and having noticed that the canvas sagged while laying the boards, and that the other men walked around the canvas, and not on it. The plaintiff was knocked off the boards without any fault on his part and fell through: *Muncie Pulp Co. v. Jones*, *supra*.

¹⁷ *Martineau v. National Blank Book Co.*, 166 Mass. 4; s. c. 43 N. E. Rep. 513 (machine started up automatically from creeping of the

belt while plaintiff was repairing another defect).

¹⁸ *Dyer v. Brown*, 64 App. Div. (N. Y.) 89; s. c. 71 N. Y. Supp. 623 (negligence in not examining the molds for rust and damp, and in failing to warn the molder of the danger).

¹⁹ *Stock v. LeBoutillier*, 19 Misc. (N. Y.) 112; s. c. 43 N. Y. Supp. 248; aff'g s. c. 18 Misc. (N. Y.) 349; 41 N. Y. Supp. 649.

²⁰ In one such case the plaintiff, seventeen years old, who was unskilled in the use of machinery, was assigned to attending a machine for grinding corn, operated by steam. At the bottom of the machine was a metal spout, out of

§ 4132. **Illustrative Cases Continued—Master Liable.**—For a mine-owner to introduce *giant powder* for use in the mine without making known, to those who were to use it, its dangerous properties, and the proper manner of using it, was negligence rendering him liable to an employé injured by reason of his ignorance of the danger of such explosive.²¹ It was the duty of an employer, engaged in the manufacture of *Paris green*, to inform his servant engaged in such work not only that it was a poison, but also of the danger from inhaling the vapor from the vats containing it, and the danger of contact of the vapor or the substance itself with the body.²² Where the plaintiff, an employé in an iron foundry, was directed to assist in carrying a ladle of molten iron along a passageway which was slippery with ice, he should have been warned of the danger of an explosion should the molten iron come in contact with the ice; this being such a fact as the master should know, but likely not to be known to a common laborer.²³ In a case at *nisi prius*, where a girl employed in a hemp factory was set by the foreman to do exceptionally hazardous work without proper instruction, Lord Cockburn said to the jury: "The foreman was put by them in their place to employ this young person in and about dangerous machinery, of which she was quite ignorant, and I think any negligence of his in the matter would be negligence for which they would be responsible." Under this instruction, the plaintiff had a verdict.²⁴ In another case the plaintiff was

which the stuff that was ground came. Such metal spout becoming choked, the plaintiff ran his fingers in to unchoke it, and the second time he did so the machine caught his hand and crushed it. The spout was subject to clogging, and the proper way to unclog it was by striking on it with something heavy. It was not apparent from the outside how near the machinery was to the mouth of the spout. It was held that it was the duty of the foreman, who left the plaintiff in charge of the machine, to warn him of the danger and instruct him how to unclog it, especially as such foreman had a short time before had his fingers injured by running his hand into the spout: *Standard Oil Co. v. Eiler*, 110 Ky. 209; s. c. 22 Ky. L. Rep. 1641; 61 S. W. Rep. 8. In another case it was held that the failure to box or otherwise protect a smooth, rapidly revolving, upright shaft coming up through the floor of an alley or passageway where an inexperienced girl was re-

quired to sweep, who was not warned of the danger, where the evidence established that such a shaft was dangerous, and tended to show that the employer knew or should have known the danger, might properly be found by the jury to constitute negligence which would render the employer liable for injuries to her when her clothing was caught and wound upon the shaft; and it was proper to submit the question to the jury: *American Tobacco Co. v. Strickling*, 88 Md. 500; s. c. 41 Atl. Rep. 1083 [citing *Pullman's Palace Car Co. v. Harkins*, 17 U. S. App. 22; s. c. 55 Fed. Rep. 932; 5 C. C. A. 326; *Fairbank v. Haentzsch*, 73 Ill. 236].

²¹ *Smith v. Oxford Iron Co.*, 42 N. J. L. 467.

²² *Fox v. Peninsular White Lead &c. Works*, 84 Mich. 676.

²³ *Smith v. Peninsular Car Works*, 60 Mich. 501.

²⁴ *Grizzle v. Frost*, 3 Fost. & Fin. 622.

employed by the defendant to shovel coal from a burning dock. Thereafter the defendant's vice-principal, without notifying the plaintiff or his foreman, ordered the removal of the supports of a trestle-work under which the plaintiff was working. In doing so the workmen negligently weakened the trestle, so that it fell upon and injured the plaintiff. It was held that the risk of the trestle's falling in such a manner was an extraordinary one, not assumed by the plaintiff, of which the master was bound to notify him; and that the master was therefore liable.²⁵ In the process of tearing down a building, if a defect or danger is not known to the employé, or so open and visible that by ordinary care it would be known and seen by him,—as if, in tearing down a building, the employer cuts away any supports which the employé has a right to expect are still firmly in place,—it is the employer's duty to notify or warn the employé, and, failing to do so, he is liable for injuries received by the employé in consequence.²⁶ A master is guilty of negligence in causing the bank of earth at the side of a ditch in which an employé is working to fall by prodding it from above for the purpose of loosening it without giving the employé any warning, and merely warning him to "look out" at the instant the earth falls.²⁷ A foreman who directs a servant to work beneath a place where another servant is working, and fails to warn the lower servant that the end of a timber being sawed off by the upper servant is about to fall, is guilty of such negligence as will render his master liable, though the upper servant is also negligent.²⁸ An employé was engaged to lay a pipe in a ditch already constructed. The dangerous condition of the ditch was not apparent to him, but the defendant's foreman in charge of and inspecting the work knew the place to be dangerous, and gave no warning, and while engaged in the work such employé was injured by a part of the embankment falling in. It was held sufficient to sustain a verdict in such employé's favor.²⁹ A master, directing his servant to go into a steam-boiler to make repairs, notified him that everything would be ready, and arranged to have the steam turned off in all of the boilers of the series. When the servant arrived the boiler was cold, and others were working there. The master, shortly before the injury, discovered steam was on in one of the other boilers, but did not notify the servant,

²⁵ *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915; s. c. 12 U. S. App. 688; 6 C. C. A. 636.

²⁶ *McFarland v. Edmunds Man. Co.*, 97 Ill. App. 629.

²⁷ *Raynor v. Trolan*, 22 App. Div. (N. Y.) 107; s. c. 47 N. Y. Supp. 897 (plaintiff, engaged as he was,

should have been given adequate warning of any intended change in the situation).

²⁸ *American Cotton Co. v. Smith*, 29 Tex. Civ. App. 425; s. c. 69 S. W. Rep. 443.

²⁹ *Garrity v. Pennsylvania Cast- ing & Co.*, 17 Pa. Super. Ct. 623.

though he knew it was dangerous. It was held that the master's failure to notify him of the danger was negligence, making him liable for injury to the servant caused by the steam rushing in from the other boiler.³⁰

§ 4133. **Other Illustrative Cases—Master Exonerated.**—Under the operation of this rule, employers have been exonerated from liability for failure to warn or instruct their employes under the following circumstances:—Where the employer failed to notify an employé, engaged in wheeling coal from a shed into which it was discharged from lighters through a hatchway in the roof, of the time when the coal would be discharged, where the employé knew the manner in which it was put into the shed, and it was easy for him to see whether a lighter was in position to unload or not, and he had never been warned during the course of his employment for more than four years;³¹ where a railway company temporarily employed a brakeman to couple cars having bumpers on either side of the drawheads, the device being open to ordinary observation;³² where an electric street-railway company failed to notify a conductor, upon his entering its service, of the obvious danger of getting caught in a place three and one-half inches wide, between a trail-car and a doorway in the power-house, through which the car must be pushed to attach it to the dummy;³³ where a railroad company failed to warn a brakeman of the presence, on a side-track from which he was ordered at night to take certain cars, of another car loaded with iron projecting over the

³⁰ *Kewanee Boiler Co. v. Erickson*, 181 Ill. 549; s. c. 54 N. E. Rep. 1044; aff'g s. c. 78 Ill. App. 35. In another of such cases the jury were justified in finding that the owner of a factory in which cooling-fans were placed which had a very great suction, should in the exercise of reasonable care have known the danger, and that he therefore owed an employé engaged in oiling such fans the duty of warning him of the danger he ran in placing his arm in a place where it might be drawn into the fan, where the master had no reason to suppose the servant possessed knowledge of the danger, and he did not in fact know the danger: *Swift & Co. v. Fue*, 66 Ill. App. 651. Another of these cases is authority for the proposition that it cannot be said as a matter of law that an employer is free from negligence in failing to

instruct an inexperienced employé in regard to the danger of removing clogs of cotton from a cotton-picking machine, without stopping the beater, where the picker-boss had removed clogs without stopping the beater in the presence of such employé, and had instructed him to put his hand in when the machine became clogged and pull out the clog, without telling him not to do it when the beater was in motion, and the internal construction of the machine could not be seen while the beater was running: *DeCosta v. Hargraves Mills*, 170 Mass. 375; s. c. 49 N. E. Rep. 735.

³¹ *Flynn v. Campbell*, 160 Mass. 128; s. c. 35 N. E. Rep. 453.

³² *East Tennessee &c. R. Co. v. Turvaville*, 97 Ala. 122; s. c. 12 South. Rep. 63.

³³ *Jennings v. Tacoma R. &c. Co.*, 7 Wash. 275; s. c. 34 Pac. Rep. 937.

end, it being customary to use such cars upon the road and such track for storing them;³⁴ where a sugar refiner failed to notify a shoveller in his refinery of the danger of being buried in the sugar while engaged in the bins keeping the holes clear through which the sugar passed to barrels underneath;³⁵ where a railway locomotive-engineer failed to signal the approach to a low or dangerous overhead structure, there being no such duty as a matter of law;³⁶ where a railway company failed to instruct a track-walker that he must get out on the caps to avoid danger when caught on a bridge or trestle by an approaching train, the danger and means of escape being obvious to a person of ordinary intelligence;³⁷ where the line of a railway company runs through a pasture, and the right of way is not fenced, and cattle may be expected anywhere, and the company fails to inform a new employé that cattle have been frequently encountered at a particular place in the pasture and may be expected there.³⁸

³⁴ Jackson v. Missouri Pac. R. Co., 104 Mo. 448; s. c. 16 S. W. Rep. 413.

³⁵ Bohn v. Havemeyer, 114 N. Y. 296; s. c. 21 N. E. Rep. 402.

³⁶ Louisville &c. R. Co. v. Hall, 87 Ala. 708; s. c. 4 L. R. A. 710; 6 South. Rep. 277.

³⁷ Gibson v. Oregon &c. R. Co., 23 Or. 493; s. c. 32 Pac. Rep. 295.

³⁸ Patton v. Central Iowa R. Co., 73 Iowa 306; s. c. 35 N. W. Rep. 149.

CHAPTER CXII.

DUTY OF EMPLOYER TO MAKE AND PUBLISH RULES AND REGULATIONS TO PROMOTE THE SAFETY OF HIS EMPLOYEES.

- ART. I. General Nature of this Duty, §§ 4135-4149.
 ART. II. Propriety, Sufficiency, and Reasonableness of such Rules and Regulations, §§ 4152-4157.
 ART. III. Promulgation, Notice, and Enforcement of such Rules and Regulations, §§ 4159-4167.
 ART. IV. Duty of Establishing and Enforcing Rules in Particular Lines of Service, §§ 4169-4173.

ARTICLE I. GENERAL NATURE OF THIS DUTY.

SECTION	SECTION
4135. General nature of this duty.	4143. Inferences from the failure of an employer to adopt such rules and regulations.
4136. This duty absolute and unalienable.	4144. Effect of absence or inadequacy of such rules.
4137. Rules requiring the discharge of absolute and unalienable duties of master.	4145. Waiver by employer of such rules.
4138. This duty discharged by the exercise of ordinary care.	4146. Questions for jury with respect to this subject.
4139. Limitations of this duty.	4147. Instructions to juries with reference to this duty.
4140. Employer not liable for failing to establish rules where he has a sufficient rule already in force.	4148. Instances where the failure to provide suitable rules has been held to be negligence as matter of law.
4141. Servant not entitled to a rule displacing ordinary prudence on his part.	4149. Evidence bearing on the question of negligence in failing to establish such rules and regulations.
4142. When such rules and regulations become immaterial.	

§ 4135. **General Nature of this Duty.**—The general obligation of exercising reasonable care for the protection of his servants, which the law puts upon the master, requires him, where his business is dangerous, complicated, and carried on by a great number of servants, different ones having different duties to perform,—to make, publish and enforce reasonable rules and regulations, devised to pro-

mote their safety and to protect them from the negligence of each other. It follows that, if one of his servants is injured, albeit by the negligence of a fellow servant, under such circumstances that the injury would have been prevented if the master had made, published and habitually enforced a reasonable rule for the conduct of the work of the fellow servant inflicting the injury,—he will be liable in damages to the injured servant.¹

§ 4136. **This Duty Absolute and Unalienable.**—This duty, like the others considered in this Title, though manifestly an absolute duty in the sense that the master will be responsible for the conduct of any agent or servant to whom he delegates it, is not an absolute duty in the sense which makes the master an *insurer*. On the contrary, negligence is not imputable to him for failing to establish a rule for the government of his employés, the necessity of which is not discoverable by the exercise of *reasonable care*.²

§ 4137. **Rules Requiring the Discharge of Absolute and Unalienable Duties of Master.**—It has been held that an employer cannot relieve itself from liability for an injury to an employé, resulting from a failure on its part, through its agents, actually to use such care for the safety of employés as the law makes it necessary for such master to use, by making and enforcing regulations, however stringent and however completely enforced, which do not actually result in the use of such care by his agents.³ Thus, a railway company may make regulations requiring the most rigid and frequent inspections of its machinery, road-bed, and equipments, and the most prompt and com-

¹ *Murphy v. Hughes*, 1 Pen. (Del.) 250; s. c. 40 Atl. Rep. 187; *Giordano v. Brandywine Granite Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332; *Terre Haute & C. R. Co. v. Becker*, 146 Ind. 202; s. c. 45 N. E. Rep. 96 (work-train left station on time of regular train); *Wallin v. Eastern R. Co.*, 83 Minn. 149; s. c. 86 N. W. Rep. 76; 54 L. R. A. 481 (failure to provide suitable rules and regulations for the control and operation of hand-cars); *Eastwood v. Retsof Min. Co.*, 86 Hun (N. Y.) 91; s. c. 34 N. Y. Supp. 196; 68 N. Y. St. Rep. 38; s. c. aff'd, 152 N. Y. 651 (*mem.*); *Rose v. Boston & C. R. Co.*, 58 N. Y. 217; *Bushby v. New York & C. R. Co.*, 107 N. Y. 374; s. c. 14 N. E. Rep. 407; *Ford v. Lake Shore & C. R. Co.*, 124 N. Y. 493; s. c. 12

L. R. A. 454; 36 N. Y. St. Rep. 494; 9 Rail. & Corp. L. J. 386; 26 N. E. Rep. 1101; *Hartvig v. Northern Pac. Lumber Co.*, 19 Or. 522; s. c. 25 Pac. Rep. 358. Therefore, an *avertment* in an action for damages for negligence, that the defendant negligently omitted to provide rules, signals, or system in cases of flying switches, or of shunting or kicking of cars, states a cause of action: *Regan v. St. Louis & C. R. Co.*, 93 Mo. 348; s. c. 12 West. Rep. 367; 6 S. W. Rep. 371.

² *Burke v. Syracuse & C. R. Co.*, 69 Hun (N. Y.) 21; s. c. 52 N. Y. St. Rep. 813; 23 N. Y. Supp. 458.

³ *Missouri Pac. R. Co. v. McElyea*, 71 Tex. 386; s. c. 1 L. R. A. 411; 9 S. W. Rep. 313.

plete repair of any ascertained defect, and may impose penalties of discharge, etc., for failure to comply with the same; yet if the agent authorized to do what the master must do to avoid liability, negligently fails to discharge his duty, then the master is liable to an employé who is injured through such neglect.⁴

§ 4138. This Duty Discharged by the Exercise of Ordinary Care.—Here, as in other cases, the employer is not an insurer, but the duty of providing rules and regulations for the safe conduct of his business, although absolute in the sense that he cannot cast it off by assigning it to one of his employés, is discharged by the exercise of reasonable care. This reasonable care is here, as in other cases, often described by calling it *ordinary care*. The meaning is, that an employer is not negligent in failing to promulgate a rule for the guidance of employés, applicable to a contingency for which other employers in a similar business do not ordinarily provide rules, and for which it is not shown that a rule is practicable or necessary.⁵

§ 4139. Limitations of this Duty.—This duty does not impose upon the master the obligation of making conjectural rules in order to guard against dangers which are not likely to happen; but to impose this duty the danger to be guarded against must be one that will probably occur and which is to be anticipated by reason of the character of the work.⁶ It does not impose upon the master the duty of making rules to govern his servants in the discharge of their duties in a work that is neither complex nor difficult. For example, it has been held that no rules regulating the manner in which cars are to be moved to a lime-kiln need be adopted and published by an employer where the cars are moved on a railway-siding to be loaded, and have to be moved only a short distance on a down-grade, not by steam, but

⁴ *Missouri Pac. R. Co. v. McElyea*, 71 Tex. 386; s. c. 1 L. R. A. 411; 9 S. W. Rep. 313.

⁵ *Doing v. New York & C. R. Co.*, 73 Hun (N. Y.) 270; s. c. 58 N. Y. St. Rep. 64; 26 N. Y. Supp. 405; s. c. rev'd, 151 N. Y. 579 (the reversing decision holding that if a railroad company's employés are known to be doing their work in a reckless and dangerous manner, it is the duty of the company to change the manner of operation by some regulation or rule).

⁶ *Sanner v. Atchison & C. R. Co.*, 17 Tex. Civ. App. 337; s. c. 43 S. W. Rep. 533 (not necessary to have a rule prohibiting switch-screw from mov-

ing a train with the switch-engine after the train has been turned over to the train-crew). For example, it has been held that negligence is not imputable to a railroad company for its failure to prescribe rules for warning an employé who went under a rear car, without the knowledge of the engineer, to fasten a brake-rod, and was injured by the starting of the train, since such condition could not have been anticipated, and the danger was obvious and might have been easily guarded against: *Norfolk & C. R. Co. v. Graham*, 96 Va. 430; s. c. 31 S. E. Rep. 604.

by hand.⁷ In short, the failure to adopt a particular rule is not evidence of negligence unless it appears that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity therefor: he need not make a specific rule for every particular act that is to be performed by his employés.⁸ For example, the failure of a railroad company to adopt rules or regulations governing the loading of rails upon a flat-car by gangs of men on either side of it, is not evidence of negligence rendering the company liable for an injury to one so engaged from the falling of a rail thrown on the car from the opposite side, in the absence of evidence showing that rules relating to such work have been adopted by other companies, or that a rule on the particular subject would be necessary and practicable.⁹ Nor is a railroad company chargeable with negligence because of its omission to make a rule for the protection of brakemen against injuries received in the course of such a simple duty as the boarding of moving freight-cars.¹⁰

§ 4140. **Employer Not Liable for Failing to Establish Rules where he has a Sufficient Rule Already in Force.**—Moreover, negligence will not be imputable to an employer for not making rules applicable to a particular situation, where it is shown that he already has a rule and established practice in force which renders the making of any other rule apparently unnecessary.¹¹ For example, a railroad company cannot be held liable for an injury to the engineer of a train resulting from an accident occurring in an *unaccountable manner*, on the ground that the accident might have been avoided by the adoption and publication of additional *rules* for the use of employés, where those in force are not shown to have been carelessly formulated, had always theretofore been effective and sufficient, and there is no evidence of more effective regulations adopted by other roads.¹²

⁷ *Moore Lime Co. v. Richardson*, 95 Va. 326; s. c. 64 Am. St. Rep. 785; 28 S. E. Rep. 334 (not necessary to have rule requiring warning to be given of moving of cars) [citing *Morgan v. Hudson River Ore & Co.*, 133 N. Y. 666; s. c. 31 N. E. Rep. 234 (case presenting very similar facts)].

⁸ *Ely v. New York & C. R. Co.*, 88 Hun (N. Y.) 323; s. c. 34 N. Y. Supp. 739.

⁹ *Ely v. New York & C. R. Co.*, *supra*.

¹⁰ *McDugan v. New York & C. R. Co.*, 10 Misc. (N. Y.) 336; s. c. 63 N. Y. St. Rep. 516; 23 Wash. L. Rep. 537; 31 N. Y. Supp. 135; s. c. *aff'd*

without opinion, 11 Misc. (N. Y.) 728; 155 N. Y. 631.

¹¹ *Kudik v. Lehigh Valley R. Co.*, 78 Hun (N. Y.) 492; s. c. 61 N. Y. St. Rep. 210; 29 N. Y. Supp. 533. For example, if a railway company has a rule which requires the brakes to be securely set upon all cars standing upon its coal-trestle, it is not guilty of negligence in failing to promulgate other rules, where such rule is entirely adequate to prevent the moving of cars so as to injure its employés, if complied with: *Kudik v. Lehigh Valley R. Co.*, *supra*.

¹² *Whalen v. Michigan & C. R. Co.*, 114 Mich. 512; s. c. 4 Det. Leg. N.

§ 4141. **Servant Not Entitled to a Rule Displacing Ordinary Prudence on His Part.**—"A rule is not intended to displace ordinary prudence." When, therefore, an employé was injured by falling into the shaft of an elevator, into which he walked without noticing whether the car was standing as he had left it,—it was held that the contention that the employer should have had rules regulating the use of the elevator for the protection of his employés, was not well taken, since the employé was not entitled to a rule forbidding him from walking into an empty elevator-shaft.¹³

§ 4142. **When Such Rules and Regulations Become Immaterial.**—The failure of the employer to make, publish and enforce suitable and adequate rules for the protection of his employés cannot be availed of by an injured employé without showing that the absence of the rule was the *proximate cause* of the injury which happened to him: if there is no causal connection between the absence of the rule and the accident, then, of course, the question of negligence in not promulgating a suitable rule becomes immaterial.¹⁴ For example, although a railroad company may have failed to provide adequate rules for the purpose of protecting track-walkers from the dangers of approaching trains in not providing by rule that the engine shall whistle at frequent intervals when approaching a bridge or trestle on which track-men may be walking,—yet this will not render the company liable for an injury to a track-walker not traceable to such a deficiency in its rules, but which is produced by his attempt to reach the end of the trestle before being overtaken by a train which he saw a half-mile distant.¹⁵ So, in an action by a servant against his employer where the plaintiff alleged that he received his injury in consequence of falling over some scrap-iron left on the floor in violation of a rule of the employer, and thereby was precipitated against the uncovered cog-wheels of a machine in motion, it was unnecessary to consider the question of the failure of the employer to enforce a regulation requiring the removal of scrap-iron, where, at the time of the injury, no scrap-iron was shown to have been present.¹⁶ It has been well reasoned that a failure of the employer to provide suitable and adequate rules, renders him liable only in a case where, by reason of such failure, one

653; 72 N. W. Rep. 323 (the semaphore indicated that the track was occupied, but for some unknown reason the air-brakes failed to work).

¹³ Poindexter v. Benedict Paper Co., 84 Mo. App. 352.

¹⁴ Rutledge v. Missouri &c. R. Co., 123 Mo. 121; s. c. 19 S. W. Rep. 38.

¹⁵ Gibson v. Oregon Short Line &c. R. Co., 23 Or. 493; s. c. 32 Pac. Rep. 295.

¹⁶ Cunningham v. Bath Iron Works, 92 Me. 501; s. c. 43 Atl. Rep. 106.

servant is injured by the act or neglect of *another servant* in the same employment; and that it does not apply in the case of a servant who is injured through an act in the performance of which he himself is alone negligent.¹⁷

§ 4143. Inferences from the Failure of an Employer to Adopt such Rules and Regulations.—It has been held that the failure of a railroad company to extend a rule requiring that in foggy weather, when a train cannot be seen at 300 yards, the trackmen shall suspend ordinary work and patrol the track, acting as signalmen to warn trains of danger, so as to make it applicable during the existence of unusual snowstorms, does not justify an inference by the jury of negligence by the company rendering it liable for injury to an employé; since it is of paramount importance under such circumstances that the trackmen shall attend to the removal of snow from the tracks, and they cannot be expected to cease such work in order to act as signalmen.¹⁸

§ 4144. Effect of Absence or Inadequacy of such Rules.—The absence or inadequacy of rules of a railroad company for the protection of its employés while making up a train in a railroad-yard, will not relieve the yard-crew from exercising ordinary care, in performing its duties, to avoid injury to the train-crew while making up a train; that is, while an employé of the train-crew may assume the risk of the absence or inadequacy of rules, he is not precluded from recovering for injuries due to the negligence of the yard-crew.¹⁹

§ 4145. Waiver by Employer of such Rules.—An engineer given charge of the movement and management of cars with the assent or knowledge of a temporary conductor acting in the absence of the regular conductor, has the authority of a conductor in giving directions to subordinate employés, but he cannot waive a general rule and contract of the company; and a brakeman injured by going between the cars to place a bent link in position for coupling under the direc-

¹⁷ Benfield v. Vacuum Oil Co., 75 Hun (N. Y.) 209; 59 N. Y. St. Rep. 663; 27 N. Y. Supp. 16.

¹⁸ Niles v. New York & C. R. Co., 14 App. Div. (N. Y.) 58; s. c. 43 N. Y. Supp. 751. Where the owners of a cartridge factory, after an employé had been injured by one of the machines while removing shells therefrom, issued orders that the power should be turned off such machines while doing such work, and it appeared that if such rule had

been in force the accident could not have happened, the mere fact of the issuing of such orders at that time does not support a conclusion that such owners were guilty of actionable negligence in not issuing the orders before the accident occurred: Morris v. Winchester Repeating Arms Co., 73 Conn. 680; s. c. 49 Atl. Rep. 180.

¹⁹ Gulf & C. R. Co. v. Williams (Tex. Civ. App.), 39 S. W. Rep. 967 (no off. rep.).

tion of such engineer, and exercising ordinary care in so doing, it being impossible to control the link properly with a stick by reason of its shape, cannot recover for the injuries sustained, he having signed a written contract forbidding him to go between cars, and requiring him to use a stick.²⁰

§ 4146. Questions for the Jury with Respect to this Subject.—Whether an employer has been guilty of negligence in failing to discharge this duty has been often held to be a question for a jury.²¹ For example, it has been held that whether a salt-mining company was negligent in failing to make rules with regard to drawing off salt from a bin by chutes below while employes were at work therein, is a question for the jury, where it is undisputed that one working at the bin, standing on the salt, might easily become engulfed in the salt so as to be unable to extricate himself.²² So, it has been held to be a question of fact for the jury whether the negligence of a railroad company, in omitting to enact proper rules for the protection of car-repairers while at work on a cripple-track, coöperated with that of another coemployé who removed a flag put up before work was commenced, where the company made no distinct rule for their protection, but left it to subordinates in the yard to establish such rules as they thought reasonable, and there is evidence that *no particular persons* were designated as alone authorized to remove the flag. This last fact was found by the jury to constitute negligence.²³ Upon this question the distinction has been taken that whether the business of an employer is of such a nature as to *require rules*, is a question for the court, but the question of the *sufficiency* of rules provided by the employer is for the jury;²⁴ but the propriety of this distinction is doubtful.

§ 4147. Instructions to Juries with Reference to this Duty.—An instruction to a jury that employers are bound to adopt only such rules as *experience* shows to be necessary, has been criticised as being

²⁰ *Richmond &c. R. Co. v. Finley*, 63 Fed. Rep. 228; s. c. 25 U. S. App. 16; 12 C. C. A. 595; rev'g s. c. *sub nom.* *Finley v. Richmond &c. R. Co.*, 59 Fed. Rep. 419.

²¹ *Hill v. Lake Shore &c. R. Co.*, 22 Ohio C. C. 291; s. c. 12 Ohio C. D. 241 (question for jury whether company should have adopted rule requiring locomotive-engineer to give warning to trainmen of his intention to apply steam emergency brakes).

²² *Eastwood v. Retsof Min. Co.*, 86 Hun (N. Y.) 91; s. c. 34 N. Y. Supp. 196; 68 N. Y. St. Rep. 38; s. c. *aff'd*, 152 N. Y. 651 (*mem.*).

²³ *Abel v. Delaware &c. Canal Co.*, 128 N. Y. 662; s. c. 40 N. Y. St. Rep. 626; 48 Am. & Eng. R. Cas. 430; 28 N. E. Rep. 663.

²⁴ *Southern Pac. Co. v. Wellington* (Tex. Civ. App.), 36 S. W. Rep. 1114 (no off. rep.).

too narrow, even though *general* experience is meant thereby, as they must adopt such rules as persons of ordinary care would discover and must know would be necessary for the safety of employ  s, though the conditions may be new to the employers, and they have had no experience in such cases.²⁵

  4148. **Instances where the Failure to Provide Suitable Rules has been Held to be Negligence as Matter of Law.**—A master has been held negligent, as matter of law, where he failed to provide a rule or regulation requiring those at the top of a chute in his lumber-mill to cry out a warning to those working at the foot of the chute before sliding a heavy piece of lumber down the chute.²⁶ In an action against a city by an employ   to recover damages for an injury received while taking down a fire-alarm wire, the question as to whether the defendant was negligent in omitting to adopt suitable rules governing such service has been held to be a *question for the court*, in the absence of any evidence tending to show the necessity and practicability of such rules, unless the necessity and propriety of promulgating rules in the particular situation were so obvious as to make the matter one of common knowledge and experience.²⁷ The employment of a car-repairer being very hazardous when he is at work under a car on a track on which switching is being done, the railway company stands under the duty, as matter of law, of making and promulgating a rule requiring the placing of danger-flags on cars when car-repairers are under them, and forbidding any coupling to be done by a locomotive while repairers are so engaged; and the failure to make and promulgate such a rule has been held negligence as matter of law.²⁸

²⁵ *Hill v. Lake Shore &c. R. Co.*, 22 Ohio C. C. 291; s. c. 12 Ohio C. D. 241 (question for jury whether company should have adopted rule requiring locomotive-engineer to give warning to trainmen of his intention to apply steam emergency brakes).

²⁶ *Hartvig v. Northern Pac. Lumber Co.*, 19 Or. 522; s. c. 25 Pac. Rep. 358.

²⁷ *Wagner v. Portland*, 40 Or. 389; s. c. 60 Pac. Rep. 985; 67 Pac. Rep. 300. In this case, there was no proof that rules requiring the fire-alarm wires to be cut wherever they crossed primary wires, or requiring the current to be turned off the primary wires while the employ  s were working near them, were practicable or necessary, or that other persons engaged in simi-

lar work had adopted and put in operation such rules, with serviceable results; and their necessity and practicability were not obvious. The court held that the proper conduct of the work was a matter of detail, within the discretion of the workmen themselves: *Wagner v. Portland*, *supra*.

²⁸ *Pool v. Southern Pac. R. Co.*, 20 Utah 210; s. c. 58 Pac. Rep. 326. In like manner, where a side-track of a railroad ran from the main track on an incline, the failure of the company to provide rules and regulations to secure and protect cars placed on the side-track from getting upon the main track if their brakes should not be sufficiently set, was negligence; and hence, where an employ   was injured by reason of the company's failure to properly

§ 4149. Evidence Bearing on the Question of Negligence in Failing to Establish Such Rules and Regulations.—Again, whether the employer has exercised reasonable care in this respect is, as in other relations, to be tested, in part at least, by the teachings of experience; so that where his *business has been conducted for years without accident*, in the absence of a particular rule, his failure to promulgate it is not evidence of negligence.²⁹ In the case of a railroad company, it has been held that in order to take to a jury the question whether it has been guilty of the want of reasonable care in promulgating an appropriate rule, which might have avoided an injury, there ought to be proof that *such a rule was in operation on other roads*, or that it was necessary or practicable under the circumstances, unless its necessity and propriety are so obvious as to be a question of common experience and knowledge,—especially where it affirmatively appears that its existing rules reasonably provided against accidents.³⁰

ARTICLE II. PROPRIETY, SUFFICIENCY, AND REASONABLENESS OF SUCH RULES AND REGULATIONS.

SECTION

4152. Principles to be applied in determining the propriety and sufficiency of such rules.

4153. What rules and regulations have been held good and sufficient.

SECTION

4154. What rules and regulations have been held insufficient.

4155. Reasonableness of such rules.

4156. What rules and regulations have been held reasonable.

4157. What rules and regulations have been held unreasonable.

§ 4152. Principles to be Applied in Determining the Propriety and Sufficiency of Such Rules.—One of the tests to be applied in de-

secure such cars, it was liable therefor: *Lake Shore &c. R. Co. v. Topliff*, 18 Ohio C. C. 709; s. c. 6 Ohio C. D. 234; 2 Ohio Dec. 522. While a railroad hand was assisting in unloading gravel from one of the defendant's cars, the person in charge of the work signalled the engineer to back the train; whereupon the engineer did back it without giving any notice or warning that he intended to do so, and such laborer was thrown off the car and killed. On the trial the plaintiff offered to prove that the defendant was negligent in not having adopted a proper system for warning its employes of intended movements of the cars. It was held that the court erred in rejecting such evidence;

since it was the duty of the defendant to guard the deceased against such perils as might have been avoided by the observance of ordinary diligence on its part, and not carelessly to omit to provide rules which, faithfully carried out, would insure safety; and it was the design of the evidence offered to show that the defendant had failed to observe this duty: *Campbell v. New York &c. R. Co.*, 35 Hun (N. Y.) 506.

²⁹ *Morgan v. Hudson River Ore &c. Co.*, 133 N. Y. 666; s. c. 45 N. Y. St. Rep. 112; 31 N. E. Rep. 234.

³⁰ *Berrigan v. New York &c. R. Co.*, 131 N. Y. 582; s. c. 42 N. Y. St. Rep. 858; 30 N. E. Rep. 57.

termining the sufficiency of the rules devised and put in execution by a master to promote the safety of his servants, is to consider the length of time during which such rules have been in operation: if they have been in force for a considerable length of time, during which they have accomplished the purpose sought by the master in establishing them, they will be deemed to be sufficient.¹ In considering the question of their sufficiency, it is to be kept in mind that the general presumption of law, founded on the presumption of right acting, is in favor of their sufficiency,—diligence and not negligence being presumed in the absence of proof to the contrary.²

§ 4153. What Rules and Regulations have been held Good and Sufficient.—The following rules have been held sufficient to exonerate the master from liability for an injury to his servant:—A rule by a railroad requiring car-inspectors and repairmen, before they go under or between cars, to display a red signal in the direction from which a train could approach, and requiring trainmen under no circumstances to back or couple on to any car while such flag is displayed;³ a rule to send all cars used in carrying ore, after they are unladen at the points of shipment, to the company's repair-shops for *inspection*, and for such repairs as any of them may be found to require,—so as to exonerate the company from the imputation of negligence in case one or more of the cars of such a train get out of repair;⁴ a rule requiring a red flag to be hung out from a car on the track in process of repair, although it does not in terms prohibit fellow servants of the car-repairers from moving other cars against the one from which the flag is exhibited,—especially when another of its rules declares that a red flag indicates danger and requires the stopping of a train by the engineer upon seeing it;⁵ a rule promulgated by a railway company requiring conductors to "look after" the switches used by their engines,—the test as to the sufficiency of the rules being to consider whether, if they are faithfully observed, they will afford reasonable protection to the employés, and it not being necessary that such a rule should specifically require the particular employé who opens a switch to close it.⁶

¹ *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.) 337; s. c. 43 Atl. Rep. 246; *Murphy v. Hughes*, 1 Pen. (Del.) 250; s. c. 40 Atl. Rep. 187.

² *Murphy v. Hughes*, 1 Pen. (Del.) 250; s. c. 40 Atl. Rep. 187; *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.) 337; s. c. 43 Atl. Rep. 246.

³ *Peterson v. Chicago & C. R. Co.*,

64 Mich. 621; s. c. 10 West. Rep. 870; 34 N. W. Rep. 260.

⁴ *Flannagan v. Chicago & C. R. Co.*, 50 Wis. 462.

⁵ *Corcoran v. Delaware & C. R. Co.*, 126 N. Y. 673; s. c. 38 N. Y. St. Rep. 251; 27 N. E. Rep. 1022.

⁶ *Davis v. Staten Island & C. R. Co.*, 1 App. Div. (N. Y.) 178; s. c. 72 N. Y. St. Rep. 559; 37 N. Y. Supp. 157.

§ 4154. What Rules and Regulations have been held Insufficient.

—A rule of a railway company requiring repair-men to put up a red flag upon commencing to repair cars upon a cripple-track, unaccompanied by a rule prohibiting other employés from taking it down to remove cars from such track, unless by the consent or direction of such repair-men, has been held inadequate, in that it leaves the latter exposed to the danger of the mistake or negligence of other employés.⁷ A general rule that freight is to be safely loaded so that it cannot fall off the cars, has been held not sufficient as a rule for *loading timber* above the sides of the car, so as to relieve the railroad company from liability for injury to a servant by the fall of timber from a gondola-car, on which it was piled above the sides without stakes to hold it, although stakes were furnished by the company to be used in the discretion of its servants.⁸ The test by which to determine the sufficiency of the rule devised for the protection of *car-repairers* is to consider whether, if faithfully observed by the employés of the company, a reasonable person in the situation of a car-repairer would rely upon it to afford him protection.⁹

§ 4155. Reasonableness of Such Rules.—The rules and regulations of corporations, in order to be valid, must be reasonable,¹⁰ and whether they are so or not will, in any given case, ordinarily present a *question of law for the court*.¹¹ There are, however, decisions which hold that the question whether the rules and regulations devised and

⁷ *Abel v. Delaware &c. Canal Co.*, 128 N. Y. 662; s. c. 40 N. Y. St. Rep. 626; 28 N. E. Rep. 663; 48 Am. & Eng. R. Cas. 430.

⁸ *Ford v. Lake Shore &c. R. Co.*, 124 N. Y. 493; s. c. 12 L. R. A. 454; 36 N. Y. St. Rep. 494; 9 Rail. & Corp. L. J. 386; 26 N. E. Rep. 1101. A rule of such a company requiring all switching on repair-tracks to be done, as far as possible, at night, and that actual notice shall be given of any switching done in the daytime to all men working upon the repair-tracks, before the switch-engine shall enter, has been held not reasonably sufficient for the protection of the employés, where the rule does not designate the person upon whom the duty of giving the notice shall rest: *Evansville &c. R. Co. v. Holcomb*, 9 Ind. App. 198; s. c. 36 N. E. Rep. 39.

⁹ *St. Louis &c. R. Co. v. Triplett*, 54 Ark. 424; s. c. 11 L. R. A. 773; 15 S. W. Rep. 831; 16 S. W. Rep.

266. In an action against a railway company for negligently causing the death of a car-repairer as the result of kicking cars from a main track on to a siding where he was at work under a car, the evidence was held to support a finding that the rules of defendant company were insufficient, there being no rule prohibiting the kicking of cars on such track, or prohibiting the running of v. *New York &c. R. Co.*, 170 N. Y. cars on such track without an engine being attached to them: *Dowd* 459; s. c. 63 N. E. Rep. 541; aff'g s. c. 61 App. Div. (N. Y.) 612 (*mem.*); 70 N. Y. Supp. 1138 [following *Doing v. New York &c. R. Co.*, 151 N. Y. 579; s. c. 45 N. E. Rep. 1028; rev'g s. c. 73 Hun (N. Y.) 270].

¹⁰ 1 Thomp. Corp., § 1021.

¹¹ 1 Thomp. Corp., § 1022; *Little Rock &c. R. Co. v. Barry*, 84 Fed. Rep. 944; s. c. 56 U. S. App. 37; 28 C. C. A. 644.

promulgated for the purpose of affording protection to its employés are reasonably sufficient to that end, presents a *question for a jury*.¹² Another court has reasoned that a railroad company should not be charged with negligence because of the adoption and use of rules for the management of its trains, unless such rules are clearly shown to be unreasonable or insufficient; since they are presumably established as the best for avoiding accidents.¹³

§ 4156. What Rules and Regulations have been held Reasonable.—A rule of a railway company, warning its employés that going between cars while *in motion* to couple and uncouple them is dangerous and a violation of duty, and providing that such employés shall assume the risk of so doing, and requiring the use of *sticks* to make *couplings*, is reasonable;¹⁴ and so is a rule imposing the duty upon employés to examine for their own safety the condition of engines and machinery before using them, so as to ascertain as far as practicable their condition and soundness.¹⁵

§ 4157. What Rules and Regulations have been held Unreasonable.—Among the rules and regulations of employers which have been held unreasonable, we find a rule of a mining company, posted in its mine, warning its workmen against risking themselves under bad

¹² Gulf &c. R. Co. v. Finley, 11 Tex. Civ. App. 64; s. c. 32 S. W. Rep. 51; Southern Pac. Co. v. Wellington (Tex. Civ. App.), 36 S. W. Rep. 1114 (no off. rep.).

¹³ Little Rock &c. R. Co. v. Barry, 84 Fed. Rep. 944; s. c. 56 U. S. App. 37; 28 C. C. A. 644. It has been held that the rules of a railroad company, based upon the experience of many years of railroad operation, deliberately adopted, made familiar to its employés, and under which the road has been operated for many years, are not unreasonable merely because they do not provide for warning the employés upon special or extra trains of the movements or whereabouts of other locomotives, which are liable to meet or to be overtaken by the special or extra trains; and hence, that, as matter of law, the adoption of rules containing this deficiency does not exhibit negligence, the question of their reasonableness being for the court, and not for the jury: Little Rock &c. R. Co. v. Barry, 84 Fed. Rep. 944; s. c. 56 U. S. App. 37;

28 C. C. A. 644. See also the following cases as sanctioning such a system of rules: Illinois &c. R. Co. v. Neer, 26 Ill. App. 356; s. c. 31 Ill. App. 126 (where the court said that the question as to the sufficiency of such a method was *for the jury*, but that they thought the jury were bound to accept as a fact proved without contradiction that it was a prudent and proper method, and that adherence to it was not negligence in this case); Wright v. New York &c. R. Co., 25 N. Y. 562; Kenelty v. Baltimore &c. R. Co., 166 Pa. St. 60; s. c. 30 Atl. Rep. 1014; McGrath v. New York &c. R. Co., 15 R. I. 95; aff'g s. c. 14 R. I. 357. See Enright v. Toledo &c. R. Co., 93 Mich. 409; s. c. 53 N. W. Rep. 536, where the disadvantages of a departure from such system are shown.

¹⁴ Memphis &c. R. Co. v. Graham, 94 Ala. 545; s. c. 10 South. Rep. 283.

¹⁵ Memphis &c. R. Co. v. Graham, 94 Ala. 545; s. c. 10 South. Rep. 283.

roofs, and requiring them to ascertain whether places have been made safe before entering them,—the court reasoning that such a rule could not operate to cast any burden of investigation or extraordinary care upon a workman who was killed by the falling of a roof, such rules being nothing more than attempts to make laws, and being, in so far as they were claimed to operate as a contract against the negligence and dereliction of the employer, void as against public policy.¹⁶

ARTICLE III. PROMULGATION, NOTICE, AND ENFORCEMENT OF SUCH RULES AND REGULATIONS.

SECTION	SECTION
4159. Promulgation and notice of such rules and regulations.	4164. When servant assumes risk of injury from habitual and known violation of a rule.
4160. When rules need not be promulgated in print or in writing.	4165. Consequence of the failure of the employer to comply with his own rules.
4161. Duty to enforce such rules.	4166. Observance by employer of his own rules presumed in the absence of proof.
4162. Master not an insurer of their enforcement.	4167. Right of employé to rely upon the observance of such a rule.
4163. Effect of the habitual violation of such rules.	

§ 4159. Promulgation and Notice of such Rules and Regulations.

—It need not be said that an employer does not discharge his full duty merely by *adopting* rules designated to promote the safety of his servants, unless he *promulgates* the rules to those who are required to obey them, or uses reasonable efforts to that end. For example, an employer cannot, as matter of law, escape liability for injuries to a servant who is temporarily employed, upon the ground that the employer had furnished suitable materials and appliances, the use of which would have prevented the injury, where the servant was not aware that they had been furnished, and the employer had not adopted any *rules or regulations* requiring or directing his agent in charge of the work to advise servants temporarily employed of the existence of such materials and appliances; but in such a case the question of the master's negligence is for the jury.¹ So, it has been held

¹⁶ *Himrod Coal Co. v. Clark*, 197 Ill. 514; s. c. 64 N. E. Rep. 282; aff'g s. c. 99 Ill. App. 332.

¹ *Tully v. New York & C. S. S. Co.*, 10 App. Div. (N. Y.) 463; s. c. 42 N. Y. Supp. 29; s. c. aff'd, 162 N. Y. 614 (*mem.*) The case was that a longshoreman, temporarily em-

ployed to load a ship, was sent forward on a lower deck to stow freight and fell through an open hatchway which he could not see because a hatchway on the upper deck had been closed to protect the cargo from rain. There were lanterns in a building on the dock,

that the promulgation of a rule, requiring the boom attached to a derrick used in connection with an engine to be lowered before shifting or moving the engine, to the engineer only, is not enough where the engineer is, in the general work, including the adjustment of the engine and the lowering of the boom, under the orders of the foreman.³ In an action for the death of an employé who was engaged as a sausage-maker, and was working at a chopping-machine, it has been held that a rule of defendant that the employés of the sausage-room were forbidden to interfere with the machinery when it became disordered will not preclude a recovery, where the only notice the deceased had was a statement by the foreman that there was such a rule, and the foreman himself ordered deceased to do the work in doing which he was killed.⁴ The writer challenges the holding of the Supreme Court of Appeals of West Virginia, to the effect that the duty of a master to make and promulgate proper rules for the conduct of his business does not include a personal duty to see that notice of such rules comes to the knowledge of all of his employés to be governed thereby, but he performs his duty in that respect if he chooses competent servants to receive and transmit the necessary orders; and that an employé assumes the risk of the failure of such servants to perform their duty.⁵ The writer maintains, on principle, that the duty of establishing reasonable rules for the conduct of his work, so as to promote the safety of his servants, is one of the absolute and unassignable duties of the master, and that the master is therefore responsible for the negligence of any particular servant to whom he assigns the duty of promulgating or publishing such rules.

§ 4160. When Rules Need Not be Promulgated in Print or in Writing.—There is no rule of law which renders it imperative that a rule established by a master to promote the safety of his employés should be in *writing* or in *print*. Thus, it has been held that the failure to reduce to a written rule a custom of a railroad company requiring employés engaged in handling cars at a given point to notify those engaged in repairing before setting cars in upon the repair-track, does not render the company liable for an injury to a car-re-

which the injured employé might have had, but of which he had no knowledge: *Tully v. New York & C. S. S. Co.*, *supra*.

³*Daley v. Brown*, 60 N. Y. Supp. 840; s. c. 45 App. Div. (N. Y.) 428; s. c. *aff'd*, 167 N. Y. 381; 60 N. E. Rep. 752. The rule should have been communicated to the foreman; so that where the plaintiff, while as-

sisting to shift the engine under the orders of the foreman, was injured by reason of the strain of the unlowered boom causing the engine to lunge toward him, he could recover damages from the master.

⁴*Daubert v. Western Meat Co.*, 135 Cal. 144; s. c. 67 Pac. Rep. 133.

⁵*Oliver v. Ohio River R. Co.*, 42 W. Va. 703; s. c. 26 S. E. Rep. 444.

pairer caused by the failure to give such notice.⁶ A railroad company does not owe the engineer of a train the duty of providing a *written or printed rule* as to the use of the automatic conductor's cord, operating the air-brakes, when the engineer whistles for brakes, where the trainmen whose duty it is to pull such cord are *orally* instructed as to its use.⁷

§ 4161. **Duty to Enforce such Rules.**—It is not only the duty of the employer to devise, establish and publish such rules, but it is his duty to use reasonable diligence to the end that they be enforced; otherwise the mere making and publishing of them would be nugatory and might even be fraudulent. If, therefore, it comes to the knowledge of the employer that the rules which he has devised for the protection of his servants are *habitually disobeyed* by a particular servant, and he takes no steps to remedy such misconduct, he will be liable to a *fellow servant* of such disobedient servant for an injury happening through the violation of such a rule.⁸

⁶ *Campbell v. Texas &c. R. Co.*, 16 Tex. Civ. App. 665; s. c. 39 S. W. Rep. 1104; 2 Am. Neg. Rep. 658.

⁷ *Whalen v. Michigan &c. R. Co.*, 114 Mich. 512; s. c. 4 Det. Leg. N. 653; 72 N. W. Rep. 323.

⁸ *Whittaker v. Delaware &c. R. Co.*, 126 N. Y. 544. See also, *International &c. R. Co. v. Hinzle*, 82 Tex. 623; s. c. 18 S. W. Rep. 681; *St. Louis &c. R. Co. v. Triplett*, 54 Ark. 289; s. c. 11 L. R. A. 773; 15 S. W. Rep. 831; *Nolan v. New York &c. R. Co.*, 70 Conn. 159; s. c. 39 Atl. Rep. 115 (*dictum*); *Sprong v. Boston &c. R. Co.*, 58 N. Y. 56; *Koosorowska v. Glasser*, 8 N. Y. Supp. 197 (employer failed to see that his order was obeyed to keep excavated earth shovelled away from edge of trench eleven to twelve feet deep in which servant was working, who was unable to see whether order was being obeyed—edge caved in, killing him). There is, however, a decision to the effect that negligence can not be imputed to an employer of experienced men, so as to render him liable for injuries sustained by them, because he permits them to relax regulations or disregard his general instructions or advice, when they choose to do so for their own

convenience and with knowledge of the risk: *The Persian Monarch*, 55 Fed. Rep. 333; rev'g s. c. 49 Fed. Rep. 669. The prevailing point in the case was that the master had furnished suitable machinery and that the servants had elected to use such as was *unsuitable*. As to this, see *ante*, § 4003. For the foreman in a mine to allow a man in the mine at a station part way up an incline, on which cars ran, sometimes to give a signal for the men to stop work and go out up the incline if the signal was not given at the proper time from above, although he could not possibly know when the cars would be sent down from the top, in breach of a rule that the signal should be given by some person on the surface,—constitutes negligence on the part of the employer; and an employé who was injured by a descending car after such signal, while going up the incline, although he was going in disobedience to the rule, is entitled to recover. Having adopted the rule, the company must be held responsible for disregarding it: *Silver Cord &c. Min. Co. v. McDonald*, 14 Colo. 191; s. c. 23 Pac. Rep. 346.

§ 4162. **Master Not an Insurer of their Enforcement.**—But, whatever the sound view on this question may be, it is clear, upon all the analogies, and upon good authority, that the employer is not an *insurer* of the observance of his rules, but that the measure of his duty is discharged when he exercises reasonable care to the end of enforcing them.⁹

§ 4163. **Effect of the Habitual Violation of Such Rules.**—Where the rules and regulations established by the master, with the view of promoting the safety of his servants, are habitually violated by them with his knowledge or express consent, or under such circumstances, in such a manner, and for such a length of time as to raise a presumption that the master must have become aware of such habitual violation and must have approved the same,—then such rules and regulations will be regarded as having been *abrogated* by the master, and any case calling for their application will stand on the same footing as though they had never been established.¹⁰ Mere proof of a custom on the part of the employes of a master to violate a rule intended to promote their safety,—*e. g.*, a rule forbidding brakemen to go between moving cars to uncouple them,—is not sufficient to preclude the company from relying on such violation as a defense, but it must be shown that such a custom of violating the rule was so universal and notorious that the company may be presumed to have known of, and to have ratified it, thereby virtually abrogating the rule.¹¹ Evidence which shows a violation by the servants of an em-

⁹ Rutledge v. Missouri Pac. R. Co., 123 Mo. 121; s. c. 24 S. W. Rep. 1053; s. c. aff'd *in banc*, 27 S. W. Rep. 327.

¹⁰ Brookside Coal Min. Co. v. Dolph, 101 Ill. App. 169 (failure to see that "drags" were used on cars being hauled out of mine, to prevent their descending should they become detached from cables); Galveston & C. R. Co. v. Slinkard, 17 Tex. Civ. App. 585; s. c. 2 Am. Neg. Rep. 654; 39 S. W. Rep. 961 (rule prohibiting brakemen from coupling or uncoupling cars while in motion was uniformly disobeyed, and the company had knowledge of the fact); Wright v. Southern Pac. R. Co., 14 Utah 394; Pool v. Southern Pac. R. Co., 20 Utah 210; s. c. 58 Pac. Rep. 326; Konold v. Rio Grande & C. R. Co., 21 Utah 379; s. c. 60 Pac. Rep. 1021.

¹¹ Fluhrer v. Lake Shore & C. R. Co., 121 Mich. 212; s. c. 80 N. W.

Rep. 23. In a case calling for the application of this doctrine, it appeared that the plaintiff, a track-hand, was injured while working on defendant's track, by an engine which was being run into a round-house by a fireman, contrary to a regulation of the railroad company forbidding firemen to handle its engines. It appeared that the master mechanic of the road, who lived close by, had knowledge of the practice, on the part of engineers at that place, of disobeying the orders of the company and letting the firemen run the engines into the round-house, but that the company still retained in its employ the engineers who had so violated its rules. The company was held liable: Ohio & C. R. Co. v. Collarn, 73 Ind. 261; s. c. 38 Am. Rep. 134 (notice to master mechanic, whose duty it was to employ and discharge engineers and firemen, was notice to the com-

ployer of his rules and regulations on only two occasions, one of them being the occasion of the accident which is the foundation of the action, has been held not sufficient to show an abrogation of such rules and regulations.¹²

§ 4164. When Servant Assumes Risk of Injury from Habitual and Known Violation of a Rule.¹³—The obligation of an employer, in a complicated business, where a large number of servants are mutually engaged, to formulate and enforce proper rules for their conduct, will not authorize a claim for damages to one of such employes, who, with knowledge of repeated violations of an established rule, continues thereafter in the service, until injured by reason thereof, without notice by him to the master, since he thereby assumes the risk.¹⁴

§ 4165. Consequence of the Failure of the Employer to Comply with His Own Rules.—Where the rules of a railroad company require trackmen to use the utmost caution, and specify the precautions to be taken when rails are being removed, a failure by the trackmen to comply with the requirements of such rules will render the company liable for injuries resulting to trainmen from such failure, even where the trainmen have been notified to look out for the trackmen at a certain place; since the observance of the rules was required of the master in the performance of his absolute duty to the trainmen to furnish them a reasonably safe track.¹⁵ The failure of a railroad company to observe its own rules by notifying an extra train, ordered to run over the working-limits of a work-train, that the work-train is within such limits, and to guard itself against the work-train, is negligence rendering the company liable for injuries to an employe on the work-train, which are the proximate result of such failure.¹⁶

§ 4166. Observance by Employer of His Own Rules Presumed in the Absence of Proof.—Thus, where a railroad company has estab-

pany). In another case it was held that a railroad employe was not precluded from recovering by the fact that the terms of a *printed rule* did not require lookouts on trains backing in the yards, where it was shown that the officers of the road required lookouts to be stationed on such trains in the yards, and such had long been the rule and practice in and about the yards: *Galveston &c. R. Co. v. Collins*, 24 Tex. Civ. App. 143; s. c. 57 S. W. Rep. 884.

¹² *Konold v. Rio Grande &c. R. Co.*, 21 Utah 379; s. c. 60 Pac. Rep.

1021. See also, *Fluhrer v. Lake Shore &c. R. Co.*, 121 Mich. 212; *Carlson v. Cincinnati &c. R. Co.*, 120 Mich. 481.

¹³ See also, *post*, § 4625.

¹⁴ *Reberk v. Horne &c. Co.*, 85 Minn. 326; s. c. 88 N. E. Rep. 1003 (failure to enforce rule prohibiting the throwing of pieces of tin around a room in a tinware factory).

¹⁵ *Chicago &c. R. Co. v. Eaton*, 194 Ill. 441; s. c. 62 N. E. Rep. 784; *aff'g* s. c. 96 Ill. App. 570.

¹⁶ *Louisville &c. R. Co. v. Heck*, 151 Ind. 292; s. c. 11 Am. & Eng. R. Cas. (N. S.) 382; 50 N. E. Rep. 988.

lished proper rules for the inspection of cars by its employés, it cannot be assumed, in the absence of proof, that such rules were not observed, for the purpose of charging the company with negligence and liability on account of an injury to an employé resulting from a defective car.¹⁷ The trustees of the New York and Brooklyn Bridge will be held to have authorized or adopted a rule by the superintendent in charge thereof, directing his subordinates to make a record of all accidents of all kinds occurring on the bridge, and to enter the same in a book kept for the purpose.¹⁸

§ 4167. Right of an Employé to Rely upon the Observance of such a Rule.—Though a rule of notifying a tower watchman of the approach of *trains run on the wrong track* was adopted primarily for the safety of the trains, and was not for the protection of trackmen, yet, where the custom had been followed for a long time without interruption, a watchman accustomed to receive the notice provided for by the rule might properly rely on the rule being observed when going on the tracks to throw a switch for a train approaching on the proper track.¹⁹

ARTICLE IV. DUTY OF ESTABLISHING AND ENFORCING RULES IN PARTICULAR LINES OF SERVICE.

SECTION	SECTION
4169. Importance of this duty in railway service.	enforce rules to protect its servants.
4170. Illustrations of this duty in railway service.	4172. Interpretation of railway rules and regulations.
4171. When railroad company under no duty to make and	4173. Duty of promulgating rules to protect servants engaged in blasting.

§ 4169. Importance of this Duty in Railway Service.—"It is settled doctrine that a railroad company is bound to guard its employés against negligence of coemployés so far as it can, by the enactment and promulgation of reasonable rules in the management of its

¹⁷ *Hodges v. Kimball*, 104 Fed. Rep. 745; s. c. 44 C. C. A. 193.

¹⁸ *Rogers v. New York & c. Bridge*, 11 App. Div. (N. Y.) 141; s. c. 42 N. Y. Supp. 1046 (action for personal injuries—book offered in evidence to prove happening at same place of somewhat similar accidents, though slightly different in

detail and cause from the one in question).

¹⁹ *Lake Shore & c. R. Co. v. Schultz*, 19 Ohio C. C. 639 (company failed to notify him because telephone was out of order; it was negligence not to anticipate such a probable contingency and provide other means of notifying watchman).

business. The rule that the servant takes the risks of the business is subject to the qualification that the master must exercise reasonable care to guard the servant while engaged in his duties, from unnecessary hazards, including hazards from negligence of coemployés. In the business of a railroad this duty is especially important in view of the dangers of the employment, and the serious consequence, likely to ensue from the negligence of coemployés.”¹

§ 4170. **Illustrations of this Duty in Railway Service.**—It is the duty of a master engaged in such a complex and hazardous business as operating a railroad to adopt and promulgate definite and suitable rules or regulations for the protection of his servants; but when he has discharged this duty he is not liable for an injury proximately resulting from an employé’s failure to observe such rules or regulations.² It is, for example, the duty of a railroad company to establish regulations advising its servants, engaged in moving cars on the track, of the whereabouts of an employé at work in a dangerous position between the cars, and to provide adequate means of warning him of the approach of danger.³ So, it is the duty of such company to make, publish and enforce adequate regulations which, if carried out, would advise its employés, engaged in moving cars at a station, of the duty of exercising care to avoid injuring other employés engaged in moving cars upon its switch-tracks, by which they would be notified of the approach of moving cars.⁴ So, it is the duty of a railroad com-

¹ *Abel v. Delaware &c. Canal Co.*, 128 N. Y. 662; s. c. 40 N. Y. St. Rep. 626; 48 Am. & Eng. R. Cas. 430; 28 N. E. Rep. 663; *Lake Shore &c. R. Co. v. Topliff*, 18 Ohio C. C. 709; s. c. 6 Ohio C. D. 234; 2 Ohio Dec. 522 (siding temporarily constructed on inclined plane, so that cars ran therefrom on to main track); *Gulf &c. R. Co. v. Finley*, 11 Tex. Civ. App. 64; s. c. 32 S. W. Rep. 51 (duty to make rules governing the work in railroad-yards); *Whittaker v. Delaware &c. Canal Co.*, 126 N. Y. 544 (must not only frame and publish proper rules for guidance and control of its servants and conduct of its business, but must also exercise such a supervision over them and the prosecution of its business as to have reason to believe that it is being conducted in pursuance of such rules); *International &c. R. Co. v. Hinzie*, 82 Tex. 623 (must establish regulations which would advise its

servants moving cars at a station of the duty of care against injuring other employés at work and liable to injury from movement of cars on switch-tracks; must also provide means to notify employés on such tracks of approach of moving cars. Such regulations should be published and made known to employés. Company cannot avail itself of a rule which it has not properly published, and has uniformly neglected to enforce,—as where a painter from the car-shops, at work on cars on side-track, did not know and had not been informed of rule requiring use of danger-flags under such circumstances).

² *Terre Haute &c. R. Co. v. Becker*, 146 Ind. 202; s. c. 45 N. E. Rep. 96 (work-train left station on time of regular train); citing *Rose v. Boston &c. R. Co.*, 58 N. Y. 217.

³ *International &c. R. Co. v. Hall*, 78 Tex. 657; s. c. 15 S. W. Rep. 108.

⁴ *International &c. R. Co. v. Hin-*

pany to provide suitable rules and regulations for the operation of its hand-cars,—an operation which is attended with considerable danger by reason of the speed at which it is often necessary for them to be propelled to avoid trains.⁵ A railroad company does not as matter of law perform all its duty to its employés by preparing a time-table and printed rules for the running of the trains on regular time, without making arrangements for emergencies arising from a regular train being behind time;⁶ as well as some suitable and safe method for running special and irregular trains.⁷ A railroad company which *knowingly* permits its cars to be kicked back, for the purpose of loading them, on tracks leading into a repair-shop, where unguarded and unwarned employés are at work, in such a manner that they are liable to back through the doors leading into the repair-shop, *without making a rule* to prevent such practice, is liable for an injury to an employé caused thereby,—especially where it allows cars with defective brakes to be thus kicked back; such rule being necessary in order to discharge the duty of the company of furnishing the men in the shop with a safe place in which to work.⁸ The *absence of a regulation* by a railway company, requiring engineers of trains approaching a quarry to sound their whistles before reaching it, for the protection of workmen at such quarry, is not unreasonable, where another rule is established requiring the workmen to give signals to approaching trains when there is any reason for slowing up or stopping the trains, and it does not appear that the proposed regulation would have afforded protection to the workmen.⁹

zie, 82 Tex. 623; s. c. 18 S. W. Rep. 681.

⁵ Wallin v. Eastern R. Co., 83 Minn. 149; s. c. 86 N. W. Rep. 76; 54 L. R. A. 481.

⁶ Sprague v. New York & C. R. Co., 68 Conn. 345; s. c. 36 Atl. Rep. 791.

⁷ Darrigan v. New York & C. R. Co., 52 Conn. 285.

⁸ Doing v. New York & C. R. Co., 151 N. Y. 579; s. c. 45 N. E. Rep. 1028; rev'g s. c. 73 Hun (N. Y.) 270. A count in a *complaint* brought by the personal representative of a deceased employé against the employer, which charges that the injury resulted from the failure of the employer to discharge its duty to its employés by neglecting to provide rules for signals to engineers of switch-engines in a yard where there are many tracks, and where two or more engines are employed near each other at night, it being averred that the signals used

were the same for all engines, and that plaintiff's intestate was killed in consequence of the engineer of the engine with which he was working mistaking a signal intended for another engineer,—states a good cause of action at common law: Louisville & C. R. Co. v. York, 128 Ala. 305; s. c. 30 South. Rep. 676.

⁹ Kansas City & C. R. Co. v. Hammond, 58 Ark. 324; s. c. 24 S. W. Rep. 723. The plaintiff, defendant's section-hand, was run over and injured by cars which were being "kicked" about defendant's railroad-yards. Defendant had no rules for the management of the yard as to the conduct of section-hands. Plaintiff's witnesses testified that it was impracticable by any system of whistling or bell-ringing to warn yard-employés of danger, which would not be more confusing than placing a man on the cars which

§ 4171. **When Railroad Company under No Duty to Make and Enforce Rules to Protect Its Servants.**—We extract from one case the statement that a railroad company is under no legal duty to make, establish, and enforce rules and regulations with respect to the operation of its trains in its freight and coal yards, to protect an employé from obvious risks, or from risks incident to his employment, or from risks arising from his own negligence or that of his coservants.¹⁰ Another court holds that a railroad company operating a single-track road owes no duty to employés upon regular trains to adopt a rule requiring notice to be given to its regular trains of the whereabouts of work-trains or wild trains, in addition to a rule requiring the conductors and enginemen of all work-trains or wild trains, who are furnished with time-tables of regular trains, with such rule printed thereon, to keep their trains out of the way and off the time of all regular trains, and in no case to occupy the main track of the road within ten minutes of the time of any regular train.¹¹

were being kicked, to control them and warn others in danger,—the method commonly in use in railroad-yards. It was held error to refuse an *instruction* that the jury were not authorized to find a rule necessary or proper for the management of the yard in question, unless the proof showed that such rule was in force on some other road, or that it was practicable and reasonable to provide against accident by such a rule, or unless the propriety and necessity of that rule were so obvious as to make it a matter of common knowledge and experience: *Corcoran v. New York &c. R. Co.*, 58 App. Div. (N. Y.) 606; s. c. 69 N. Y. Supp. 73.

¹⁰ *Voss v. Delaware &c. R. Co.*, 62 N. J. L. 59; s. c. *sub nom.* *Delaware &c. R. Co. v. Voss*, 41 Atl. Rep. 224; 12 Am. & Eng. R. Cas. (N. S.) 820; 5 Am. Neg. Rep. 55 (injury from the "kicking" of a car across a yard at a dangerous speed—no averment showing it to be the result of failure to make rules—employé injured while on coal-car unloading coal).

¹¹ *Terre Haute &c. R. Co. v. Becker*, 146 Ind. 202; s. c. 45 N. E. Rep. 96. According to the seemingly untenable view of another court, a jury would not be authorized to find that failure to promulgate rules for railway employés was negligent, and hold the company liable for not having adopted and enforced them,

in the absence of expert testimony that rules were necessary for the protection of the employés, or that other companies had adopted rules under such circumstances; and a nonsuit was proper: *Hebert v. Delaware &c. Canal Co.*, 41 N. Y. St. Rep. 860; s. c. 16 N. Y. Supp. 561; s. c. aff'd, 136 N. Y. 655 (*mem.*) (failure to prescribe the distance at which cars on side-tracks should be placed from a wagon-crossing, so as not to obstruct view of employés on engines—employé riding on step of engine killed in collision with wagon). Another court holds that an exceptional case of emergency requiring a railroad company to adopt a special rule, in addition to the general rules which forbid a rear train to leave a station in less than ten minutes after the departure of the forward train, and provide for signalling at a proper distance in case the forward train stops at an unusual place,—does not arise, where the rear train consists of an engine pushing a snow-plow, proceeding at a greater rate of speed than the forward train and throwing snow so as to render it difficult for the lookout to see ahead, and the forward train is upward of an hour behind its schedule time and stops to attach freight-cars at a siding where freight-trains stop only occasionally; since the general rules, if obeyed, are reasonably suf-

§ 4172. **Interpretation of Railway Rules and Regulations.**—A rule of a railway company that no lumber, wood, stone, materials or tools shall be placed within five feet of the rails, has been held not to apply to a *wing fence* erected at a cattle-guard, since not to permit the ends of such a fence to come within five feet of the rails would destroy the efficacy of the cattle-guards as a means of excluding cattle from the track.¹² A rule of a railroad company requiring *signals* to be given by the foreman of workmen upon its track when any work is to be done which will render its track unsafe or impassable, or unsafe for trains at their usual rate of speed,—does not require signals to be given where the work being done is not such as to render the track impassable or dangerous, so as to render the company liable for injuries to a workman who fails to clear the track for a passing train, and who is acquainted with the usage not to signal approaching trains or slacken their speed, but that the workmen should clear the track.¹³ A rule of a railroad company that *wild trains* must run cautiously around curves and over grade crossings, looking out for trackmen, has been regarded as having been made with reference to the safety of the train, and not the trackmen, where there was evidence that it was not customary to signal trackmen or to provide any special means of warning them of approaching trains, but where they were required to look out for such trains and take care of themselves.¹⁴ A rule of a railroad company that the rear brakeman shall never allow the train to leave the station until certain that the conductor is on the train, does not apply to movements of the train while setting out a car or switching in yards, and cannot be availed of by the defendant company in an action against it by a brakeman for injuries received through the negligent failure of the conductor to set the brakes on a portion of the train which had been detached, the conductor having been absent from his post of duty.¹⁵

ficient to prevent a collision under such circumstances: *Nolan v. New York & C. R. Co.*, 70 Conn. 159; s. c. 39 Atl. Rep. 115 (collision due to failure of employes on preceding train to set out signals upon stopping).

¹² *McKee v. Chicago & C. R. Co.*, 83 Iowa 616; s. c. 13 L. R. A. 817; 10 Rail. & Corp. L. J. 472; 48 Am. & Eng. R. Cas. 154; 50 N. W. Rep. 209.

¹³ *Aurandt v. Chicago & C. R. Co.*, 90 Iowa 617; s. c. 57 N. W. Rep. 442.

¹⁴ *Sullivan v. Fitchburg R. Co.*, 161 Mass. 125; s. c. 36 N. E. Rep. 751. See *Louisville & C. R. Co. v.*

Markee, 103 Ala. 160; s. c. 15 South. Rep. 511 (signal required by statute to be sounded at public crossing, held to be for protection of travelling public, and not for protection of company's employes).

¹⁵ *Pearl v. Omaha & C. R. Co.*, 115 Iowa 535; s. c. 88 N. W. Rep. 1078. A rule of a railroad company, making *conductors* personally responsible for examining cars in their trains at every convenient point, and requiring them with the "help of their men" to know that their cars are in safe condition, applies to a brakeman who claims to have been injured by the unsafe condi-

§ 4173. **Duty of Promulgating Rules to Protect Servants Engaged in Blasting.**—The work of blasting rock with powder or dynamite is so dangerous that it should seem to be the duty of an employer prosecuting such work, to establish reasonable rules and regulations for the protection of his workmen from that frequent species of accident, the explosion of a blast which has failed to explode. Nevertheless, this has been judicially set down as a mere detail of work, with respect to which the workmen must protect themselves from the consequences of each other's negligence. Accordingly, it has been held that there is nothing in the business of drilling out the tamping from a hole loaded for a blast, which has failed to explode, that calls for the promulgation of rules by the master; the selection of means therefor being a detail depending on the judgment of the workmen.¹⁶

tion of the cars, and is competent evidence for the defendant in such an action: *Joyce v. Rome & C. R. Co.*, 92 Hun (N. Y.) 107; s. c. 36 N. Y. Supp. 731; 71 N. Y. St. Rep. 742. A rule of a railroad company requiring that at all stations where automatic block-signals are not used a red signal will be at once displayed *next* the track on which a train has passed, and kept there until it has been gone the length of time given in the time-table between it and the train which should follow, if not more than ten minutes, but in all cases kept there for five minutes, and that no train will pass such signal until the five minutes have elapsed, unless otherwise ordered in the time-table or by special instructions,—does not require the employé whose duty it is to display such signal to place it *on* the track, or *so near* thereto that he will be struck by a passing train, or to keep it there the full ten minutes, where that is the time before the next train is due: *Foss v. Old Colony R. Co.*, 170 Mass. 168; s. c. 49 N. E. Rep. 102. Where the rules of a railroad company provide that *block-lights* at its stations *shall*

show red at all times, against which trains cannot proceed unless furnished with clearance-cards, except when the white signal is given, indicating that there are no orders for the train, and allowing it to continue; and a signal-light remains red until an approaching train has nearly stopped, and then is changed to white,—the fact that the train proceeds without receiving a clearance-card, is not such a violation of the rules relating to the issuance of clearance-cards as to constitute actionable negligence as toward a conductor who is thrown off the train by its starting up again; especially where he *knows* that the train will proceed without waiting under such circumstances: *Crawford v. New York & C. R. Co.*, 23 Ohio C. C. 207.

¹⁶ *Johnson v. Portland Stone Co.*, 40 Or. 436; s. c. 67 Pac. Rep. 1013; rehearing denied *sub nom.* *Johnson v. Portland Granite & C. Co.*, 68 Pac. Rep. 425 (used steel drill for the work—did not know that load had failed to explode, but thought it had exploded and had failed to blow tamping out).

CHAPTER CXIII.

DUTY OF EMPLOYER SO TO SYSTEMATIZE AND CONDUCT HIS BUSINESS AS TO PROMOTE THE SAFETY OF HIS SERVANTS.

SECTION

4175. General statement of doctrine.

4176. Liability of master for injuries of this nature.

SECTION

4177. Omissions which have been held insufficient to charge the employer.

§ 4175. **General Statement of Doctrine.**—The duty now to be considered is closely analogous to that considered in the preceding chapter. It is the duty of an employer, carrying on a dangerous or complicated business, to reduce it to such a system and to conduct it in such a manner as will best promote the safety of his servants; and he is consequently liable to a servant for an injury occasioned by a defective system of using his machinery or conducting his business, as well as for injuries occasioned by defects in such machinery.¹ In order to a recovery, the defect in the system of the master must, of course, be the *proximate cause* of the injury. Thus, it has been held that a master is not liable to a servant injured upon an elevator, for want of an employé to give signals to start and stop it, where the servant himself gave the signal to start, and the injury did not arise from the starting.² So, it has been held that an employé cannot charge a railroad company with negligence in running a train in a city at a higher rate of speed than that prescribed by statute, unless his injury can be traced to that cause,—as, by showing that it resulted from a collision with some object at a street-crossing.³ A leading illustration is found in the proposition that the failure of the master to employ a *sufficient number of hands* to conduct his business with safety to the servants there engaged, will make him liable for damages for an injury to any one of them proceeding from that cause, unless, under principles hereafter considered,⁴ the circumstances are such that they are deemed to accept the risks of the service under those circumstances.⁵

¹ *Ante*, § 3805; *Webster v. Foley*, 21 Can. S. C. 580.

² *Riordan v. Ocean S. S. Co.*, 124 N. Y. 655; s. c. 36 N. Y. St. Rep. 476; 9 Rail. & Corp. L. J. 426; 26 N. E. Rep. 1027.

³ *Lockwood v. Chicago & C. R. Co.*, 55 Wis. 50.

⁴ *Post*, §§ 4768, 4829.

⁵ *Ante*, § 3807; *Johnson v. Ashland Water Co.*, 71 Wis. 553; s. c. 5 Am. St. Rep. 243; 37 N. W. Rep.

§ 4176. **Liability of Master for Injuries of this Nature.**—An electric-light company is liable to a man sent to work upon one of its towers, where he is injured by the turning on of the electric current before the usual time.⁶ A man who goes inside a steam-boiler to repair it, is entitled to a diligent supervision on the part of the owner to the end that he is not injured while there. His position is analogous to that of car-repairers operating under cars standing upon the railway-track. Where such a person, while so engaged, was scalded with hot water from an apparatus under the control of the engineer of the vessel, it was held that he was entitled to recover damages of the ship, whether the accident was caused by the negligence of the engineer or his subordinates, or by the intermeddling of a stranger.⁷

§ 4177. **Omissions which have been held Insufficient to Charge the Employer.**—Collecting a number of cases, without attempting to analyze the grounds upon which all of them proceed, it has been held that the omission of an employer to furnish means to *stop his machinery* in case of accident, will not be ascribed to him as negligence;⁸ nor will the omission to have and use a counter-shaft and a fast and loose pulley, which would have made it safer to connect and disconnect the power from a machine;⁹ nor does the mere happening of an accident to an employé, in using a machine not shown to be defective, render the employer liable for injuries so sustained, although another employé was previously injured while engaged on the same machine;¹⁰ nor an accident to an employé, through the breaking of an elevator, which could have happened without negligence of the engineer in charge of it;¹¹ nor the fact that a mill-owner furnishes a sawyer operating a circular saw with wood that is uneven and knotty, in sawing which he is killed;¹² nor is he liable for any injury that is to be ascribed to the negligence of a fellow servant, instead of to the defect in the machine,—as where an employé is injured by a blow from a piece of iron attached to a lathe in operation near him, where the negligence, if any, is that of the foreman of the lathe in failing properly to se-

823; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; s. c. 3 Am. St. Rep. 92; *Heiner v. Heuvelman*, 45 N. Y. Super. Ct. 88.

⁶ *Colorado Elec. Co. v. Lubbers*, 11 Colo. 505; s. c. 7 Am. St. Rep. 255.

⁷ *Keiley v. The Alliance*, 44 Fed. Rep. 97.

⁸ *Gordon v. Reynolds Card Man. Co.*, 47 Hun (N. Y.) 278; s. c. 14 N. Y. St. Rep. 394.

⁹ *Jacobson v. Cornelius*, 52 Hun

(N. Y.) 377; s. c. 24 N. Y. St. Rep. 260; 5 N. Y. Supp. 306.

¹⁰ *Benedict v. Schneider*, 38 N. Y. St. Rep. 201; s. c. 14 N. Y. Supp. 888. Similarly, see *Neff v. Broom*, 70 Ga. 256.

¹¹ *Kern v. De Castro & Co.*, 125 N. Y. 50; s. c. 34 N. Y. St. Rep. 363; 25 N. E. Rep. 1071.

¹² *Hooper v. Snead Iron Works*, 12 Ky. L. Rep. 483; s. c. 14 S. W. Rep. 542 (no off. rep.).

cure the counter-balance, and there is no proof of any superior kind of lathe in general use;¹³ nor where the evidence fails to show that the defect in the machine, upon which the negligence is predicated, was the efficient cause of the accident, but leaves it equally probable that it may have been due to some other cause;¹⁴ nor where a sliding door was not properly secured, if the work the servant was doing required the door to be opened;¹⁵ nor where there was a projecting nut or screw securing a collar to a shaft, whereby a boy was injured, who might have avoided coming in contact with it,—and this although the collar could have been secured to the shaft without a projecting nut or screw;¹⁶ nor where a boy fifteen years old was injured while operating a machine, where it was of the kind ordinarily used in the business, and had operated well for a long time before the accident, and, without any alteration or readjustment, continued so to operate for a long time afterwards;¹⁷ nor where an employé was injured by a sliver being broken off the end of a chisel when struck by a sledge, in the absence of evidence that the condition of the chisel before being struck was dangerous, or that a reasonable examination would have disclosed the danger;¹⁸ nor where an employé in a foundry was injured by a pot of metal which he was engaged in handling, tipping over and spilling the molten metal upon him, where the cause of the accident was conjectural, but the preponderance of the evidence was that it was caused by his own act;¹⁹ nor where there was a depression of about one-fourth of an inch in a platform over which an employé was wheeling barrels at the time of being injured,—especially where it was improbable that the imperfection played any part in the accident occasioning the injury complained of;²⁰ nor, of course, where the accident is ascribed to the negligence of the employé as its efficient cause, and not to the negligence of the employer.²¹

¹³ *Faber v. Carlisle Man. Co.*, 126 Pa. St. 387; s. c. 17 Atl. Rep. 621.

¹⁴ *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202.

¹⁵ *Daigle v. Lawrence Man. Co.*, 159 Mass. 378; s. c. 34 N. E. Rep. 458.

¹⁶ *Hale v. Cheney*, 159 Mass. 268; s. c. 34 N. E. Rep. 255.

¹⁷ *Dingley v. Star Knitting Co.*, 134 N. Y. 552; s. c. 48 N. Y. St. Rep. 336; 12 Rail. & Corp. L. J. 310; 32 N. E. Rep. 35.

¹⁸ *Mulligan v. Crimmins*, 75 Hun (N. Y.) 578; s. c. 58 N. Y. St. Rep. 737; 27 N. Y. Supp. 819.

¹⁹ *Hansell v. Jansen*, 46 Ill. App. 335.

²⁰ *Kaare v. Troy Steel & Co.*, 139

N. Y. 369; s. c. 54 N. Y. St. Rep. 653; 34 N. E. Rep. 901.

²¹ *Ingermann v. Moore* (Cal.), 25 Pac. Rep. 275 (no off. rep.). In an action by a railway employé against the company for a personal injury, evidence that when he was lining the track on trestle twenty feet high, his boss told him to hurry; that he used a pinch-bar as a lever to push the track into position, resting one end on the bridge stringer, and threw his weight against the bar, and the wood of the stringer split off, and he fell to the ground, breaking his leg,—was held not to make a *prima facie* case: *Gassaway v. Georgia South. R. Co.*, 69 Ga. 347.

CHAPTER CXIV.

LIABILITY OF MINE-OWNERS FOR INJURIES TO MINERS AND OTHER EMPLOYES.

SECTION

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- 4181. Liability of mine-owner for injuries to miners from explosions of fire-damp.
- 4182. Statutory liability of mine-owners for injuries to miners.
- 4183. Statutory duty to provide suitable ventilation in mines.
- 4184. Liability under the Illinois Miners Act.
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4213. Sending empty bucket down shaft to ascertain whether shaft is free from obstructions.
 4214. Negligence with respect to the construction or repair of the cage in which miners are lowered and raised.
 4215. Various negligences for which mine-owner has been held liable.

§ 4179. **General Principles Governing such Liability.**—The owner, lessee or operator of a mine is bound, under the leading principles announced elsewhere in this Title, to exercise reasonable care and skill to keep his mine free from danger to his employés, and is liable to them in damages if they are injured through his default in this particular without fault of their own;¹ which reasonable care and skill must manifestly be proportionate to the very great dangers of this employment.²

§ 4180. **Mine-Owner Not an Insurer of the Safety of his Appliances or Methods.**—But he is not an absolute *insurer* of the appliances which he furnishes, or of the method which he adopts or pursues in carrying on his work. He will generally discharge himself from the imputation of a want of ordinary care by adopting and using such appliances as are commonly in use in mines of the same kind in the same mining district;³ especially where the appliance is of a kind which has long been used without accident in his own and in other mines.⁴ He will not be liable in damages for an injury caused by the breaking of timbers which have become rotten, where the outside portion of the wood presents every appearance of being perfectly sound, and its deceptive condition is liable to mislead the most careful ob-

¹ *Sampson Min. &c. Co. v. Schaad*, 15 Colo. 197; s. c. 25 Pac. Rep. 89; *Ashland Coal &c. R. Co. v. Wallace*, 101 Ky. 626; s. c. 19 Ky. L. Rep. 849, 857; 42 S. W. Rep. 744; 43 S. W. Rep. 207.

² Vol. I, § 25; *ante*, § 3772; *Ashland Coal &c. R. Co. v. Wallace*, *supra*.

³ A coal company, for example, is not guilty of negligence in failing to provide any appliance or means or method by which warning can be given to persons working in a pock-

et that a draw is about to be made of the coal from the chutes, where none of the numerous colleries in the district have any appliances of any kind for such signals, and all the apparatus and appliances used by such company are such as are used in that district: *Lehigh &c. Coal Co. v. Hayes*, 128 Pa. St. 294; s. c. 18 Atl. Rep. 387; 5 L. R. A. 441; 47 Phila. Leg. Int. 384; 24 W. N. C. (Pa.) 559.

⁴ *Burke v. Witherbee*, 98 N. Y. 562.

server;⁵ nor for piling culm on the surface of the ground above the mine, in the usual method followed in that coal region, especially where it is merely conjectural whether such piling and subsequent accumulation of water caused the roof of the mine to fall in;⁶ nor for an accident in the operation of a hoisting-apparatus of the mine, which the evidence does not attribute to the defective condition of the apparatus, but to the negligence of a *fellow servant*;⁷ nor, of course, for an accident which the evidence does not attribute to the negligence of himself or his vice-principal,—such as the explosion of a fuse which failed to ignite, injuring a miner who was drilling it out, where the superintendent failed to inform him that the fuse was wet, when the explosion might have happened from a variety of causes.⁸

§ 4181. **Liability of Mine-Owner for Injuries to Miners from Explosions of Fire-Damp.**—Notwithstanding the great dangers and the dreadful calamities which accrue from the failure of mine-owners to take measures for ventilating their mines so as to prevent explosions of the gases which accumulate therein, the rule of law is that they are not bound to employ the most expensive precautions to that end, but are held only to the use of reasonable efforts.⁹

⁵ *Reinder v. Black &c. Coal Co.*, 12 Ky. L. Rep. 30; s. c. 13 S. W. 719 (no off. rep.). See also, *ante*, § 3785.

⁶ *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; s. c. 33 W. N. C. (Pa.) 204; 27 Atl. Rep. 577.

⁷ *Trewatha v. Buchanan Gold Min. &c. Co.*, 96 Cal. 494; s. c. 28 Pac. Rep. 571. See also, *post*, §§ 4853, 4863.

⁸ *Henderson v. Williams*, 66 N. H. 405; s. c. 23 Atl. Rep. 365.

⁹ *Berns v. Gaston Coal Co.*, 27 W. Va. 285; s. c. 55 Am. Rep. 304. A sounder doctrine is that they must use all appliances *readily* attainable, known to science, for the prevention of accidents arising from the accumulation of gas and other explosive substances in the mine; and an instruction so charging is correct: *Western Coal &c. Co. v. Berberich*, 94 Fed. Rep. 329; s. c. 36 C. C. A. 364 (citing *Mather v. Rillston*, 156 U. S. 391; s. c. 39 L. ed. 464, where the above is said to be "laid down as a legal principle" in regard to all occupations attended with great and unusual danger, in discussing the duties of mine-owners to their

employés). A mining company violated its duty in respect to providing its employés with a safe place in which to work, where, through its foreman, it directed plaintiff, an inexperienced employé, to go with another workman into an up-raise known to be filled with powder-smoke, gas and foul air, and is liable to plaintiff for an injury resulting from the effect of such foul air on the other workman, plaintiff not being guilty, on account of his inexperience, of contributory negligence in exposing himself to the danger: *Portland Gold Min. Co. v. Flaherty*, 111 Fed. Rep. 312; s. c. 49 C. C. A. 361 (the other employé preceded the plaintiff in the ascent; he was overcome by the gas and foul air, and fell and struck the plaintiff, causing plaintiff to fall to the bottom of the up-raise and receive injuries). The presence of dangerous gas in one room of a mine which is marked with a danger-signal, prohibiting all miners entering with a naked light, is not negligence on the part of the mine-owner towards a miner, working by contract in another room of the mine, who knows that the custom in the mine is that

§ 4182. **Statutory Liability of Mine-Owners for Injuries to Miners.**—Where the statute imposes upon the mine-owner an express duty to the end of protecting his miners, a failure to perform that duty will, as already seen,¹⁰ be negligence *per se*,—as where the statute requires the owner or operator of a coal mine to supply the workmen therein with suitable timber for props and supports to secure the workings from falling in.¹¹ On the other hand, statutes of this kind may be so ably drawn by the lawyers of mining companies as to diminish the liability which the common law puts upon such masters. Such would seem to be the case in respect of a statute of Pennsylvania,¹²—at least, it was so construed by a court which evidently had great solicitude for the rights of the miners, and which was so deficient in general learning as to say in its opinion that the principle “that the employer cannot be made responsible for the damages resulting to a servant from the negligence of a fellow servant, is a principle as old as the common law.” The court took the view that if an operator of an anthracite-coal mine has employed a competent person to drive a gangway in his mine, he is not liable in damages for the death of another miner, even though it resulted from the defective construction of the gangway, if the proprietor had no notice or knowledge of the defect; but that it is to be attributed to the negligence of a fellow servant,¹³—a conclusion which, as we have seen,¹⁴ is contrary to the rule of the common law as understood by nearly all of the courts.¹⁵

§ 4183. **Statutory Duty to Provide Suitable Ventilation in Mines.**—The omission to comply with the requirements of statutes enacted to prevent accidents due to unsuitable ventilation, is, on principles elsewhere considered,¹⁶ negligence *per se*,—such as the omission to

work will be carried on without cessation, although there is standing gas in certain rooms, where such rooms are marked with the danger-signal: *Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 49; s. c. 49 Pac. Rep. 807.

¹⁰ Vol. I, § 10.

¹¹ *Hochstetler v. Mosier Coal & Co.*, 8 Ind. App. 442; s. c. 35 N. E. Rep. 927. A person employed as cager at the bottom of the shaft of a coal mine, who is injured in the performance of his duty by a lump of coal falling upon him from the top of the shaft from an uncovered cage, is entitled to recover damages, under the Mo. Act of March 23, 1881, requiring the cage to be covered “so

as to keep safe, as far as possible, persons descending into and ascending out of said shaft,” although he may not be strictly within the letter of the clause: *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; s. c. 10 S. W. Rep. 484.

¹² Pa. Act of March 3, 1870.

¹³ *Waddell v. Simonson*, 112 Pa. St. 567.

¹⁴ *Ante*, § 3874.

¹⁵ Liability under English Metaliferous Mines Regulation Act, 1872, § 23, subsec. 10, for drawing men up a “working-shaft” in a bucket unprovided with guides: *Foster v. North Hendre Min. Co.*, [1891] 1 Q. B. 71.

¹⁶ Vol. I, § 10; *Mosgrove v. Zim-*

provide means of ventilation and circulation so as to carry off dangerous gases; to employ a fire-boss to examine the working-places and other places where such gases are known to exist; to employ a mining-boss to keep watch over the ventilating-apparatus, the air-ways, the travelling-ways, the pumps, the means of drainage, and to see that proper break-throughs are made, and that all loose coal or rock overhead is removed and proper timbers and props provided;—all or any of these omissions will render the mine-owner or operator liable for any injuries resulting therefrom;¹⁷ though where the statute predicates the liability of the mine-owner upon his *willful* neglect of the statutory requirement, the question whether his failure to comply with the statute was willful is necessarily a question for a jury.¹⁸ The failure of a mine-owner to comply with such a statute, whereby his employé is injured without his own fault, entitles the employé to recover damages from the employer, although the statute provides no penalty for its violation.¹⁹ A *prima facie* case for the recovery of such damages is made out when it is shown that the injury to the employé was caused by an explosion in the mine, and that the defendant had not complied with the statute.²⁰ Under the Act of Congress of March 3, 1891,²¹ the operator of a mine is required to *use reasonable efforts* to secure the requisite ventilation for the miners, requiring them to provide adequate ventilation of not less than a specified number of cubic feet of air per minute for so many men, and force the same through the mine by proper appliances; and an instruction has been held improper which implies that the operator is *absolutely bound* to secure such ventilation.²²

bleman Coal Co., 110 Iowa 169; s. c. 81 N. W. Rep. 227 ("every person while violating an express statute is a wrong-doer, and is *ex necessitate* negligent in the eyes of the law").

¹⁷ Graham v. Newburg Orrel Coal & Co., 38 W. Va. 273; s. c. 18 S. E. Rep. 584. But it has been held that the stoppage of ventilating-machinery in a mine from Saturday night until Sunday night is not negligence as matter of law, in respect to the employés in the mine, where it is started and continuously run for twelve or fourteen hours before an accident occasioned by the explosion of gas in the mine: Morgan v. Carbon Hill Coal Co., 6 Wash. 577; s. c. 34 Pac. Rep. 152.

¹⁸ Muddy Valley Min. & Co. v. Phillips, 39 Ill. App. 376.

¹⁹ Mosgrove v. Zimbleman Coal Co., 110 Iowa 169; s. c. 81 N. W. Rep. 227.

²⁰ Godfrey v. Beattyville Coal Co., 101 Ky. 339.

²¹ 26 U. S. Stat. at Lg. 1104.

²² Cerrillos Coal R. Co. v. Deserant, 9 N. M. 49; s. c. 49 Pac. Rep. 807. There is a holding to the effect that if the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp, instead of a safety-lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner: Berns v. Gaston Coal Co., 27 W. Va. 285; s. c. 55 Am. Rep. 304. But this holding is probably unsound, in that it violates the principle that the servant is entitled to recover damages where the hurt was received through the negligence of the master in failing to perform one of his absolute duties, although

§ 4184. **Liability under the Illinois Miners Act.**—The Constitution of Illinois, adopted in 1870, contains this provision: "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement-shafts, or such other appliances as may secure safety, in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."²⁴ In conformity with this provision, an act was passed in 1872 by the Legislature of Illinois, entitled "An act to provide for the health and safety of persons employed in coal mines," and another act of the same nature in 1877. The Supreme Court of Illinois affirmed the constitutionality of that part of this statute which requires maps of coal mines to be made and kept, and copies thereof to be filed with the inspector of coal mines and recorded in the office of the recorder of deeds.²⁵ The statute prescribes a system of rules and regulations to be observed by mine-owners for the protection of their miners, and provides: "For any injury to persons or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such willful violation or willful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, or his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives."²⁶ Among other things, the statute provides that "the top of each shaft shall also be securely fenced by vertical or flat gates, properly covering and protecting the area of such shaft."²⁷ For a neglect of this duty, which resulted in the death of a miner eight days after the statute went into operation, an action for damages was sustained. The court refused to listen to the contention that the company had not had time to comply with the act, saying: "The law went into force on the first day of July, 1872, and the accident occurred on the ninth day of the same month, and, it is urged, no adequate time had elapsed in which the company, by the exercise of reasonable diligence, could have complied with its provisions. This was purely a question of fact, and the jury has found

the negligence of a fellow servant may have concurred in producing it: *Post*, § 4856, *et seq.* p. 871, § 14; Hurd's Ill. Stat. 1877, p. 671, § 14.

²⁴ Const. Ill. 1870, art. iv, § 29.

²⁵ *Daniels v. Hilgard*, 77 Ill. 640.

²⁶ *Underwood's Ill. Stat.* 1878,

Underwood's Ill. Stat. 1878, p. 869, § 8; Hurd's Ill. Stat. 1877, p. 669, § 3.

it against the company. But the objection is untenable for another reason. The appellant will be presumed to have known when the law took effect, and if the company was not prepared to comply with its provisions, it was its duty to suspend operations in the mines until the necessary preparations could be made, and its failure to do so must be regarded as willful. The company continued to operate its mines in defiance of the law, and must bear the consequences."²⁸ In a later case,²⁹ the court ruled that an action under the statute was properly brought by the widow of the deceased, and not by his personal representative, holding that the fourteenth section, above quoted, was not repealed by the passage of the statute of 1874, entitled "Injuries."³⁰ A miner having been killed in consequence of the falling of a lump of coal from above, after he had got into the cage for the purpose of ascending from the pit, an action by his widow for damages was sustained, the court passing upon some questions of variance between the pleadings and the proof, and holding that the contributory negligence of the deceased should not bar a recovery, since the misconduct of the company in using an uncovered cage for the purpose of conveying the miners up and down, to and from their work, was *willful*.³¹ The word "willful" as employed in the statute does not involve an imputation of wrongful intent, but merely implies that the omissions were conscious acts of the mind, and that they did not spring from mere inadvertence; therefore, in an action grounded on a failure to comply with a statute, resulting in the death of a miner, it has been held proper to refuse to allow the defendant to introduce the testimony of its officers to the effect that they *intended* to comply with the statute in good faith.³²

§ 4185. Failure to Comply with a Provision of the Same Statute Requiring an Examination of the Mine Each Morning.—The statute of Illinois known as the "Miners Act" is said to be a police regulation, passed in obedience to a provision of the Constitution of the State; and a willful failure to obey the provisions of the statute has, in contemplation of law, all the force of wanton and intentional injury.³³ Such being the nature of the statute, in an action for an injury to a miner predicated on a willful violation of the act the question of

²⁸ Bartlett &c. Coal Co. v. Roach, 68 Ill. 174, 175.

²⁹ Litchfield Coal Co. v. Taylor, 81 Ill. 590.

³⁰ Underwood's Ill. Stat., ch. 70, § 1; Hurd's Ill. Stat., ch. 70, § 1.

³¹ Litchfield Coal Co. v. Taylor, 81 Ill. 590.

³² Odin Coal Co. v. Denman, 185 Ill. 413; s. c. 57 N. E. Rep. 192; aff'g s. c. 84 Ill. App. 190.

³³ Donk Bros. Coal &c. Co. v. Stroff, 100 Ill. App. 576.

contributory negligence is not involved;³⁴ since, as already seen,³⁵ contributory negligence is not a defense to an action for a willful or wanton injury. The right to recover damages under the statute arises only where the violation of the statute or the failure to comply with its terms is "willful."³⁶ Mere *non-compliance* is not conclusive evidence of willfulness; but whether such non-compliance was *willful* is for the jury to determine from all the facts and circumstances of the particular case.³⁷ And a verdict finding that a violation of the statute was the cause of the injury will not, it is said, be set aside unless there is an entire absence of proof.³⁸ A recovery was denied under the statute for the death of a miner killed in a mine by the fall of a clod of dirt, on the ground that no examination of the mine had been made *before* the men began work, where it appeared that the subsequent examination was made in good faith prior to the accident, though some time after the men commenced work.³⁹ Two things must concur to make out a case under the statute: a willful violation of its provisions, and an injury resulting from such violation; and the burden is on the plaintiff to prove both of these predicates.⁴⁰

§ 4186. Liability under Same Statute for Failing to Provide Adequate Means of Egress.—The statute in question requires that "in all coal mines * * * which are worked by or through a shaft, slope, or drift, and in which more than fifteen⁴¹ miners are employed, * * * there shall be an escapement-shaft, making at least two means of ingress and egress for all persons * * * permitted to work in such coal mine," and prescribes how the shaft shall be constructed.⁴² A coal company had opened three coal mines, at differ-

³⁴ Spring Valley Coal Co. v. Rowatt, 196 Ill. 156; s. c. 63 N. E. Rep. 649; aff'g s. c. 96 Ill. App. 248 (neither the question of contributory negligence nor that of the negligence of a fellow servant is involved).

³⁵ Vol. I, § 206.

³⁶ Consolidated Coal Co. v. Carson, 66 Ill. App. 434; Himrod Coal Co. v. Schroath, 91 Ill. App. 234 (no right of action for negligence, but only for *willful* negligence).

³⁷ Odin Coal Co. v. Denman, 84 Ill. App. 190; s. c. aff'd 185 Ill. 413; 57 N. E. Rep. 192.

³⁸ Jupiter Coal Min. Co. v. Mercer, 84 Ill. App. 96 (evidence sufficient to sustain a verdict in an action predicated on the statute, where a driver was supposed to have been

killed by a collision between his cars, which he was driving on to the main line from the switch, and loaded cars standing on the main track, his body having been found lying between the rail and a rib of coal four feet distant and in front of his "trip").

³⁹ Missouri &c. Coal Co. v. Schwalb, 74 Ill. App. 567; s. c. on second appeal, 77 Ill. App. 593.

⁴⁰ Missouri &c. Coal Co. v. Schwalb, 74 Ill. App. 567; s. c. on second appeal, 77 Ill. App. 593.

⁴¹ This number has been since reduced to ten: Hurd's Ill. Stat., p. 668, § 3; Underwood's Ill. Stat., p. 868, § 3.

⁴² Hurd's Ill. Stat., p. 668, § 3; Underwood's Ill. Stat., p. 868, § 3.

ent distances from the surface, and there was no second escapement-shaft constructed to the second and third mines. While more than fifteen men were employed in the second mine, a fire occurred in the main shaft, filling the latter mine with smoke. The miners at work therein, in their alarm and confusion, rushed to the shaft, and one of them fell down into the other mine and was killed. It was held a case in which his widow might recover damages, even though the fire was purely accidental,—the ground of liability being the failure of the company to comply with the statute as to the making of the second escapement. The evidence warranted a finding by the jury that the death of the plaintiff's intestate was one of the direct consequences of the defendant's negligence,—the court, on this last point, saying: "It is said there was no real danger; that the fire was readily extinguished, and had the men stayed at their work they would have suffered no harm. All this is very true. That, however, is not the hinge on which this question turns. It is equally true that men of ordinary prudence, with a full knowledge that there was but one mode of escape from the mine, hearing a cry of fire, finding the mine filling with smoke, and that from a fire burning in the main shaft, at a point above them, and past which they must be carried if they escape at all, would ordinarily be very much alarmed, and, in most cases, lose their ordinary presence of mind. The natural consequence of such a combination of facts would be, a rush of the men for the carriage at the main shaft; and, in the smoke and darkness, another very probable consequence would be, that some one or more of these men, in this confusion, would, by some misstep, or the jostle of a companion, lose his footing and fall down the shaft. Had there been a second mode of escape, no such cause of alarm would have existed. Men of ordinary prudence would have felt safe, and been left to exercise their caution in avoiding accidents on their way to a sure mode of escape. It has long been settled that a party, having given another reasonable cause for alarm, cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm. The jury, under the circumstances, may well have found that the death was the direct result of the alarm, and that the alarm or fright resulted directly from the want of a second mode of escape."⁴³

⁴³ Wesley &c. Coal Co. v. Healer, 84 Ill. 126; s. c. 5 Cent. L. J. 80. For an instruction telling the jury that it was the duty of the defendant to keep its "premises" in a reasonably safe condition, which was not er-

roneous because it did not limit the jury to a consideration of the place of ingress and egress,—see Downey v. Gemini Min. Co., 24 Utah 431; s. c. 68 Pac. Rep. 414.

§ 4187. **Liability under Same Statute for Failing to Provide Safe Means of Hoisting or Lowering Miners in a Cage.**—A mining company which willfully fails to provide *safe means of hoisting or lowering persons in a cage*, as required by the Illinois statute,⁴⁴ is liable for an accident to one of its employes resulting from a fall of the cage, although the injury is caused by the negligence of a fellow servant, or through defects in the machinery of which the employé had knowledge.⁴⁵

§ 4188. **Liability under the Indiana Statute.**—It is provided by statute in Indiana that miners' bosses shall visit their mines at stated intervals in their working-places, and see that they are made secure, and that a sufficient supply of props and timbers is always on hand;⁴⁶ that the owners of mines shall keep their miners supplied with props and timbers of proper length;⁴⁷ and that they shall be liable for injuries occasioned by any violation of such statute or any of its provisions.⁴⁸ It was held that the right of action for compensation for injuries caused by violation of such statute was not taken away or in any way affected by a provision imposing a penalty for such violation.⁴⁹ The violation of the statute requiring suitable timbers to be supplied,⁵⁰ resulting in injury to an employé, has been held to be negligence *per se*.⁵¹ Under another section of the statute requiring owners and operators of coal mines to cover the cages with one-fourth inch boiler-plate, for the safety of persons ascending and descending the shaft;⁵² and the section authorizing an action against such owner or operator for any injuries resulting from a failure to comply with any provision of the act,⁵³—it was held that a miner employed at the bottom of a shaft to run cars into the cage is not prevented from recovering for an injury received from a failure so to cover the cage by the fact that he was not ascending or descending, since the manifest purpose of the act, as shown by its scope and title, is to protect all persons employed in coal mines.⁵⁴

⁴⁴ Hurd's Ill. Rev. Stat. 1903, ch. 93, § 16 (e).

⁴⁵ Girard Coal Co. v. Wiggins, 52 Ill. App. 69.

⁴⁶ Burns' Rev. Stat. 1901, §§ 7447, 7472; Horner's Rev. Stat. 1901, §§ 5472a, 5480m.

⁴⁷ Burns' Rev. Stat. 1901, § 7466; Horner's Rev. Stat. 1901, § 5480g.

⁴⁸ Burns' Rev. Stat. 1901, § 7473; Horner's Rev. Stat. 1901, § 5480n.

⁴⁹ Davis Coal Co. v. Pollard, 158 Ind. 607; s. c. 62 N. E. Rep. 492.

⁵⁰ Burns' Rev. Stat. 1901, § 7472; Horner's Rev. Stat. 1901, § 5080m.

⁵¹ Hochstetter v. Mosier Coal & Co., 8 Ind. App. 442.

⁵² Burns' Rev. Stat. 1901, § 7469; Horner's Rev. Stat. 1901, § 5480j.

⁵³ Burns' Rev. Stat. 1901, § 7473; Horner's Rev. Stat. 1901, § 5480n.

⁵⁴ Bodell v. Brazil Block Coal Co., 25 Ind. App. 654; s. c. 58 N. E. Rep. 856.

§ 4189. **Liability under the Missouri Statute.**—Under the Missouri statute requiring every owner, agent, or operator of a mine to provide safe means of lowering and hoisting persons in such mine,⁵⁵ and giving a right of action for an injury caused by any willful violation of the act or willful failure to comply with its provisions,⁵⁶ it is held that a person employed as a “cager” at the bottom of the shaft in a mine is within the protection of the act, and that knowledge on his part of the violation of the act will not prevent a recovery for injuries caused thereby.⁵⁷

§ 4190. **Liability under the West Virginia Statutes.**—Under the statutes of West Virginia, providing that mines shall be kept free from gas, and that a “fire-boss” shall be employed to superintend the work,⁵⁸ it has been held that the presence of gas in a mine, in dangerous quantity or condition, is *prima facie* evidence of negligence, which, unexplained, will entitle an employe injured thereby to a recovery, in the absence of fault on his part.⁵⁹

§ 4191. **Liability for Injuries Caused by the Falling of the Roof of the Mine.**—Mine-owners are bound to exercise reasonable care and skill, and to adopt all reasonable means and precautions, to lessen the danger to their employes from the falling of portions of the roof of the mine; but they are not insurers, in favor of their miners, that the roof of their mine will be at all times so propped that it absolutely will not fall, either under the principles of the common law, or, it may be assumed, under the statute law.⁶⁰ In order to charge the owner or operator of a coal mine with negligence because of the falling of loose rock or earth from the roof of the mine, he must have had previous knowledge of a defective or dangerous condition of the roof, or by the exercise of ordinary care and caution have been able to discover the defective condition.⁶¹ A mine-owner has accordingly been exonerated where the falling of a portion of a roof took place without the warning signs and the dropping of coal which usually precede such an accident, and where those employed to make the usual test deemed it suitable and safe, although some of the miners deemed it unsafe, but kept their opinions to themselves until after the acci-

⁵⁵ Mo. Rev. Stat. 1899, §§ 8811-8813.

⁵⁶ Mo. Rev. Stat. 1899, § 8820.

⁵⁷ *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62.

⁵⁸ W. Va. Code 1891, p. 991; Acts 1887, ch. 50, § 10.

⁵⁹ *Graham v. Newburg Orrell Coal &c. Co.*, 38 W. Va. 273.

⁶⁰ *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619.

⁶¹ *Cherokee &c. Coal Co. v. Britton*, 3 Kan. App. 292; s. c. 45 Pac. Rep. 100.

dent;⁶² and where a clod fell from the roof of the mine, injuring a miner in a room into which he went to work of his own accord, when both he and the others tested the roof and he thought it safe.⁶³ Where there is a rule or method of inspection imposed upon the mine owner by statute, his failure to adopt and put into force such rule in his mine will be negligence *per se*;⁶⁴ and he will be answerable in damages to a miner injured in consequence of such neglect.⁶⁵ A mine-owner has been held liable to a miner injured by the falling of portions of the mine, where there had been a crack for some time where the rock broke off, and the superintendent of the mine knew that it was widening and was dangerous;⁶⁶ where a mine-owner so constructed a coal-chute that the coal was liable to fall over the edges, and then sent a workman who was ignorant of its condition to shovel slack under the chute, and he was injured by such a fall of coal;⁶⁷ where the mine-owner caused the pillars supporting the roof to be cut away until they were smaller than was customary in such mines, and left masses of coal on them hanging over the gangway, which fell upon a workman who was rightfully there and not aware of the defect;⁶⁸ where a contractor agreed with the owner of a mine to do certain work therein, and the owner agreed to furnish and put up such props or supports for the roof of the mine as would render it secure, whenever notified by the contractor that they were necessary,—the court holding that, although such notice from the contractor may not have been received by the owner, nevertheless, if he had actual knowledge that such supports were necessary, he became liable in damages to a servant of the contractor who, without negligence on his own part, had been injured while at work in the mine, through the want of such supports for the roof.⁶⁹ Where mining has progressed far enough to suggest the propriety of propping the roof, and props are requested and refused, a liability on the part of the operator for resulting injury arises, and he is not excused by a false appearance of safety which induces the miner to continue his work.⁷⁰ A mining company is not relieved from liability for an injury to one of its employés, caused by its negligence in failing to keep the roof of the mine in a reasonably safe condition, although the negligence of a mine-boss, even conced-

⁶² Southwest Virginia Imp. Co. v. Andrew, 86 Va. 270; s. c. 9 S. E. Rep. 1015; 13 Va. L. J. 634; 17 Wash. L. Rep. 599.

⁶³ Consolidated Coal Co. v. Young, 31 Ill. App. 417.

⁶⁴ Vol. I, § 10.

⁶⁵ Davis v. Nuttalsburg Coal & Co., 34 W. Va. 500; s. c. 12 S. E. Rep. 539.

⁶⁶ Pantzar v. Tilly Foster Min. Co., 99 N. Y. 368.

⁶⁷ Crown Coal Co. v. Hiles, 43 Ill. App. 310.

⁶⁸ Cunningham v. Union Pac. R. Co., 4 Utah 206; s. c. 7 Pac. Rep. 795.

⁶⁹ Kelly v. Howell, 41 Ohio St. 438.

⁷⁰ Adams v. Kansas & Co. Coal Co., 85 Mo. App. 486 (under a statute).

ing him to be a fellow servant, contributed to the injury;⁷¹ since it is the principle of the law that the master is liable where his own negligence producing an injury mingles with that of a fellow servant of the person injured.⁷² A custom which imposes on another employé the work of posting and propping the roof of a coal mine cannot exonerate a miner from the duty imposed on him by statute to do this, in order to shift the risk undertaken by himself over on his employer, as such a holding would violate the policy of the statute providing that any miner who shall refuse or willfully neglect to prop the roof of any working-place under his control shall be guilty of an offense; the policy of the act being to protect the lives and limbs of those engaged in a perilous business.⁷³ The owner of a coal mine having a *sloping entry* through which the coal is brought to the surface owes to an employé riding in the cars through such entry the duty of exercising reasonable care to have the roof of the entry sufficiently propped so that rock will not fall on the track.⁷⁴

§ 4192. Cases Exhibiting Evidence of Negligence in Failing to Prop the Roofs of Mines.—Other cases illustrating the doctrine of the preceding paragraph show that evidence of negligence taking the question to the jury was discovered where the general mine-manager of a coal-mining company failed to do what he knew to be necessary to support the roof of an entry in a mine which afterwards fell;⁷⁵ where the mine-manager had been informed of the dangerous condition of

⁷¹ *Island Coal Co. v. Risher*, 13 Ind. App. 98; s. c. 40 N. E. Rep. 158.

⁷² *Post*, § 4856, *et seq.* An instruction ignoring a statutory provision relieving the operator from securing the roof of a place where coal is being mined, and only requiring him to provide props, caps, and timber for the miner to use to secure the place where he is working, was not erroneous, where the place of the accident was not one where miners were working, but was over a track, where the miners were not called on to put up props: *Consolidated Coal Co. v. Lundak*, 196 Ill. 594; s. c. 63 N. E. Rep. 1079; *aff'g* s. c. 97 Ill. App. 109. A rule posted to the effect that timbermen should have no duty except to re-timber places in the mine which have once been properly timbered, and should in no case assume the duty of securing the roof, except as therein provided, unless expressly directed to do so by the mine manager, could not exempt the mine operator from liability to a miner for

negligently failing to properly secure the roof: *Consolidated Coal Co. v. Lundak*, *supra*. Evidence in this case examined with reference to the defendant's negligence in failing to support the roof of a mine, with the conclusion that it was proper for the trial court to refuse to direct a verdict for the defendant: *Consolidated Coal Co. v. Lundak*, *supra*. The duty of propping the roof of a mine to keep it safe is not imposed on the owner or operator by Ill. Rev. Stat., § 14 of ch. 93, entitled "Miners": *Consolidated Coal Co. v. Carson*, 66 Ill. App. 434.

⁷³ *Coal &c. Co. v. Clay*, 51 Ohio St. 542; s. c. *sub nom.* *Consolidated Coal &c. Co. v. Floyd*, 25 L. R. A. 848; 38 N. E. Rep. 610; 32 Ohio L. J. 355; 2 Ohio Leg. N. 75.

⁷⁴ *Corson v. Coal Hill Coal Co.*, 101 Iowa 224; s. c. 70 N. W. Rep. 185.

⁷⁵ *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258.

the roof about two days before the accident, and one witness had discovered it, and pulled down loose pieces of rock, and had afterwards, before the accident, demanded his pay for such work from the manager;⁷⁶ where the "timber-boss" of a coal mine knew for several days previous to an accident in which a miner was killed by the fall of a rock from the roof of a mine, that timbers and cap-pieces had not been furnished for use by the miners as required by them and repeatedly requested during that time,—such failure of the owner of the mine amounting, in the judgment of the court, to a *willful* failure within the meaning of a statute;⁷⁷ where the timbers supporting the roof in an entry to a mine were known by the mine-owner to be rotten and unsafe, and a servant, while riding in a car to his work, was injured by the fall of a large quantity of loose slate and rock, caused by the mule which drew the car shying so as to strike a post and snap it in two,—it appearing that if it had been sound the injury would not have happened;⁷⁸ where a miner at work in a mine-entry was informed by the superintendent that there was danger from the looseness of the rock in the roof of the entry, but nevertheless continued at work at the request of the superintendent, and while so at work the loose part fell, and carried with it other parts which were apparently solid, which latter parts fell upon and injured plaintiff;⁷⁹ where the evidence tended to show that a prop was so placed in a mine as to fall by itself or to be knocked down by a car passing along the track, and the roof of the mine, being thus deprived of support, came down and injured a miner.⁸⁰ Upon the question of the contributory negligence of the injured miner the general principle⁸¹ applies that where his duties in the mine do not themselves concern the propping of a roof, he has the right to presume, unless admonished to the contrary, that his employer has done his duty—especially where that duty is pre-

⁷⁶ Himrod Coal Co. v. Clark, 197 Ill. 514; s. c. 64 N. E. Rep. 282; aff'g s. c. 99 Ill. App. 332 (of course there was countervailing evidence, but the question was whether there was evidence to take the case to the jury).

⁷⁷ Kellyville Coal Co. v. Yehnka, 94 Ill. App. 74.

⁷⁸ Koltinsky v. Wood, 112 Ky. 372; s. c. 23 Ky. L. Rep. 1665; 65 S. W. Rep. 848.

⁷⁹ Taylor v. Star Coal Co., 110 Iowa 40; s. c. 81 N. W. Rep. 249.

⁸⁰ Consolidated Coal Co. v. Lundak, 196 Ill. 594; s. c. 63 N. E. Rep. 1079; aff'g s. c. 97 Ill. App. 109. Where there was evidence that the falling of a portion of the roof of a

mine, which caused the death of a miner, was the result of defendant mining company's failing to prop the same, an instruction that it was defendant's duty to provide a reasonably safe place for deceased to work in, and that if it failed to do so, and for this reason deceased, while performing his duty and in the exercise of due care, was injured by the falling of the roof, because of the absence of sufficient props, plaintiff was entitled to recover, was not objectionable: Himrod Coal Co. v. Clark, 197 Ill. 514; s. c. 64 N. E. Rep. 282; aff'g s. c. 99 Ill. App. 332.

⁸¹ Vol. I, § 190.

scribed by a statute,—and has the right to act upon the assumption that the roof is properly propped and that the place is reasonably safe.⁸² But contrary to this, another court has held that the owner of a coal mine is not liable for an injury to an employé caused by a fall of top coal from the roof of the mine at the place where he was at work, which the mine-boss had failed to have taken down, where the injured employé was an experienced miner, and had thoroughly tested the roof shortly before the fall and believed it to be perfectly safe, although the statute makes it the duty of the mining boss to examine every working-place in the mine as often as every alternate day, and see that the same is properly secured by props or timber, and that safety is in all respects assured.⁸³

§ 4193. **Liability for Injuries from Falling Rock, Coal, Ore, etc., Other than Falling Roofs.**—Mine-owners are bound to adopt all reasonable means and precautions to lessen the dangers to their employés from the falling of rocks down the slope of the excavation, although such danger cannot be entirely averted.⁸⁴ Therefore, the proprietor of a *marble quarry* will become liable for the failure of the foreman in charge of it, to test projecting rocks which are liable to slip and fall, and to have them removed when they become apparently dangerous.⁸⁵ So, it is the duty of an employer, who orders a laborer to work near or alongside a pile of ore packed in such a mass that the use of explosives has been required to loosen it, to observe carefully the condition of the material as to looseness or compactness and all other features of its structure, so as to be able to determine what shall be done to prevent the fall of ore upon such employé.⁸⁶

⁸² As where a miner employed to operate a machine and having nothing to do with the propping or timbering of the mine, which was done by workmen employed for that purpose and provided with implements to detect defects in the roof, was killed by the fall of a roof while he was in the entry preparing to remove his tools to another part of the mine, he having had no notice of any defect in the roof, or that it was apt to fall: *Himrod Coal Co. v. Clark*, 197 Ill. 514; s. c. 64 N. E. Rep. 282; aff'g s. c. 90 Ill. App. 332.

⁸³ *Island Coal Co. v. Greenwood*, 151 Ind. 476; s. c. 4 Am. Neg. Rep. 146; 50 N. E. Rep. 36 (plaintiff and assistant were both experienced miners and the roof had been properly inspected).

⁸⁴ *Deweese v. Meramec Iron Min. Co.*, 54 Mo. App. 476.

⁸⁵ *McMillan Marble Co. v. Black*, 89 Tenn. 118; s. c. 14 S. W. Rep. 479.

⁸⁶ *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; s. c. 44 N. E. Rep. 876; aff'g s. c. 59 Ill. App. 32. A miner employed in the shaft of a talc mine was injured by a mass of quartz and talc becoming detached and falling from the side of the shaft. The shaft was made by taking out a vein of talc, which is a slippery mineral, easily dislodged, and is usually separated from the rock by a mixture of talc and quartz, which safety requires to be taken out in the construction of a shaft. It was held to be sufficient evidence of the employer's negligence to go to the jury; since it was the employer's duty, in excavating the shaft, to be duly careful to leave the walls in a reasonably safe

§ 4194. **Duty to Keep a Supply of Timbers for Propping and Shoring Up.**—The duty of keeping the roofs of mines propped up and the sides shored up where necessary, implies an obligation to keep on hand a reasonable supply of timber suitable for that purpose, and, moreover, to keep it where it may be readily available in case of necessity. This duty is in some states enforced by the statute law. Thus the Illinois Miners Act⁸⁷ provides that mine-owners must have on hand suitable timber for propping the mines so that the miners may be able at all times to secure the place where they are working for their own safety. It has been held, construing this statute, that it is the implied duty of the miners to inspect the roof from day to day, and, where there is no timberman, to set the props themselves, and, if there is a timberman, to report dangerous places to him;⁸⁸ and that the miner himself is the one to determine the length and dimensions of the props and cap-pieces necessary to properly secure his safety;

condition: *Severance v. New England Talc Co.*, 72 Vt. 181; s. c. 47 Atl. Rep. 833. For another case where a miner was killed by the fall of a pillar of talc, and where the evidence was held sufficient to support a judgment against the mine-owner,—see *Tetherton v. United States Talc Co.*, 41 App. Div. (N. Y.) 613; s. c. 58 N. Y. St. Rep. 55; s. c. aff'd, 165 N. Y. 665; 59 N. E. Rep. 1131. The fact that props furnished a coal-miner at his request were not of the precise length required for the place where they were designed to be used, did not create a liability for an injury to the miner from falling coal, where the miner failed to specify the length desired: *Sugar Creek Min. Co. v. Peterson*, 177 Ill. 324; s. c. 52 N. E. Rep. 475; rev'g s. c. 75 Ill. App. 631. A mine-owner was not guilty of negligence toward an employé engaged in timbering an entry, in respect to a mass which another employé had for an hour before its fall vigorously endeavored to bring down, and which the foreman also tried to bring down with his pick; so that where the foreman directed the timber-man to cut a notch for a stull at a place lower than and a little to one side of the mass that fell, and to do so he took a position directly under the mass, and it fell and killed him, and injured the other miner, there could be no recovery: *Finalyson v. Utica Min. & Co.*, 67 Fed. Rep. 507; s. c.

14 C. C. A. 492. Where two tunnels were being mined by the same company—one above the other—in the same gulch, each tunnel-gang being under the supervision of an independent superintendent, and a rock negligently ordered to be rolled down the gulch struck and injured a man working at the tunnel below, who had no notice that such rock would be thrown down, and the rock could have been thrown into another gulch, in which no one was working, the evidence was sufficient to warrant a verdict for the employé in a suit to recover for such injury. The superintendents were vice-principals; nor were the members of the two gangs fellow servants: *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; s. c. 64 Pac. Rep. 174.

⁸⁷ Rev. St. Ill., ch. 93, § 16; *Hurd Rev. St. Ill.* 1887, p. 1167.

⁸⁸ *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619. This statute authorizes a recovery for an injury to a miner through a willful failure to comply with its provisions, although the entry which he is opening has a high and dangerous roof, and he is being paid, by reason thereof, a price exceeding the scale fixed by the union to which he belongs, since he is a "workman" within the meaning of the statute, without regard to such facts: *Mt. Olive & Co. Coal Co. v. Herbeck*, 190 Ill. 39; s. c. 60 N. E. Rep. 105; aff'g s. c. 92 Ill. App. 441.

and if he orders props and cap-pieces of a certain dimension and length, it is no compliance with the statute for the owner to furnish him props which must be spliced or sawed before they can be used.⁹⁰ One court held that the failure of a coal-mining company to furnish props and to prop the clod, dirt, and slate was not a violation of the statute, which was satisfied if a sufficient supply of timber was kept for the purpose to be sent down when required; and that such failure, without more being shown, did not create a common-law liability.⁹¹ But the Supreme Court of the same State, with seemingly more justice and humanity, held that the provisions of the statute do not relieve the owners of all responsibility for the condition of the roofs in their mines, nor supersede the requirement of the common law that a master shall furnish his servant a reasonably safe place to work, so as to relieve him from further responsibility after complying with the statute, as applied to a driver of cars over tracks in a mine-entry, who has nothing to do with the propping of the roofs, and especially where the mine-owner had been notified of the unsafe condition of the roof of the entry, and had assumed to repair it.⁹² As observed when treating another provision of the same statute,⁹³ it uses the word "willfully," and predicates a liability upon the willful failure of the mine-owner to fail to comply with the precautions required by the statute. In the enactment of such a statute the mine-owners or their attorneys must have got in their nefarious work; for the common law, properly defined and administered, would make the mine-owner liable for damages visited upon an employé by his *negligently* omitting the mere precautions; nevertheless the courts are obliged to administer the statute as the Legislature has made it, although to do so may and does in many cases condone the negligent manslaughter of a deserving class of citizens. In order to sustain a recovery under the statute where a miner has been killed through a neglect to comply with its provisions, it must appear that the mine-owner *willfully* failed and neglected to deliver to the deceased miner props and caps of sufficient length and dimensions with which to prop the mine, and that because of such willful failure and neglect the miner met his death.⁹⁴ In another State where there is a similar statute, giving a right of action

⁹⁰ *Western Anthracite Coal &c. Co. v. Beaver*, 192 Ill. 333; s. c. 61 N. E. Rep. 335; aff'g s. c. 95 Ill. App. 95.

⁹¹ *Consolidated Coal Co. v. Young*, 24 Ill. App. 255 (facts and circumstances may exist in a given case from which such duty will be imposed at common law, but no such facts were averred in plaintiff's declaration).

⁹² *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9; s. c. 54 N. E. Rep. 567; aff'g s. c. 75 Ill. App. 605.

⁹³ *Ante*, §§ 4184, 4185.

⁹⁴ *Western Anthracite Coal &c. Co. v. Beaver*, 95 Ill. App. 95; s. c. aff'd, 192 Ill. 333; 61 N. E. Rep. 335 (proper to refuse to direct a verdict for the defendant).

for an injury caused by the "willful failure" of the owner, etc., of a coal mine to keep a supply of timber for props when required, it is an essential condition to recovery that the defendant had notice that the timber and props were required, and, with such notice, neglected and refused to supply them; and an instruction not requiring the jury to find to that effect is faulty.⁹⁴ That there may have been props *somewhere* in the mine is not a substantial compliance with a statute requiring that props shall be delivered at the "usual place," particularly when the miner knows nothing about them.⁹⁵ The rule with respect to the *willful* failure to comply with other statutory requirements⁹⁶ applies in this relation; so that if a miner is injured through the willful failure of the mine-owner to furnish timbers to prop up the roof of the mine, *contributory negligence* on the part of the miner who is killed or injured by the falling of the roof will be no defense to an action for the damages, provided the willful neglect is the proximate cause of the injury.⁹⁷ But it has been held that a liability of a mine-owner for injuries to an employé from the fall of slate cannot be based upon his negligent failure to provide the latter with props, where the fall was caused by the employé tapping the slate, as it was his duty to do after a blast before propping; since the miner had willfully encountered a danger known to him.⁹⁸ Under a statute giving a right of action against the "owner, agent, or operator" of a mine, for injuries caused by a willful failure to furnish props, the owner is liable, even though the mine is operated by another under a contract with the owner, where the contract provides that the latter shall furnish timber for props. The duty enjoined was intended for the protection of persons employed in the mines, no matter by whom employed. The relation of master and servant is not, therefore, necessarily involved, nor the principles of law governing that relation. The actual owner has a right to transfer the occupancy and proprietorship of the mine by lease or other contract, and thus relieve himself from the duties imposed. But he cannot be permitted to relieve himself of the statutory duty and at the same time retain any joint occupancy or proprietorship of the mine. To relieve himself he must part

⁹⁴ *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 31; s. c. 19 S. W. Rep. 308. This decision is deserving of little respect, because it ignores the obvious consideration that the mine-owner is under a continuing duty of inspection to the end of seeing and knowing when the timbers and props are required.

⁹⁵ *Donk Bros. Coal &c. Co. v. Stroff*, 100 Ill. App. 576.

⁹⁶ Vol. I, § 206; *ante*, § 4185.

⁹⁷ *Donk Bros. Coal &c. Co. v. Stroff*, 100 Ill. App. 576. See also, *Sunnyside Coal Co. v. Center*, 100 Ill. App. 546.

⁹⁸ *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620; s. c. 24 S. E. Rep. 644.

with all immediate proprietorship and occupancy of the mine and control of its operation.⁹⁹

§ 4195. Failing to Provide Place of Refuge on Hauling-Roads and Gravity Roads.—A willful failure on the part of an owner of a coal mine to comply with so much of the Illinois Miners Act as requires him to provide places of refuge on all gravity or inclined entries in his mine, renders him liable for injuries received by reason of such failure.¹⁰⁰ The statute provides¹⁰¹ that on all single-track hauling roads wherever hauling is done by machinery, and on all gravity and inclined planes, in mines, on which persons employed in the mine travel on foot to and from their work, places of refuge must be cut in the side wall. Construing the statute, it is held that a mining company cannot escape liability for an injury occasioned by the failure to provide such places of refuge on an inclined track in its mine, on the ground that there was a double track, and that the statute did not require such places except on a single-track road where machinery was used,—the court reading the statute as requiring such places “on all inclined planes where coal-cars are hauled, whether by machinery or mules, whether by single or double track.”¹⁰²

§ 4196. Failure to Provide Barriers upon Ore-Tramways to Prevent Cars from Running into the Shaft of the Mine.—The construction, in an upper level of a mine, of an ore-tramway on such a grade that cars started thereon, or starting by gravity, will run into the shaft by their own momentum, without providing sufficient barriers to prevent their falling down the shaft, is negligence.¹⁰³

§ 4197. Injuries in “Timbering” Mines.—The fact that mining operations in a mine have proceeded beyond a point in the stope¹⁰⁴ to which it has been timbered, does not change the portion so timbered into a place to work, so as to bring it within the rule requiring the master to furnish the servant a reasonably safe place in which to work, where the timbering amounts only to a temporary lagging, and is an incident of the work; but he has only the duty of furnishing men and suitable materials for the use of his employes working in such tim-

⁹⁹ *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 31; s. c. 19 S. W. Rep. 308.

¹⁰⁰ *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 169; *Brookside Coal Min. Co. v. Hajnal*, 101 Ill. App. 175.

¹⁰¹ *Rev. St. Ill. 1901*, p. 1216, § 21.

¹⁰² *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 169.

¹⁰³ *Union Gold Min. Co. v. Crawford*, 29 Colo. 511; s. c. 69 Pac. Rep. 600.

¹⁰⁴ *Stope*, an excavation made in a mine in the process of removing ore.

bered portion.¹⁰⁵ A mine-owner is not guilty of negligence toward an employé engaged in timbering an entry, in respect to a mass of earth which another employé has been an hour before its fall vigorously endeavoring to bring down, and which the foreman also tried to bring down with his pick.¹⁰⁶

§ 4198. **Objects Falling Down Shaft of Mine.**—The owner of a coal mine who negligently left the mouth of an air-shaft to the mine unprotected, while it was being constructed, was held liable for the death of an employé at work at the bottom of the shaft, caused by a barrel falling down the shaft, although a sudden and violent gust of wind contributed to the accident.¹⁰⁷

§ 4199. **Duty of Mine-Owners as to Ladders, Scaffolding, etc., in their Mines.**—The mine-owner being under a primary and absolute duty with respect to the safety of his mine, he cannot, if he employs certain methods of bracing and supporting the staging and scaffoldings, relieve himself from liability for injuries to a miner by the falling of a scaffold, on the ground that the method employed in bracing and supporting it was dangerous, and that the miner was bound to know that the methods were not the best, where he had nothing to do with the construction of the scaffolds and staging in the mine.¹⁰⁸ It has been pronounced gross negligence in a servant who, ordered to remove the waste from a level of a mine, removed the waste supporting one upright of a ladder used by workmen in passing from the upper to the lower level of the mine, where it was dark, and the changed condition was not observable to one attempting to pass from the upper level.¹⁰⁹ Where a miner descended a ladder, and, on stepping off the

¹⁰⁵ *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463; s. c. 2 Det. Leg. N. 534; 3 Det. Leg. N. 43, 53; 32 L. R. A. 435, 438; 64 N. W. Rep. 335; 66 N. W. Rep. 951.

¹⁰⁶ *Finalyson v. Utica Min. &c. Co.*, 67 Fed. Rep. 507; s. c. 14 C. C. A. 492. The deceased came along after above-noted efforts to bring down the mass, and the foreman directed him to cut the notch for the next prop at a place lower than and a little to one side of the mass, to do which the deceased sat directly under the mass, and after drilling for half an hour it fell and killed him. — — Construction of § 25, rule 20, of the Brit. Col. statute known as the Inspection of Metalliferous Mines Act, which requires each shaft, etc., to be kept

securely timbered or protected,—with the conclusion that the statute was not intended to impose unreasonable burdens upon mine-owners: *McDonald v. Canadian Pac. Exploration Co.*, 7 Brit. Col. L. Rep. 39.

¹⁰⁷ *Springside Coal Min. Co. v. Grogan*, 67 Ill. App. 487; s. c. aff'd, 169 Ill. 50.

¹⁰⁸ *Eddy v. Aurora Iron Min. Co.*, 87 Mich. 548; s. c. 46 N. W. Rep. 17.

¹⁰⁹ *Dryburg v. Mercur Gold Min. &c. Co.*, 18 Utah 410; s. c. 5 Am. Neg. Rep. 253; 55 Pac. Rep. 367 (whether two servants working at a distance from each other were fellow servants was a question of fact for a jury, under proper instructions from the court as to who are fellow servants).

last rung, fell into a hole in the platform, made and left open by the company's foreman without such miner's knowledge, the question of a fellow servant's negligence was not involved, but whatever was done by the foreman in the mine in leaving the hole in the platform was chargeable to the company.¹¹⁰

§ 4200. **Caving In of the Shaft.**—The owner of a mine is not liable for the death of an experienced miner in its employ caused by the caving of a shaft while sinking it, where such shaft was at the time only twelve feet deep, and the owner, on being informed that the shaft needed timbering, immediately began to place the timber, in which work the miner was engaged when the injury occurred.¹¹¹

§ 4201. **Duty of Mine-Owner to Give Warnings of Danger.**—The general duty which rests upon every employer,¹¹² is particularly applicable in the case of mines having extensive ramifications under ground and many workmen engaged in various departments and kinds of service. Accordingly, it has been held that a mining company is liable for injury to a workman by the fall of a stone from a slope under which he is set to work, where he does not know that pebbles and stones in unusual numbers have been falling there during the day, but this fact is known to the superintendent of the mine, who orders him to work there, without first warning him, or having the stones raked off, or taking any other precautions to prevent the accident.¹¹³ But the operator of a mine, who, in accordance with a custom in his business, places a danger-signal in the room of a mine where there is standing gas, is not required, in addition, to place a man on duty to watch and warn against entrance into such room with a naked light.¹¹⁴

§ 4202. **Negligence with Respect to Stulls and Platforms.**—A mining company, which erects a stull or platform across a narrow and

¹¹⁰ Downey v. Gemini Min. Co., 24 Utah 431; s. c. 68 Pac. Rep. 414. In such a case an instruction that, where a mining company, in the prosecution of its work, is putting in timbers and floors to catch ore as it is broken down and distribute it into various chutes, and the floors are being changed from time to time to keep up with the work, such floors and timbers and passageways are to be deemed the *work* itself, and not the *place* of work, or the means of egress or ingress, within the rule requiring the mas-

ter to keep them reasonably safe,—was not correct, and was properly refused: Downey v. Gemini Min. Co., 24 Utah 431; s. c. 68 Pac. Rep. 414.

¹¹¹ Stiles v. Richie, 8 Colo. App. 393; s. c. 46 Pac. Rep. 694.

¹¹² *Ante*, § 4055, *et seq.*

¹¹³ Deweese v. Meramec Iron Min. Co., 54 Mo. App. 476; s. c. *aff'd*, 128 Mo. 423; 31 S. W. Rep. 110.

¹¹⁴ Cerrillos Coal R. Co. v. Deserant, 9 N. M. 49; s. c. 49 Pac. Rep. 807.

dark fissure in its mine, seventy feet from the bottom, on which its employés are required to work, is bound to the exercise of reasonable care to see that the timbers are of adequate strength and number, and securely fastened, so as to render it a safe place on which to work.¹¹⁵

§ 4203. **Electric Wires Not Properly Insulated.**—There are duties which a mine-owner owes to his employés, as licensees, though not strictly as employés, with respect to keeping those portions of the mine safe where they are not required to work, but through which they are accustomed to pass in congregating or visiting during the hours of recreation. Accordingly, it has been held to be negligence in the owner to introduce and extend along such an entry an electric wire which is dangerous to the lives of those who come in contact therewith, without properly insulating or inclosing the same, or giving notice of the danger to those who, he should reasonably apprehend, are likely to be brought in contact with it; and such negligence will render him liable for the death of a miner who, in the accustomed use of the premises, and without knowledge of the danger or negligence on his own part, is killed by coming in contact with such wire.¹¹⁶

§ 4204. **Negligence after the Breaking Out of a Fire in a Mine.**—The doctrine that an employer must exercise a care, diligence, and exertion in proportion to the danger with which his employés are threatened,¹¹⁷ finds expression with reference to a fire in a mine in the following language: "Where human life is at stake the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done regardless of difficulties and expense." Therefore, it was held to be the duty of a superintendent of a mine in which a fire starts while employés are in the mine, to telegraph for and have appliances for flooding the mine sent by express, if the lives of the employés cannot be properly saved by any other method.¹¹⁸ The fact that the superintendent of a mine in which a fire was burning consulted the operatives as to the expediency of closing up the mine, and so smothering the fire, and that in their opinion it was the best thing to be done, does not relieve the operators of the mine from liability for the death of an employé resulting from such action, where another course, by which his life could have been saved, should

¹¹⁵ *Westland v. Gold Coin Mines Co.*, 101 Fed. Rep. 59; s. c. 41 C. C. A. 193.

¹¹⁶ *Ellsworth v. Metheney*, 104 Fed. Rep. 119; s. c. 44 C. C. A. 484; 51 L. R. A. 389.

¹¹⁷ Vol. I, § 25; *ante*, § 3772.

¹¹⁸ *Bessemer Land & Co. v. Campbell*, 121 Ala. 50; s. c. 25 South. Rep. 793.

have been pursued in the exercise of due care and diligence.¹¹⁹ This is consistent with the conclusion of another court, that a mere error of judgment in stopping the ventilating-fan in the air-shaft of a mine under the influence of the excitement and confusion occasioned upon the discovery of a fire and the peril of the miners, even if chargeable to the company, does not necessarily constitute negligence rendering it liable for the death of a miner, to which such act contributed.¹²⁰ But, on the other hand, it has been held that negligence may be imputed to a mine-owner where, after stopping a fan which operates so as to drive smoke to a part of the mine where miners are at work, he or his agents *permit* it to be started again, although there is much excitement and a great number of people about the mouth of the mine, and it is not shown clearly who started the fan again.¹²¹

§ 4205. Duty to Cut Separate Manways for Ingress and Egress.—It is not, unless required by statute, the duty of persons operating coal mines to cut manways, different and separate from the slopes through which coal is brought to the surface, for the ingress and egress of their employes; and a count proceeding on the theory that such failure is negligence presents no cause of action.¹²²

§ 4206. Employment of a Mine-Boss or Mine-Foreman.—When it is recalled that the duty of exercising care to the end that the mine shall be a reasonably safe place within which his employes are to work, is an absolute and unassignable duty, it quite readily follows that the owner of a mine does not, by employing a so-called “mining-boss” or “mine-boss” or “mine-foreman,” who is competent and fit for his duties, relieve himself from the obligation of taking those precautions which are necessary for the reasonable safety of his miners, nor from the necessity of taking the precautions prescribed by the statute law, although the statute law requires him to employ a mine-boss. The effect of such a statute is to prescribe the duties *owing by the master*, and the fact that the mine-boss is required to be employed to perform those duties does not relieve the master from the obligation of performing them or of seeing that they are performed.¹²³ In like

¹¹⁹ Bessemer Land &c. Co. v. Campbell, 121 Ala. 50; s. c. 25 South. Rep. 793.

¹²⁰ Hughes v. Oregon Imp. Co., 20 Wash. 294; s. c. 55 Pac. Rep. 119.

¹²¹ Drennen v. Smith, 115 Ala. 396; s. c. 22 South. Rep. 442.

¹²² Whatley v. Zenida Coal Co., 122 Ala. 118; s. c. 26 South. Rep. 124.

¹²³ Linton Coal &c. Co. v. Persons, 11 Ind. App. 264; s. c. 39 N. E. Rep.

214. The court held that the duties prescribed, relating to the safety of the mine, are the positive duties of the master, and that the statute was intended, not to lessen his duties, but to increase them to the extent of requiring him to employ a competent mining-boss to give special attention to the condition of the mine.

manner it has been held that, under a statute providing that every working-place in all mines where there is enough explosive gas or fire-damp to be detected by ordinary safety-lamps shall be examined immediately before each shift by a competent person or persons, appointed by the superintendent and mine-foreman,—the superintendent of a mine cannot delegate his statutory duties to the mine-foreman, but must consult with him and join in the appointment of a competent person—a certified fire-boss—who shall make the examination of the mine.¹²⁴ Contrary to the above, we find an untenable and regrettable decision to the effect that a mine-owner discharges his full duty to his miners when he complies with a statute requiring him to employ a properly qualified person to discharge the duties prescribed therein as to the care and inspection of the mine, and is not liable for accidents traceable to the carelessness or negligence of such person, who is a fellow servant with the other miners.¹²⁵ Reasoning on similar lines, another court holds that the employment of a competent mine-boss as required by statute,¹²⁶ discharges the full duty prescribed by the statute, and that the employer is not liable for the negligence of the mine-boss in the performance of those duties which the statute prescribes shall be performed by him. He is not a vice-principal, and his duties are not delegated to him by his employer, but are prescribed by statute.¹²⁷

§ 4207. Who is the "Owner, Agent or Operator" within the Meaning of a Statute.—The actual owner, who has engaged another to open his coal mine, reserving to himself the obligation and burden of furnishing and operating machinery, is not thereby relieved of liability for failure to provide a cage with a spring catch for lowering the men, as required of the "owner, agent or operator" by the Missouri statute; to this extent the relation of master and servant exists between him and an employé of the person operating the mine under contract.¹²⁸

§ 4208. Failure to Protect the Shafts and Stairways by Hand-Rails.—A failure on the part of the owner of a coal mine, the orig-

¹²⁴ *Kless v. Youghiogheny Min. Co.*, 18 Pa. Super. Ct. 551.

¹²⁵ *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; s. c. 33 W. N. C. (Pa.) 204; 27 Atl. Rep. 577.

¹²⁶ The West Virginia statute is taken from the statute of Pennsylvania; and the construction placed upon the Pennsylvania statute as above seen, is adopted by the West Virginia court.

¹²⁷ *Williams v. Thacker Coal &c. Co.*, 44 W. Va. 599; s. c. 30 S. E. Rep. 107; 40 L. R. A. 812.

¹²⁸ *Fell v. Rich Hill Coal Min. Co.*, 23 Mo. App. 216. But see *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 31; s. c. 19 S. W. Rep. 308, where it is held that this liability does not necessarily rest on the relation of master and servant.

inal shaft of which is two hundred feet in depth, to place hand-rails along the stairway and around the platform in an additional or an escapement-shaft, and to partition off the escapement-shaft from the main air-way, in the manner required by statute, within a year after coal is mined for sale or use, will be treated as a willful violation of the statute, rendering such owner liable for injuries resulting therefrom.¹²⁹

§ 4209. Employment of Competent and Fit Servants in Mines.—As in other relations,¹³⁰ so here, the operator of a mine is not absolutely required to employ fit, suitable, competent, and experienced men to operate and manage the mine; but his duty in such regard is fulfilled if he takes all reasonable precautions to inquire into the competency of those proposing to enter into his service.¹³¹

§ 4210. Employment of Children in Mines.—To employ an experienced and careful boy fourteen and a half years old as “trapper” to give signals to drivers in a mine, is not negligence which will render the company liable to another employé for his failure to give a signal at a proper time, if it is the custom among men of ordinary care and prudence engaged in mining to employ boys of that age as “trappers,” and the practice is universal among mine-owners and companies.¹³² A master was held to have exercised, as matter of law, due care in the employment of a boy seventeen years old to control the brakes of the hoisting-machinery at a mine where the machinery used was simple and easily managed, where, before hiring, he made inquiries of one competent to judge of the applicant’s experience and ability, who assured him of the applicant’s competency, and the master further had him instructed and watched by the engineer for a time after he commenced work,—the question of whether due care was used in hiring him being for the court to determine, the testimony being undisputed.¹³³

¹²⁹ *Carterville Coal Co. v. Abbott*, 181 Ill. 495; aff’g s. c. 81 Ill. App. 279.

¹³⁰ *Ante*, § 4048.

¹³¹ *Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 49; s. c. 49 Pac. Rep. 807.

¹³² *Kansas &c. Coal Co. v. Brownlie*, 60 Ark. 582; s. c. 31 S. W. Rep. 453.

¹³³ *Walkowski v. Penokee &c. Consol. Mines*, 115 Mich. 629; s. c. 41 L. R. A. 33; 73 N. W. Rep. 895. In an action by a boy fourteen years old against a mining company for

injuries, a verdict for the plaintiff will be sustained where it appears that a month before the accident, plaintiff had been placed at work, without previous experience, in keeping coal moving in chutes; that this work, while dangerous, was not so obviously dangerous as to deter a prudent person from doing it; and the evidence as to whether plaintiff had been properly instructed was contradictory: *Brislin v. Kingston Coal Co.*, 20 Pa. Super. Ct. 234.

§ 4211. **Negligence with Respect to Unexploded Blasts.**¹³⁴—As in the case of quarries,¹³⁵ so in the case of mines, a mine-owner is imputable with negligence in failing to make diligent search for and discover a charge of dynamite which has been left unexploded or to warn the miners of that fact.¹³⁶

§ 4212. **Proximate and Remote Cause of Injuries in and about Mines.**—When an employé in a mine tripped upon a loose plank in a platform constructed on a “level” of the mine, and fell and was injured, the proximate cause of the injury was deemed the neglect of the mining company to securely fasten the plank, and not the fact that it was loosened by a blast fired in the ordinary course of mining. If the plank became loosened under the strain of the ordinary operations of mining, by reason of the defective construction of the platform, the company could not plead those operations as an intervening cause of the injury so as to escape liability.¹³⁷

§ 4213. **Sending Empty Bucket Down Shaft to Ascertain whether Shaft is Free from Obstructions.**—In a case where a miner had been injured while being rapidly lowered to his place of work by the bucket coming in contact with an obstruction which a fellow servant had negligently left across the shaft, where there was testimony tending to show that, by reason of the danger of obstructions and displaced timbers caused by the operations of blasting, it was the custom in many mines to send the empty bucket down the shaft to ascertain that it was clear of obstructions before sending the workmen down,—it was not error to submit to the jury the question whether sending the

¹³⁴ See also, *ante*, § 3921, *et seq.*

¹³⁵ *Ante*, § 3975.

¹³⁶ *Alton Lime &c. Co. v. Calvey*, 47 Ill. App. 343. Where several shifts were engaged in sinking a shaft in a mine, and a shift discharged several blasts, and one failed to explode, leaving a missed hole charged with dynamite, the danger arising from the same to the members of another shift taking up the work was one which it was the duty of the master to make known to the servants: *Shannon v. Consolidated Tiger &c. Min. Co.*, 24 Wash. 119; s. c. 64 Pac. Rep. 169.

¹³⁷ *Smizel v. Odanah Iron Co.*, 116 Mich. 149; s. c. 4 Det. Leg. N. 1111; 74 N. W. Rep. 488. In another case it appeared that the miner who was killed was employed at the bottom of a mine-shaft in shifting “emp-

ties” and placing loaded cars on the cage. The timber supporting the cage, and the sheet-iron surface surrounding it, had become decayed or misplaced, so that loaded cars could not be placed thereon without some one getting on the cage to pull them on and adjust them. While deceased was so engaged, the cage, without negligence of the mine-owners, was suddenly hoisted and deceased was caught between the cage and shaft, and injured. It was held that the untimely hoisting of the cage, and not defendants’ negligence in permitting the timber and the sheet-iron surface surrounding the cage to become misplaced, was the proximate cause of the injury, and hence there could be no recovery: *Roe v. Thomason*, 25 Tex. Civ. App. 67; s. c. 61 S. W. Rep. 528.

bucket on a trial trip was a necessary precaution for the safety of the men before sending them down to the place of their work.¹³⁸

§ 4214. **Negligence with Respect to the Construction or Repair of the Cage in which Miners are Lowered and Raised.**—A coal-mining company is, as matter of law, not liable for injury to an employé's hand, caused by the drawing up of a nut to which such employé was holding, fastening an eyebolt to a cross-beam in the cage by which the employés were raised from the mine, although such eyebolt had become so loose as to drop down about three-quarters of an inch when the cage was at the bottom, where such bolt and nut were not out of repair for the original purpose for which the cage was constructed, and were not intended as a handhold.¹³⁹

§ 4215. **Various Negligences for which Mine-Owner has been held Liable.**—The mine-owner has been held liable for an injury caused by *adopting a system*¹⁴⁰ of bumping an empty car against a loaded car for the purpose of starting the latter along without giving any warning to the employé engaged in loading the car;¹⁴¹ for so constructing the passageway in a mine that cars have to pass dangerously near to the wall, injuring a servant engaged in the duty of inserting sprags or blocks in the wheels of the cars while on a down-grade to prevent them from moving too rapidly;¹⁴² for leaving a post improperly secured in the roadway of a mine, from the fall of which an inexperienced boy miner is killed;¹⁴³ for employing a hoisting-engine for a mine-cage, the valve of which is so defective that the engine will start automatically, where the death of a miner is caused thereby;¹⁴⁴ for the failure of his superintendent, who, because of the supersensitiveness of his nerves, lost his head and failed to use the proper means to save the life of an employé in an emergency,—the test being whether the superintendent did what an ordinarily careful and prudent man would do under the same circumstances;¹⁴⁵ for receiving a mine from his lessor, a level in which is in a dangerous, negligent condition, and for maintaining it in that condition until it results in an injury to an employé.¹⁴⁶ It is, moreover, a just conclusion, that if a mine-owner

¹³⁸ Alaska United Coal Min. Co. v. Keating, 116 Fed. Rep. 561.

¹³⁹ Jayne v. Sebawaing Coal Co., 108 Mich. 242; s. c. 2 Det. Leg. N. 825; 65 N. W. Rep. 971.

¹⁴⁰ *Ante*, § 4175.

¹⁴¹ Wenona Coal Co. v. Holmquist, 51 Ill. App. 507.

¹⁴² McNamara v. Logan, 100 Ala. 187; s. c. 14 South. Rep. 175.

¹⁴³ McLean County Coal Co. v. McVey, 38 Ill. App. 158.

¹⁴⁴ Consolidated Coal Co. v. Maehl, 31 Ill. App. 252.

¹⁴⁵ Bessemer Land & C. Co. v. Campbell, 121 Ala. 50; s. c. 25 South. Rep. 793.

¹⁴⁶ Union Gold Min. Co. v. Crawford, 29 Colo. 511; s. c. 69 Pac. Rep. 600.

adopts a method of bracing and supporting timbers and staging in his mine, which is less safe than other methods in use, this puts upon him the obligation of an *increased duty of inspection* to the end of preventing accidents thereby.¹⁴⁷

¹⁴⁷ Eddy v. Aurora Iron Min. Co., 81 Mich. 548; s. c. 46 N. W. Rep. 17. ,

CHAPTER CXV.

LIABILITY OF SHIPOWNERS FOR INJURIES TO THEIR SEAMEN AND OTHER EMPLOYEES.

SECTION

4220. Liability of ship or shipowner for injury to seamen through defective marine appliances.

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SECTION

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4239. Compulsory pilots.

§ 4220. Liability of Ship or Shipowner for Injury to Seamen through Defective Marine Appliances.—Aside from the obligations imposed on the owners and charterers of vessels by the Federal statute for the protection of seamen,¹ which statute is not now under consideration, but upon the general principles of jurisprudence, the owner of a vessel, among other obligations to the seamen, is bound to provide a seaworthy ship; which means that at the commencement of a voyage the ship shall be furnished with all necessary and customary requisites

¹ U. S. Comp. Stat. 1901, p. 3091, § 4554, *et seq.*

for navigation, or, as the term is, shall be found seaworthy. But the owner is not an insurer or warrantor of the seamen against latent and undiscoverable defects in the vessel.² In other words, outside of statutory rules, the owner of a vessel stands under the same duty of exercising reasonable care to make the vessel, its tackle and appliances safe for the use of the seamen by which it is manned, which the law puts upon any other employer in favor of his servants. If there is any difference in the rule between a ship at sea and a railway-train or manufacturing establishment on land, it is in favor of the seafaring servant; for the obvious reason that the master of the ship is the sovereign of the deck, may exercise compulsory power over the sailor, and may order him into whatsoever place of danger he pleases, and the sailor has no alternative but to obey. Therefore, when a sailor ships under articles of agreement which bind him to obey the orders of his superiors, if he is ordered to operate dangerous and defective machinery he has the right to rely upon the assumption that it is reasonably safe for the purposes to which it is applied, and is entitled to recover damages against the shipowner if he is injured because it is not thus safe.³ For example, a seaman unacquainted with a ship has been held entitled to recover his actual damages for injuries from falling into the hold because of the giving way, through imperfect fitting, of which he was ignorant, of a section of the hatch upon which he was standing while adjusting another section, under direction of the boatswain, who was hurrying him in his work.⁴ Under the operation of this principle a seaman has recovered damages where the master of a vessel caused the spare-wheel, which, in its ordinary condition, rested loosely on the drum of the steam-wheel, to be so lashed that it would necessarily rotate with the drum, thereby rendering the apparatus dangerous to anyone engaged in cleaning it, and without giving notice to the seaman whose duty it was to clean it, in consequence of which he was injured,—the *recovery being against the master*,⁵ where the hatch-cover of the vessel gave way when a seaman stepped upon it, and precipitated him into the hold,—the recovery being against the *vessel*,⁶ where the master of a steamboat attempted to deliver freight without mooring, and the vessel was obliged to withdraw from the shore to save her smokestacks, and in so doing one of the crew was precipitated from the gangplank into the water and drowned.⁷ On

² The *Lizzie Frank*, 31 Fed. Rep. 477.

³ *Eldridge v. Atlas S. S. Co.*, 58 Hun (N. Y.) 96; s. c. 33 N. Y. St. Rep. 1016; 11 N. Y. Supp. 468.

⁴ *Erquit v. New York & C. S. S. Co.*, 50 Fed. Rep. 325.

⁵ *Withcofsky v. Wier*, 32 Fed. Rep. 301.

⁶ *The Yoxford*, 33 Fed. Rep. 521.

⁷ *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

the other hand, the vessel and its owners will be exonerated where the injury to the sailor happens from an unavoidable danger of the sea,—as where he is thrown over the wheel in consequence of a heavy sea striking the rudder;⁸ or where the injury happens through the breaking or giving way of an appliance, apparently sound and strong, and having in it no obvious defect,—such as the breaking of the handle of an ash-bag;⁹ or where the sailor was injured by falling through a scuttle, properly constructed and covered, and such as is in common use, and over which cargo had been trucked in safety before the accident,—the inference being that the accident arose from the cover becoming tilted out of place;¹⁰ and, in general, where the sailor is injured in using or coming in contact with some appliance which is customarily used and approved by *competent* and experienced marine architects;¹¹ or where, although the appliance may be defective, there is nothing to charge the shipowner with knowledge of it or with negligent ignorance in respect of it.¹²

§ 4221. Liability of Ships and Shipowners to Ship-Repairers for Defects in the Ship.—Plaintiff was employed by ship-repairers to assist their foreman in making such repairs to a vessel as the engineer thereof should direct. The engineer directed the repair of a band at the bottom of a ventilator made of boiler-iron, in the fire-room. While the foreman and plaintiff were fastening the band around the ventilator, twenty feet of the lower part of the ventilator broke off, through some defect in the riveting, and crushed plaintiff's foot. It was held that the defendants were not negligent in failing to provide proper tools and implements, the ventilator not being a tool, implement, or appliance; nor in failing to provide a safe or proper place to do the work, the place where the work was done not being obviously or necessarily dangerous, and being the only place where the work could have been done.¹³

§ 4222. Liability of Ships and Shipowners to Stevedores.—The obligation to exercise reasonable care to the end of furnishing safe appliances for loading and unloading, extends to the protection of stevedores engaged in that business, whether under a contract with the

⁸ The Harry Buschman, 33 Fed. Rep. 558.

⁹ The France, 59 Fed. Rep. 479; s. c. 8 C. C. A. 185; rev'g s. c. 53 Fed. Rep. 843.

¹⁰ The Theresina, 31 Fed. Rep. 90.

¹¹ The Lizzie Frank, 31 Fed. Rep. 477.

¹² Geoghegan v. Atlas S. S. Co., 3 Misc. (N. Y.) 224; s. c. 51 N. Y. St. Rep. 868; 22 N. Y. Supp. 749; s. c. aff'd, 146 N. Y. 369; 40 N. E. Rep. 507.

¹³ Brown v. Terry, 67 App. Div. (N. Y.) 223; s. c. 73 N. Y. Supp. 733.

owner of the vessel, or under a contract with the contractor who has undertaken to load or unload the ship.¹⁴ But the limit of this obligation and liability is measured by reasonable care. It does not extend so far as to make the vessel-owner liable for the breaking of tackle furnished by him for the purpose, which exhibits no apparent defect, when the stevedore is competent, and has the exclusive appointment of the laborers and control of the work of loading and unloading the vessel.¹⁵ An employer was held not liable for injury to an employé in the hold of a vessel by the overturning of a loaded bucket which hit the combings of the hatch, where the appliance was safe if properly used, it was a common occurrence for the bucket to turn out its load if it hit anything, and on reaching the combings it was pulled sidewise by another employé, to be dumped on the dock, and there was no other showing of negligence.¹⁶ Where, according to the usual custom, the owner or charterer of a vessel—or as the expression would be in the admiralty law, the vessel itself—furnishes the tackle, rigging and appliances to be used in loading and unloading her, then the owner or charterer is bound to exercise that reasonable care already described,¹⁷ to the end that such tackle, rigging and appliance shall be reasonably safe for the purposes intended; and, although the loading and unloading of the vessel is committed to a master stevedore, who may be regarded, in a sense, as an independent contractor,¹⁸ yet the vessel-owner and the vessel itself will, in case of an injury to such master stevedore or his servant, through a failure to exercise reasonable care in this regard, stand under the same liability under which a master rests for failing to exercise due care to the end that the machinery, appliances, etc., which he puts into the hands of his servants are reasonably safe for the purposes intended. It follows that an action *in rem* will lie for damages happening to the stevedore or his servants from defects and imperfections in such appliances so furnished, whenever, under analogous conditions, a servant could recover against his master.¹⁹ The vessel-owner must, it is held, take care to keep his ship

¹⁴ *Hannigan v. Union Warehouse Co.*, 3 App. Div. (N. Y.) 618; s. c. 38 N. Y. Supp. 272; 73 N. Y. St. Rep. 753.

¹⁵ *The Dago*, 31 Fed. Rep. 574. Where a ship was not bound to furnish tackle to hold up a chute used by contractors in loading the vessel with grain, and that used was rigged up by the stevedores employed by the contractors, by unfastening the down-haul of the trysail and attaching it to the chute, the mere fact that the mate in charge did not object to the use of

the trysail tackle would not render the owners liable for the death of a stevedore, caused by the breaking of such tackle and the falling of the chute, the mate having no better means than others for judging of its safety: *Jeffries v. DeHart*, 96 Fed. Rep. 494.

¹⁶ *McDonough v. Walsh*, 49 N. Y. St. Rep. 361; s. c. 21 N. Y. Supp. 203; 66 Hun (N. Y.) 633 (*mem.*).

¹⁷ *Ante*, §§ 3986, 3989.

¹⁸ Vol. I, § 635.

¹⁹ *Steel v. McNeil*, 8 C. C. A. 512; s. c. 60 Fed. Rep. 105; *The Para*, 56

in such condition that the loading appliances may be reasonably used without danger of catching on obstructions so as to endanger a gangway-man.²⁰ If he suffers a heavy iron bucket used in unloading salt, equipped with iron wheels and lowered and raised by machinery and operated by an engineer, to become insecurely attached by reason of a defective pin on which the bucket turns, so that it falls upon the hand of an employé, the master will in like manner be liable for the damages.²¹

§ 4223. Liability of Ship or Shipowner to Servant of Stevedore for Injuries from Defective Appliances Used in Loading and Unloading.

—And, although a master stevedore has charge of the loading and unloading of the vessel which furnishes the tackle, and one of his men is injured by its breaking, in consequence of the failure of the shipowner or charterer to exercise reasonable care in its inspection and repair, and the foreman of the stevedore calls the attention of the mate of the ship to its defective character,²² the vessel will be liable for the damages. The doctrine of one court is, that if the master exercises reasonable care in furnishing suitable appliances, and then commits to a competent servant the duty of *keeping them in order*, this servant is a fellow servant with any servant who may be injured through a failure of such duty, so as to exonerate the master, under a rule hereafter considered.²³ Applying this principle, the same court has held that where a corporation, engaged in the business of moving cargoes by means of lighters and hoisting-apparatus, has furnished suitable ropes and appliances, and put a competent man in charge of them, he is not liable for an injury sustained by a workman, from the parting of a rope defective from wear, which defect was known to the man in charge, whose duty it was to replace it.²⁴ A learned admiralty judge has also denied the operation of the rule first above stated, on the ground that the owner of the vessel is not in privity of contract with the servants of the stevedore with whom he makes a contract for the loading or unloading of his ship.²⁵ But this conclusion is unsound in principle and out of line with the general course of authority. The shipowner furnishes the appliances for the very purpose of their

Fed. Rep. 241; *The Persiam Monarch*, 49 Fed. Rep. 669; *The Truro*, 31 Fed. Rep. 158; *The Carolina*, 30 Fed. Rep. 199.

²⁰ *The Anchoria*, 113 Fed. Rep. 982.

²¹ *Morton v. Zwierzykowski*, 192 Ill. 328; s. c. 61 N. E. Rep. 413; aff'g s. c. 91 Ill. App. 462.

²² *The Phoenix*, 34 Fed. Rep. 760.

²³ *Post*, § 4934; *Killea v. Faxon*, 125 Mass. 485. See also, *Colton v. Richards*, 123 Mass. 484; *Kelley v. Norcross*, 121 Mass. 508.

²⁴ *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; s. c. 46 Am. Rep. 458.

²⁵ *The Aalesund*, 9 Ben. (U. S.) 203.

being used by the servants of the stevedore. This brings the case within the doctrine of *Langridge v. Levy*,²⁶ and if there is not, under that doctrine, an implied warranty of the fitness of the appliances for the purposes intended, there is at least an implied warranty that the shipowner furnishing them has exercised reasonable care for the purpose of seeing that they are fit.

§ 4224. **Circumstances under which the Ship or Shipowner has been Exonerated from Liability for Injuries Arising from its Appliances for Loading or Unloading.**—Outside of these principles, the vessel has been exonerated where the hoisting-tackle was new, sound, large enough and apparently fit for the purpose intended, but nevertheless gave way after several days' use through the parting of a rope in consequence of a sudden jerk;²⁷ where the stevedore was injured in consequence of the breaking of a hook through a latent defect, not discoverable by an ordinarily careful inspection;²⁸ where the injury arose from the giving way of a chock in the hands of an experienced stevedore, such as was constantly used in the business, no previous accident having resulted from its use;²⁹ where the appliances furnished by the vessel were put to a use by the injured stevedore and his co-employés for which they were not intended, all the requisite appliances for the particular purpose having been furnished them;³⁰ where the injury happened through the manner in which the stevedores adjusted the appliances furnished them, and not from any defect in the appliances themselves,—as where one of them was killed in consequence of their failure to lay the usual planks about the platform or "stool" on which they stood in their work of rolling merchandise into the hold of the vessel, it being customary for the servants to lay such planks and it not being the primary duty of the master.³¹ On a principle already considered,³² it is not actionable negligence on the part of a shipowner to keep in use a winch which has been used with safety for several years, although it may require more care to operate it safely than is required in the case of some more modern machines,—especially when the machine and the care required in using it are well known to the injured employé.³³

²⁶ *Murph. & H.* 134; s. c. 2 *Mee. & W.* 519; *Horn & H.* 325; 4 *Mee. & W.* 337.

²⁷ *The Dago*, 31 *Fed. Rep.* 574.

²⁸ *The Benbrack*, 33 *Fed. Rep.* 687.

²⁹ *McCampbell v. Cunard S. S. Co.*, 36 *N. Y. St. Rep.* 852; s. c. 13 *N. Y. Supp.* 288.

³⁰ *The Persian Monarch*, 55 *Fed. Rep.* 333. Similarly as to the liability of the owners of a dock-yard on

analogous facts: *Butler v. Townsend*, 126 *N. Y.* 105; s. c. 36 *N. Y. St. Rep.* 508; 26 *N. E. Rep.* 1017; *rev'g* s. c. 32 *N. Y. St. Rep.* 1055; 10 *N. Y. Supp.* 809.

³¹ *Hogan v. Smith*, 125 *N. Y.* 774; s. c. 35 *N. Y. St. Rep.* 870; 26 *N. E. Rep.* 742. See also, *ante*, § 3954.

³² *Ante*, § 3996.

³³ *The Serapis*, 51 *Fed. Rep.* 91; s. c. 8 *U. S. App.* 49; *rev'g* s. c. 49

§ 4225. **Liability of Stevedore for Injuries to his Servant in Consequence of Using Defective Appliances Belonging to the Ship.**—A stevedore contracting to load a ship and for such purpose using appliances belonging to the ship, is charged with the duty toward his own employé of exercising reasonable care to the end that such appliances are safe.³⁴

§ 4226. **Liability of Warehousemen, Owners of Shipyards, etc., for the Safety of Appliances Used in Loading and Unloading Ships.**—A warehouse company owes to the employés of one engaged with it in removing the cargo of a ship directly to its warehouse for their mutual advantage, the same duty of supplying safe implements for their use that it owes its own employés.³⁵ An iron hook fastened by the owner of a shipyard to a wharf, to hold a pulley through which passed a rope used in the work of unloading, running from the ship to a steam-winch on the wharf, is regarded as an appliance used in the business, so as to make the owner of the yard liable to his employés for the exercise of reasonable care in maintaining it in a safe condition.³⁶ And where a warehouse company is negligent in furnishing slings for unloading a ship which are unfit for the purpose intended and which are unable to carry the weight put upon them, it is liable to an employé of a master stevedore for an injury resulting from the breaking of such a sling.³⁷

§ 4227. **Obstructions on a Deck.**—Where a deck-hand on a tug-boat was injured by stepping on a siphon-pipe which another deck-hand had carelessly left lying on the deck,—it being the duty of the

Fed. Rep. 393. Plaintiff was a long-shoreman employed by defendant stevedores, and was injured by the breaking of a rope used by defendants to hoist barrels on board ship. Great care was taken by defendants in procuring good ropes. The rope which broke had been tested before it was put in use, and the load when it broke was small compared to the ordinary carrying power of such a rope. The cause of the breaking of the rope was not known, but it had been used but a short time compared with the time such rope could ordinarily be used with safety. This was held to show freedom from negligence as a matter of law. *Kelly v. Hogan*, 37 Misc. (N. Y.) 761; s. c. 76 N. Y. Supp. 913.

³⁴ *Young v. Hahn* (Tex. Civ.

App.), 69 S. W. Rep. 203 (no off. rep.); s. c. rev'd on other grounds, 96 Tex. 99; 70 S. W. Rep. 950.

³⁵ *Hannigan v. Union Warehouse Co.*, 3 App. Div. (N. Y.) 618; s. c. 73 N. Y. St. Rep. 753; 38 N. Y. Supp. 272.

³⁶ *Olsen v. Starin*, 43 App. Div. (N. Y.) 422; s. c. 60 N. Y. Supp. 134 (but the evidence, tending to show that the hook straightened out only under an extraordinary strain, due to an accident, was held not to be sufficient to go to the jury on the question of the sufficiency of the hook).

³⁷ *Hannigan v. Union Warehouse Co.*, 3 App. Div. (N. Y.) 618; s. c. 38 N. Y. Supp. 272; 73 N. Y. St. Rep. 753.

deck-hands to keep the deck clear,—the negligence was in a mere detail of the business, for which the owner of the boat was not responsible.³⁸

§ 4228. Defective Gang-Planks, Staging, etc.—A shipowner will not be liable to an employé for an injury through a defect in a gang-plank caused by the metal strip at the end of the plank wearing loose and projecting above the surface of the plank, where the defect is plainly visible and of such a nature that it could have been readily repaired, and where the shipowner kept for use at the pier an extra gang-plank which was in good condition.³⁹ Where the use of staging or connecting planks in transferring cotton from a barge to a river steamboat was neither customary nor practical, the failure to furnish such staging was not negligence; and there could be no recovery for the death of a steamboat-hand caused by falling overboard from such a cause.⁴⁰

§ 4229. Dangerous Defects in Ladders, Hatches, Scuttles, etc.—Defects of this nature have been a frequent source of injuries to employés of the owners of vessels, and to stevedores and their employés. The question of the negligence of the owner of a vessel has been held to be for the jury where the evidence tended to show that it did not appear that the owner of a vessel had, by any regulation, required those in charge of it to advise an inexperienced workman, temporarily engaged in loading it, that lanterns and materials to cover the hatchways had been provided, and the workman was injured by falling

³⁸ Direct Nav. Co. v. Anderson, 29 Tex. Civ. App. 65; s. c. 69 S. W. Rep. 174.

³⁹ O'Connor v. Pennsylvania R. Co., 48 App. Div. (N. Y.) 244; s. c. 62 N. Y. Supp. 723.

⁴⁰ Red River Line v. Smith, 99 Fed. Rep. 520; s. c. 39 C. C. A. 620. A complaint in an action for negligently causing the death of plaintiff's intestate while in defendant's service as fireman on a steamboat alleged that defendant failed to provide a safe and suitable gang-plank over the hold of the boat for the use of employés, in that the plank in use was made of unsound material, and not fastened at its ends in jambs, to prevent slipping. The evidence showed that deceased had put the plank out, i. e., away from the jambs, to reach for something, and that it slipped while he was

standing on it. The plank was sound and had been used for a long time. Jambs were prepared to receive it where it generally stayed, and when it stayed in them it could not slip; and there was no proof that the plank would not have been a proper and safe appliance for the purpose for which it was used, if properly stayed at the ends. It was held that a nonsuit was properly granted, since the evidence was insufficient to sustain a finding that defendant was negligent; it tending rather to show that the accident happened through the misuse by deceased of a proper appliance: Meekins v. Norfolk & C. R. Co., 127 N. C. 29; s. c. 37 S. E. Rep. 77 (Douglas, J., dissenting on the ground that a nonsuit seems to him a "judicial lynching").

through an open and unlighted hatchway on the lower deck;⁴¹ where the injury was alleged to have been produced by a defective ladder leading into the hold of a ship, and the evidence tended to show that one of the rounds of the ladder was missing, and that a fellow servant of the plaintiff, while attempting to descend the ladder, fell, and to save himself jumped against a bale of cotton, which thereupon fell through the hatchway and struck the plaintiff, breaking his leg;⁴² and where the owner of a ship or his representative suffered an open hatchway in a passageway leading to the coal-bunkers to remain unlighted, although in use, on a dark night while the ship was coaling, although he had furnished lanterns to two of the servants who were specially designated to look after them and who were paid extra compensation therefor, but no care being used to see that they were properly placed and lighted.⁴³

§ 4230. **Defective or Insufficient Ropes.**—In a case in admiralty the libellant, a seaman, who had just signed and reported for duty on board the steamer, fell and was injured by reason of the breaking of a rope which he was directed by the mate in charge to use to support him while washing down the mast. The rope had been in use for a number of voyages as a staysail halyard, and had been in a position where it was exposed to injury from heat and smoke, but during the preceding voyage had been subjected to no strain to test its strength, the

⁴¹ *Tully v. New York & C. S. S. Co.*, 10 App. Div. (N. Y.) 463; s. c. 42 N. Y. Supp. 29; s. c. aff'd, 162 N. Y. 614 (*mem.*); 57 N. E. Rep. 1127.

⁴² *Burns v. Ocean S. S. Co.*, 84 Ga. 709; s. c. 11 S. E. Rep. 493.

⁴³ *The Saratoga*, 87 Fed. Rep. 349. But it was held that there was no evidence of negligence to charge the owner of the vessel under the following circumstances:—Where it appeared that the stevedore stepped on the cover of a scuttle in the deck and it tilted and he fell through; that the scuttle, with its cover, was a proper one of a kind in common use, and that the accident was probably due to a temporary misplacement of the cover due to a cause not shown in the evidence: *The Theresina*, 31 Fed. Rep. 90. Where it appeared that the employé of a master stevedore who was loading a vessel under a contract was injured by stepping into a small hatch in the hold which had been uncovered by the foreman of the stevedore: *The William F. Babcock*, 31 Fed.

Rep. 418. Where a stevedore was injured in consequence of taking hold of a batten which had been insecurely nailed across the top of a ladder to replace a broken rung: *The Truro*, 31 Fed. Rep. 158 (recovery limited to loss of wages—no damages given for pain and suffering). It has been held that a steamship company is not liable to an experienced coal-passer in its employé for injuries sustained while working in the coal-bunker, by being struck with a proper portable ladder, securable at the top by hooked ends, on which he had descended and with whose use he was familiar, whether the fall of the ladder was due to insecure fastening or was caused by the pitching or rolling of the ship, or the sliding and sinking of the coal; since the fastening of the ladder was a detail of the work, and the other risks named were assumed by him: *Balleng v. New York & C. S. S. Co.*, 28 Misc. (N. Y.) 238; s. c. 58 N. Y. Supp. 1074.

staysail not having been set during the voyage, though during such voyage the rope had been exposed more than usually to heat and smoke, on account of the direction of the wind. It was held that, in failing to test it before directing its use, the mate was guilty of negligence for which the vessel was liable.⁴⁴

§ 4231. **Defective Appliances for Navigation.**—The owner of a schooner owes to one employed to perform such service on the vessel as the captain may call upon him to perform, the duty of supplying a good *reefing-pennant*, so as to render him liable for injuries caused by the breaking of the pennant while the employé is pulling on it while assisting in reefing the mainsail in the proper manner.⁴⁵

§ 4232. **Injuries from Defective Eyebolts.**—The use of an eyebolt, apparently sufficient, but in reality insufficient solely because of a latent defect, entails no liability for a resulting injury.⁴⁶

⁴⁴ *The Ethelred*, 96 Fed. Rep. 446. In a case which deserves less commendation it appeared that the plaintiff was employed by the defendants, who were contracting wharf and bridge builders, to work on their pile-driver in constructing a certain pier. The defendants had purchased the tiles from T, who had agreed to bring them to the place in his own vessel, and deliver them over the side. While the plaintiff was on T's boat, assisting in unloading the piles under direction of defendant's foreman, a short guy-rope, part of the tackle of the vessel, broke, allowing the boom to swing around and tighten another rope attached to it, which threw the plaintiff into the hold of the vessel, injuring him. It was held that plaintiff was not entitled to recover, as no duty rested on defendant in regard to the appliances on T's vessel: *Hughes v. Leonard*, 199 Pa. St. 123; s. c. 48 Atl. Rep. 862. The fallacy of this decision lies in the fact that when the defendant set his servant at work with the appliances upon T's vessel, he did assume a duty in favor of his servant with respect to such appliances: a principle which is constantly illustrated with respect to the liability of a railway company to its employés for defects in "foreign cars": *Post*, § 4373, *et seq.*

⁴⁵ *Silveira v. Iverson*, 125 Cal.

266; s. c. 57 Pac. Rep. 996. In an action for wrongfully causing the death of a steam-boat hand, by ordering him and eight or nine other men to go out over the river on a poplar plank eleven inches wide, three and a quarter inches thick, and sixteen feet long, extending from the floor of a boat to the wheel, in order to turn the wheel over, the jury was authorized to conclude that the poplar plank was not such an appliance as a man of ordinary prudence should have provided for such a body of men under the circumstances; the plank not being braced in any way, and no caution being given to the men as to its use when they were ordered upon it: *Louisville &c. Packet Co. v. Samuels*, 22 Ky. L. Rep. 979; s. c. 59 S. W. Rep. 3 (no off. rep.).

⁴⁶ *The Flowergate*, 31 Fed. Rep. 762 (grain-trimmer injured by defective eyebolt in deck to which a block was attached for the purpose of moving the vessel along the dock). The plaintiff, who was employed as guy-tender aboard a scow, was injured by the breaking of an eyebolt through which led the guy-rope used for the purpose of swinging aboard a boom hung from the mast of the scow. The bolt was originally suitable, and, while it had been used about a year and a half, plaintiff had not discovered anything wrong about it, though he

§ 4233. **Loading and Unloading at Night.**—The fact that the work of unloading cotton from a barge onto a *steamboat* engaged in the river trade on the Mississippi was carried on after dark, and while the boat was moving down the river, and that the mate was hurrying up the work, does not show negligence on the part of the owners of the steamboat; since it is the common practice and duty of the masters and crews of boats engaged in the river trade to push their employment, and, when called for, to receive, deliver, and stow freight at night as well as in the daytime.⁴⁷

§ 4234. **Accidents in Navigation.**—Where the plaintiff, while in a boat anchored near the route of defendant's steamer, was injured by a *collision* with such steamer during a fog, defendant is not bound by opinions expressed by an employé of defendant's, who could give no authority to any one to anchor at such place, in the course of the steamer, and on whose opinion plaintiff had no right to rely as to whether his boat could be seen from the steamer.⁴⁸

§ 4235. **Assaults upon Seamen.**—The owner of a vessel is not liable for an *assault* committed on a seaman by the master, unless the latter was acting within the scope of his duty and in the exercise of his control over plaintiff. So, where the master assaulted a seaman for an act of disobedience, after the emergency had passed, and the act had been done, the master was not in the line of his duty, and the owner

had observed it in his work every day for six months. After the break, however, an old crack was discovered in the bolt, which was not discoverable without removal from its position, it being below the surface of the deck. It was held that defendant was not negligent in failing to remove the bolt, after so brief a use, for the purpose of inspecting its condition for latent defects, unless its attention was directed to the propriety of doing so: *Killman v. Robert Palmer & Co. Shipbuilding & Co.*, 102 Fed. Rep. 224; s. c. 42 C. C. A. 281.

⁴⁷ *Red River Line v. Smith*, 99 Fed. Rep. 520; s. c. 39 C. C. A. 620. The owner of a steamboat engaged in the river trade on the Mississippi is not liable for the death of a servant who fell overboard while unloading cotton at night from a barge onto the steamboat, because of the failure of the electric lights, which was not shown to have been

the fault of the owners or the master, but was an incident common to the employment of such lights, where the lard-oil hand-lanterns furnished as a substitute were the best that could be obtained under the circumstances, and formerly were considered fully sufficient for the purpose: *Red River Line v. Smith*, *supra*.

⁴⁸ *Chesley v. Nantasket Beach Steamboat Co.*, 179 Mass. 469; s. c. 61 N. E. Rep. 50. Plaintiff in an action for personal injuries, was employed by defendant company as fireman on a tug, and to perform other duties as a deckhand. The accident complained of occurred while pushing a tow to her landing. Plaintiff had been directed by the captain to handle a fender over the stern of the tug, and while so doing a mooring-line from a steamer alongside the tug was dropped across the latter's deck, and unexpectedly catching on an obstruction,

was not liable; the owner not being liable for an assault made by way of *punishment* for disobedience.⁴⁹ In the opinion of the Court of Appeals of New York, the owners of a vessel are not liable in damages for the malicious and willful acts of its master in assaulting and injuring a seaman while upon the high seas. Such an act, being of a criminal nature, is not in violation of any duty imposed on the owners by maritime law, and the doctrine of *respondeat superior* has no application. The master and seamen of a vessel are engaged in a common employment and are fellow servants, although of different grades, and while the master in rendering to the seaman that care and in performing those duties imposed upon its owners by the maritime law represents them, and for a neglect of duty in these respects they are liable, in all matters outside the scope of the master's employment and without the authority committed to him by maritime law, his misconduct is a risk assumed by the seaman, for the consequences of which the owners are not responsible.⁵⁰

§ 4236 Miscellaneous Injuries to the Employés of Vessel-Owners.—

The mere fact that a stop-valve in a steam-pipe of a steamship is broken in some way while the vessel is in port, causing injury to an employé, is not in itself sufficient to create a liability on the part of the owners.⁵¹ The owner of a *fishing-tug* is liable at common law, apart from statute, for the death of a fireman, who fell overboard and was drowned as the result of the breaking of a defective wooden handle of a heavy box filled with fish as he was dragging it along the deck of the tug according to the usual practice, where the defect could have

it became fast, and then, after being pulled tight, slipped loose, striking plaintiff and causing the injury. There was no evidence that the captain had any reason, at the time of directing plaintiff, to suppose that he would be subject to risk. The accident could not have been foreseen by him. It was held that plaintiff could not recover: *Independent Tug Line v. Jacobson*, 84 Ill. App. 684.

⁴⁹ *Spencer v. Kelley*, 32 Fed. Rep. 838.

⁵⁰ *Gabrielson v. Waydell*, 135 N. Y. 1; s. c. 47 N. Y. St. Rep. 848; 31 N. E. Rep. 969; rev'g s. c. 40 N. Y. St. Rep. 991; 15 N. Y. Supp. 976; which aff'd s. c. 36 N. Y. St. Rep. 674; 14 N. Y. Supp. 125. The effect of this holding is that if a sailor, on being ordered on deck by the mas-

ter, is too sick to obey the order, he assumes the risk of being beaten and kicked and having his leg broken in order to compel obedience to the order—which was what happened in this case. Gray, J., wrote the majority opinion, which was concurred in by Earl, C. J., and Andrews and Peckham, JJ. Maynard, J., wrote a dissenting opinion, which was concurred in by Finch and O'Brien, JJ.

⁵¹ *Wyman v. The Steamship Duart Castle*, 6 Can. Exch. 327 (valve was of cast iron, had only been in use for one year, the break was clean and bright, and there was expert testimony that a cast-iron valve was a proper one to use, instead of a wrought-iron or brass one as contended by plaintiff).

been discovered by proper inspection.⁵² The plaintiff was employed by defendants, who were ship-repairers, to assist their foreman in making such *repairs* to a vessel as the engineer thereof should direct. The engineer directed the repair of a band at the bottom of a *ventilator* made of boiler-iron, projecting into the fire-room. While the foreman and the plaintiff were fastening the band around the ventilator the lower part of the ventilator broke off, through some defect in the riveting, and injured the plaintiff. It was held that the defendants were not liable on the ground of having failed to provide a safe place to work, since the work could only be done in the fire-room, which was a safe place unless made unsafe by the prosecution of the work itself; that, if the accident was due to defects in the riveting, the defendants were not liable, they having had no opportunity to inspect the ventilator, and exercising no personal supervision over the work. The plaintiff was an experienced man at such work, and was himself negligent either in failing to discover the defect or in putting too great a strain on the ventilator while replacing the band.⁵³

§ 4237. Neglect to Furnish Proper Medical Aid to Seamen.—

Where the master of a vessel, who was also one of the owners, sailed the vessel on shares, under an arrangement that he should pay for victualling, manning, and furnishing supplies, the other owners having nothing to do therewith,—this was not an actual demise, such as to take from the other owners all possession, authority, and control; hence all the joint owners were liable for the master's neglect to furnish proper medical aid to a seaman.⁵⁴

⁵² *Sim v. Dominion Fish Co.*, 2 Ont. L. Rep. 69.

⁵³ *Brown v. Terry*, 67 App. Div. (N. Y.) 223; s. c. 73 N. Y. Supp. 733. In an action for personal injuries received by plaintiff while employed, by another company than defendant, on a float containing railroad-cars which was being pulled into defendant's slip, evidence that the injury was caused by allowing large keys weighing several hundred pounds, used for adjusting and fastening the tracks on the float to those on a movable bridge, to remain projecting from the bridge after another float had been taken away from the bridge, instead of their being drawn back upon it, as was the custom; that

the night was dark, and the bridge not sufficiently lighted; that the defendant's bridgeman told the captain of the float on which plaintiff was employed, to draw out another float in the slip so that he could get in, and that fifteen or twenty minutes elapsed thereafter before the injuries occurred, while the keys could have been pulled back within two minutes,—required the submission to a jury of the issue of defendant's negligence: *Hart v. Delaware &c. R. Co.*, 76 Hun (N. Y.) 296; s. c. 59 N. Y. St. Rep. 110; 27 N. Y. Supp. 767.

⁵⁴ *Scarff v. Metcalf*, 107 N. Y. 211; s. c. 13 N. E. Rep. 796; *aff'g* s. c. 36 Hun (N. Y.) 202.

§ 4238. **Liability of Stevedores for Negligence of their Servants.**—A stevedore is liable for injuries to an employé of another stevedore independently engaged in loading the same vessel, through the negligence of one of his own employés.⁵⁵

§ 4239. **Compulsory Pilots.**—There is not between the owners of a ship, and the pilots whom they are compelled to employ, an implied contract that the pilot shall take upon himself a risk of injury from the negligence of the ship-owner's servants. Accordingly, where a pilot went on board a vessel in the course of his duty, in a district in which pilotage was compulsory, and while on board was killed by the negligence of one of the crew, it was held that his widow, as executrix, could recover damages under Lord Campbell's Act.⁵⁶ It was said that the case was covered by the rule in *Indermaur v. Dames*,⁵⁷—that one who invites another upon his premises is bound to take reasonable care that such person is not injured while there.

⁵⁵ *Brown v. Leclerc*, 22 Can. S. C. 53. ⁵⁶ L. R. 1 C. P. 274; s. c. aff'd, L. R. 2 C. P. 311; s. c. in full, 1

⁵⁷ *Smith v. Steele*, L. R. 10 Q. B. 125; s. c. 44 L. J. (Q. B.) 60. *Thomp. Neg.* (1st ed.), p. 283.

CHAPTER CXVI.

LIABILITY OF RAILWAY COMPANIES FOR NEGLIGENT INJURIES TO THEIR EMPLOYEES.

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ART. II. Injuries to Railway Employés from Defective Tracks, §§ 4253-4276.

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ART. VI. Injuries to Railway Employés from Defects in Railway-Yards, Switches, Frogs, and Other Switching-Appliances, §§ 4325-4543.

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ART. X. Injuries to Railway Employés from Defective Brakes, Brake-Beams, Chains, etc., §§ 4393-4403.

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ART. XII. Injuries to Car-Couplers from Defects in the Road-bed or Coupling-Grounds, §§ 4425-4427.

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ARTICLE I. GENERAL PRINCIPLES.

SECTION

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edge and conform to the latest improvements.

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§ 4243. **Degree of Care Required of Railway Companies for the Safety of their Employés.**—In respect of dangers and defects in a railway company's roadway and bridges, such as are likely to result in injuries to passengers as well as to servants, it is difficult to separate the degree of care which the company owes the travelling public from that which it owes to those of its servants who are employed in running its trains and laboring at its stations. These servants, from the nature of their employment, have no opportunity to inspect the track and inform themselves of its dangers and defects; and if the company owes them any duty at all in this regard, it is not plain why it should be a duty inferior to that which it owes to the

travelling public. And some courts hold that it is not.¹ Thus, the Supreme Court of Illinois declares that the result of previous rulings² is, not to hold these companies as insurers that their road, appurtenances, and instrumentalities are safe and in good condition, but that they will do all that human care, vigilance, and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition and to keep them so.³ "The duty owing by a railroad company," said Breese, J., "to the public, as well as to those in their employment, is that their road, and bridges and other appurtenances, shall be constructed of the best material, having in view the business to be done upon it. In their construction, they should equal those of the best roads doing an equal amount of business, and the utmost care and vigilance [should be] bestowed upon keeping them in a safe condition. The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires. And further, it is their duty to keep a sufficient force at command, and of capacity sufficient, to discover defects and apply the remedy. Neglecting to keep it in the best condition, if injury or loss occurs thereby, the companies will be liable; and they ought to be so liable. From this responsibility they cannot be relieved, except by showing that the defect was one which could not be discerned or remedied by any reasonable skill or foresight."⁴ Accordingly, an instruction which leaves out of view this strong obligation, but places the liability of the company upon actual knowledge of the defective construction, is erroneous.⁵ This seems to be the doctrine of the Court of Appeals of Kentucky, which has held that the *absence of slight care* by superiors in the management of a railway-train is *gross negligence*, and will render the company liable for consequent injuries sustained by a brakeman without his fault.⁶ There may be cases where the question whether it was the duty of the engineer to inspect the track will be a question for the jury. It was so held where, in passing trains over the tracks of two other railroads, temporary rails had been put down as often as required, of which the engineer of a construction-train, who was in-

¹ Chicago &c. R. Co. v. Swett, 45 Ill. 201; Illinois &c. R. Co. v. Welch, 52 Ill. 183; Illinois &c. R. Co. v. Phillips, 49 Ill. 234; Pittsburgh &c. R. Co. v. Thompson, 56 Ill. 138; Dorsey v. Phillips &c. Co., 42 Wis. 583, 597; s. c. 6 Cent. L. J. 19.

² What was said in Chicago &c. R. Co. v. Swett, 45 Ill. 201, was subsequently modified in Illinois &c. R. Co. v. Welch, 52 Ill. 183, and in Illinois &c. R. Co. v. Phillips, 49 Ill.

234, and Pittsburgh &c. R. Co. v. Thompson, 56 Ill. 138.

³ Toledo &c. R. Co. v. Conroy, 68 Ill. 560, 567; s. c. 61 Ill. 162.

⁴ Toledo &c. R. Co. v. Conroy, *supra*.

⁵ Toledo &c. R. Co. v. Conroy, *supra*.

⁶ Greer v. Louisville &c. R. Co., 94 Ky. 169; s. c. 14 Ky. L. Rep. 876; 21 S. W. Rep. 649.

jured in consequence of his engine running off the track at this point, had notice.⁷

§ 4244. **Not Bound to Adopt Every New Appliance.**—It has been said that the duty of a railway company is, to furnish good, well-constructed machinery, adapted to the purpose for which it is used, of good material, and of the kind that is found to be most safe when applied to use; it is not required to seek and apply every new invention, but must adopt such as is found by experience to combine the greatest safety with practical use.⁸ It is not bound to discard cars of an old pattern because the coupling of them with cars of a new pattern is attended with more danger than the coupling of new cars with each other.⁹ Neither is it bound to adopt what is known as the “target-switch,” simply because this kind of switch guards more effectually against the negligence of switchmen than the common switch, it appearing that the latter is safe when properly operated.¹⁰ The Supreme Court of Tennessee has, however, held that the rule just stated is not applicable to railroad companies. In the opinion of that court, “the general doctrine is, that in proportion to the importance of the business, and the perils incident to it, is the obligation of the company to see that the engines and apparatus are suitable, sufficient, and ‘as safe as care and skill can make them’”;¹¹ which, no doubt, expresses the extent of their obligation to passengers, but not to their servants.

§ 4245. **Further of the Duty of Railroad Companies as to Safety of their Appliances.**—While railroad companies, in selecting machinery and instrumentalities for the operation of their roads, must keep themselves reasonably abreast with improved methods, they are not required to adopt every new invention; but it is a sufficient fulfillment of their duty, if they adopt such as are in ordinary use upon prudently conducted railroads engaged in like business and under like circumstances.¹² This doctrine, variously expressed, is reaffirmed in many cases.¹³ Blame will not ordinarily be imputed to them for not

⁷ Indianapolis &c. R. Co. v. Love, 10 Ind. 554.

⁸ Toledo &c. R. Co. v. Asbury, 84 Ill. 429.

⁹ Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133.

¹⁰ Salters v. Delaware &c. Canal Co., 3 Hun (N. Y.) 338. Compare Piper v. New York &c. R. Co., 1 Thomp. & C. (N. Y.) 290.

¹¹ Nashville &c. R. Co. v. Elliott, 1 Coldw. (Tenn.) 611, 617, 618.

¹² Georgia Pac. R. Co. v. Propst, 83 Ala. 518; s. c. 3 South. Rep. 764.

¹³ See, for example, Walsh v. Commercial Steam Laundry Co., 11 Misc. (N. Y.) 3; s. c. 63 N. Y. St. Rep. 461; 31 N. Y. Supp. 833 (not bound to furnish to an employé the best known appliances for the work, but only those which are reasonably safe); Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. Rep. 118 (no off. rep.) (failure to block

adopting new and improved methods to promote the safety of their employés, until such methods have come into general use.¹⁴

§ 4246. Need Not Make Changes to Conform to the Latest Improvements.—The judicial courts frequently reiterate the proposition that it is not incumbent upon railroad companies to adopt the latest improvements or to make changes in their structures, or in their road-beds, so as to conform with the most recently developed ideas.¹⁵ For example, such a company cannot be required to remove a bridge that is without fault in its plan or defect in its structure, while in good repair and safe for the passage of trains, simply because some engineer pronounces it not as good and convenient as some other kind.¹⁶

§ 4247. Must Keep Pace with Scientific Development and Knowledge and Conform to the Latest Improvements.—From the proposition of the last preceding paragraph, the judicial pendulum has swung so far in the other direction as to announce, though *obiter*, the doctrine that the master must keep pace with scientific development and knowledge, in so far as it affects his business and the safety of his servants, and must keep himself and his representative informed of latent dangers, even though it be through scientific information, if such information is readily attainable. But in applying this doctrine the court did not keep pace with its profession. The case was that a servant in a packing-house was cleaning off decayed blood and rust from an iron rail, and some of the substance got in his eye, and the bacteria in it destroyed his eye. But none of the other employés had ever experienced any bad effects from doing similar work. The master was therefore held not liable, as such an accident was too exceptional in its nature.¹⁷

guard-rails—question for jury); *Gardner v. St. Louis & C. R. Co.*, 135 Mo. 90; s. c. 36 S. W. Rep. 214 (need not furnish absolutely safe cars, tenders and appliances, but only such as are reasonably safe).

¹⁴ *Lloyd v. Hanes*, 126 N. C. 359; s. c. 35 S. E. Rep. 611 (not negligence to run saw in factory without a certain safety-appliance not shown to have come into general use); *Bonner v. Pittsburgh Bridge Co.*, 5 Pa. Super. Ct. 281 (where an accidental change of gear on a crane could be prevented by a safety-lock, an inexpensive and well-known device, but the testimony was conflict-

ing as to the general use of the safety-lock on similar cranes, the question of negligence was for a jury).

¹⁵ *Illick v. Flint & C. R. Co.*, 67 Mich. 632; s. c. 12 West. Rep. 443; 35 N. W. Rep. 708.

¹⁶ *Illick v. Flint & C. R. Co.*, 67 Mich. 632; s. c. 12 West. Rep. 443; 35 N. W. Rep. 708 (brakeman knocked off side-ladder of car in going through bridge—no recovery on ground that bridge should have been wider).

¹⁷ *Hysell v. Swift & Co.*, 78 Mo. App. 39; s. c. 2 Mo. App. Repr. 124.

§ 4248. **Must Make Reasonable Provisions against Unknown Dangers.**—Another wholesome doctrine is that a railroad company, in its character of employer of labor, does not discharge its duty to its employés if it does no more than its actual knowledge of what is requisite suggests; but that it must make reasonable provisions against unknown dangers, or dangers that lie outside the range of actual experience. The doctrine thus laid down seems to have been applied with too great severity against the railroad company. The company, when it adopted the block system of signals, erected iron signal-towers along its road. These towers were planned by a civil engineer of great experience and approved by the regular engineer of the railroad company, who suggested additional safeguards for anchoring the towers, which suggestions were adopted and acted upon. Nevertheless one of the towers, in an exposed place and on gravelly soil, was uprooted by wind, injuring the man in the tower, who brought an action for damages and recovered. The court proceeded upon the view that these towers involved new mechanical and engineering problems, and that it was fairly a question for the jury, whether the railroad company had allowed a sufficient margin of safety in view of that fact.¹⁸

§ 4249. **But Bound to Furnish Proper Appliances and a Safe Roadbed.**—But railway companies are bound to use toward *their employés* reasonable care and skill to the end of providing their employés with proper appliances and a safe roadbed. This is a primary, absolute, and unassignable duty, under a principle already considered;¹⁹ and consequently a railroad company cannot justify a failure to perform it by ascribing it to the negligence of a fellow servant of the one who was injured.²⁰ They are not insurers of the safety of their appliances, but are required, as to their employés, to use only a reasonable degree of care in providing safe cars, couplings, and other appliances necessary to run the road: their duty is not to furnish cars, etc., “that are not dangerous to those engaged in their operation.”²¹ From this premise the conclusion reasonably follows

¹⁸ *Hesketh v. New York &c. R. Co.* 37 App. Div. (N. Y.) 78; s. c. 55 N. Y. Supp. 898; 89 N. Y. St. Rep. 898 (Herrick, J., dissenting on the ground that no new problems were involved, and that the accident was due to an error of judgment. Verdict for \$20,200 reduced to \$15,000 and approved).

¹⁹ *Ante*, §§ 3874, 3986, 3988.

²⁰ *Chicago &c. R. Co. v. Delaney*,

68 Ill. App. 307; s. c. *aff'd*, 169 Ill. 581; 48 N. E. Rep. 476.

²¹ *Conway v. Illinois &c. R. Co.*, 50 Iowa 465 (action for injuries received in coupling two cars of different patterns, owing to the failure of the company to furnish proper kind of link as requested—instruction criticized and judgment for plaintiff reversed, for reason stated above).

that a railroad company is not liable for the death of an employé resulting from personal injuries caused by a defective appliance furnished to him, unless the company knew of the defect or it was of such a nature or had existed for such length of time that in the exercise of ordinary care the company should have discovered it.²²

§ 4250. Duty to Maintain Appliances in a Safe Condition.—A railroad company owes to an employé not only the duty of furnishing reasonably safe machinery and appliances for the operation of its road, but of using reasonable care and diligence to *maintain* them in such a condition.²³

§ 4251. Further as to this Degree of Care.—Most of the decisions, however, unite upon a principle which has been well expressed by saying that a railroad company is only required to exercise reasonable or ordinary care and diligence in furnishing its employés a reasonably safe road-bed, machinery, and appliances for the operation of its road, and is not charged with the absolute duty of providing a reasonably safe roadway, but is liable for negligence in that regard.²⁴ The same principle has been somewhat differently expressed by saying that a railroad company owes to its trainmen the duty to exercise the care which the exigencies reasonably demand in furnishing a proper road-bed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations.²⁵ Expressed in still other language, a railroad company is not bound to furnish absolutely safe machinery to an employé, but only such as is reasonably suitable for the purpose for which it is intended, and to exercise ordinary care to see that it is kept in such a condition.²⁶ Applied to the case of an injury in consequence of a defect in a railroad *bridge*, the rule is said to be that a railroad company which uses *ordinary care* to see that a bridge on its right of way is so constructed as to be reasonably safe, and subsequently employs competent and careful inspectors who use ordinary care in inspecting it, to see that it is kept in a reasonably safe condition, is not liable to an employé for an injury received on such bridge; and a charge so stating should have been given in an action for the

²² *Carruthers v. Chicago &c. R. Co.*, 55 Kan. 600; s. c. 40 Pac. Rep. 915 (defective hand-hold on freight-car).

²³ *Atchison &c. R. Co. v. Napole*, 55 Kan. 401; s. c. 40 Pac. Rep. 669 (defective hand-car).

²⁴ *Chicago &c. R. Co. v. Oyster*, 58

Neb. 1; s. c. 12 Am. & Eng. R. Cas. (N. S.) 655; 78 N. W. Rep. 359.

²⁵ *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451; s. c. 40 L. ed. 766; 16 Sup. Ct. Rep. 618.

²⁶ *Texas &c. R. Co. v. Rhodes*, 71 Fed. Rep. 145; s. c. 30 U. S. App. 561; 18 C. C. A. 9.

death of a locomotive-engineer caused by the collapse of a bridge.²⁷ The Supreme Court of Texas has taken the refined distinction that a railroad company owes the duty to its employes of exercising only *ordinary care* to make its track reasonably safe: its duty is not to make the track reasonably safe, and an instruction so stating is erroneous.²⁸

ARTICLE II. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTIVE TRACKS.

SECTION	SECTION
4253. Rule as to "safe place to work" applies to railroad companies.	4263. Care required of construction companies.
4254. Their liability for injuries to their employes from defective tracks stated.	4264. Care required in discovering and removing obstructions caused by trespassers.
4255. Not bound to adopt every new appliance.	4265. Injuries to railway servants in consequence of derailments.
4256. Liability satisfied by furnishing a track as safe as those in general use.	4266. Burden of proof and evidence of negligence in case of injuries from derailments.
4257. This duty an absolute and unassignable duty.	4267. Failure to build a bumper at the end of an inclined track.
4258. Defective construction of track and negligence of fellow servant concurring to produce injury—Company liable.	4268. Objects falling upon the track: Snow-slides, gravel-slides, falling rock, stick of wood falling from tender.
4259. Railway trainmen under no duty of inspecting the track.	4269. Tracks dangerously near together.
4260. Trainmen do not ordinarily assume risk of defective track.	4270. Side-tracks dangerously near main track.
4261. Care demanded of railway company varies with increase or diminution of the risk.	4271. Defects in railway-tracks dangerous to the feet of employes.
4262. Notice or knowledge of the defect on the part of the company.	4272. Further of defects in the track dangerous to the feet of employes.

²⁷ Galveston &c. R. Co. v. Daniels, 1 Tex. Civ. App. 695; s. c. 9 Tex. Civ. App. 253; 28 S. W. Rep. 548, 711.

²⁸ Texas &c. R. Co. v. McCoy, 90 Tex. 264; s. c. 38 S. W. Rep. 36. This decision may well be challenged. It certainly is the duty of

railroad companies to make their tracks reasonably safe; and if the "ordinary care" of such companies is judged by the standard of what they ordinarily do or omit to do, then their ordinary care is ordinary negligence.

SECTION

4273. What defects dangerous to the feet of employes do not afford evidence of negligence.
4274. To what companies or their representatives this liability for injuries from defective tracks ascribed.

SECTION

4275. Construction and safety of logging-railroads.
4276. Cases of injuries from defective railway-tracks where the company was held liable.

§ 4253. **Rule as to "Safe Place to Work" Applies to Railroad Companies.**—The rule imposing on the master the duty to furnish a reasonable safe place for his servants to work¹ applies to its full extent to railroad companies; and they have no right to construct their roads and structures after plans of their own, regardless of the safety of their employes; and whether their roads or structures are defective, or they are negligent or not, will usually have to be determined by juries in actions against them for injuries therefrom. But when the *undisputed evidence* shows that the place furnished by the master conforms to the general condition on other roads, then the court may say, as matter of law, that there is no negligence. Judged by this test a railroad company was, as matter of law, not negligent in allowing a coal-bin to be constructed so near a *side-track* that an employe might be injured in passing between such bin and a car.²

§ 4254. **Their Liability for Injuries to their Employes from Defective Tracks Stated.**—While a railway company is bound, in favor of its passengers, to exercise a high and most exacting degree of care and diligence to the end that its track shall be made and kept safe for their transit thereover,³ yet it is not under the same extreme measure of care in favor of its own servants, but its obligation to them is answered by the exercise of ordinary care and skill.⁴ Still less is it bound to them, in any event, as an *insurer* for the safe condition of its track. It is not, for example, absolutely bound, under all conditions and at all events, to guard against the danger caused by storms, or against the danger of landslides and obstructions which imperil the lives of its employes.⁵ On the other hand, it is liable in damages to them in case they are injured, without fault on their part, through its failure to exercise such care and skill.⁶

¹ *Ante*, § 3873, *et seq.*

² *Pahlan v. Detroit & C. R. Co.*, 122 Mich. 232; s. c. 81 N. W. Rep. 103.

³ Vol. III, § 2722, *et seq.*

⁴ *St. Louis & C. R. Co. v. Weaver*, 35 Kan. 412; *Galveston & C. R. Co. v. Goodwin* (Tex. Civ. App.), 26 S. W. Rep. 1007 (no off. rep.); *Central R.*

& C. Co. v. Kent, 84 Ga. 351; s. c. 10 S. E. Rep. 965.

⁵ *Gates v. Southern Minn. R. Co.*, 28 Minn. 110; *Southern Pac. R. Co. v. Aylward*, 79 Tex. 675; s. c. 15 S. W. Rep. 697.

⁶ *Little Rock & C. R. Co. v. Voss* (Ark.), 18 S. W. Rep. 172 (no off.

§ 4255. **Not Bound to Adopt Every New Appliance.**—On a principle already considered,⁷ a railroad company will not be bound to change the manner of using its side-tracks or to adopt the most approved appliances in its business, unless its system or its appliances are so dangerous as to require reformation, in the exercise of reasonable care for the safety of its employes.⁸ For example, its omission to provide a side-track at a flag-station with side-blocks has been held not actionable negligence, although it was proved that they might

rep.); *Chicago &c. R. Co. v. Swett*, 45 Ill. 197; *Illinois &c. R. Co. v. Welch*, 52 Ill. 183; *St. Louis Bridge Co. v. Fellows*, 52 Ill. App. 504; *Lake Shore &c. R. Co. v. Conway*, 67 Ill. App. 155; s. c. aff'd, 169 Ill. 505; *Chicago &c. R. Co. v. Eaton*, 96 Ill. App. 570; s. c. aff'd, 194 Ill. 441; 62 N. E. Rep. 784; *Knapp v. Sioux City &c. R. Co.*, 71 Iowa 41; s. c. 32 N. W. Rep. 18; *McKee v. Chicago &c. R. Co.*, 83 Iowa 616; s. c. 13 L. R. A. 817; 10 Rail. & Corp. L. J. 472; 48 Am. & Eng. R. Cas. 154; 50 N. W. Rep. 209; *St. Louis &c. R. Co. v. Irwin*, 37 Kan. 706; s. c. 16 Pac. Rep. 146; *McFee v. Vicksburg &c. R. Co.*, 42 La. An. 790; s. c. 7 South. Rep. 720; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 446; *Gibson v. Pacific R. Co.*, 46 Mo. 163; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 944; *Lewis v. St. Louis &c. R. Co.*, 59 Mo. 495; *Stoher v. St. Louis &c. R. Co.*, 105 Mo. 192; s. c. 16 S. W. Rep. 591; *Gorham v. Kansas City &c. R. Co.*, 113 Mo. 408; s. c. 20 S. W. Rep. 1060; *Smith v. Erie R. Co.*, 67 N. J. L. 636; s. c. 52 Atl. Rep. 634 (injury from derailment of train, caused by a "low spot" on a curve, which company negligently failed to repair); *True v. Lehigh Valley R. Co.*, 22 App. Div. (N. Y.) 588; s. c. 48 N. Y. Supp. 86 (quantity of shale caved down on track from bluff 60 feet high, causing injury to engineer—liability of shale to slide down was known to company, but no inspection of rock had been made beyond having a track-walker look at it from track—question for jury whether this was a sufficient inspection—recovery); *Pidgeon v. Long Island R. Co.*, 87 Hun (N. Y.) 43; s. c. 67 N. Y. St. Rep. 486; 33 N. Y. Supp. 870; s. c. aff'd, 152 N. Y. 652; 47 N. E. Rep. 1110 (verdict for

plaintiff supported by evidence tending to show that the track had been out of order for some time; that it was laid in a soft, spongy place where the tracks settled as the frost came out of the ground, one witness testifying that the track would sometimes work up and down two or three inches; and that plaintiff had no knowledge of the dangerous condition of the track); *Wilkie v. Raleigh &c. R. Co.*, 127 N. C. 203; s. c. 37 S. E. Rep. 204 (failure of a railroad company to construct and maintain safe road-bed for the use of its employes is negligence *per se*); *Marcom v. Raleigh &c. R. Co.*, 126 N. C. 200; s. c. 35 S. E. Rep. 423 (same holding); *Texas &c. R. Co. v. Johnson*, 76 Tex. 421; s. c. 13 S. W. Rep. 463; 42 Am. & Eng. R. Cas. 7; *Taylor &c. R. Co. v. Taylor*, 79 Tex. 104; s. c. 14 S. W. Rep. 917; *Texas &c. R. Co. v. Magrill*, 15 Tex. Civ. App. 353; s. c. 40 S. W. Rep. 138; *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772 (train ran into an open switch and was there derailed in consequence of the defective condition of the track); *Jefferson &c. R. Co. v. Woods* (Tex. Civ. App.), 64 S. W. Rep. 830 (no off. rep.); *Monsarrat v. Keegan*, 58 U. S. App. 377; s. c. *sub nom.* *Valley R. Co. v. Keegan*, 11 Am. & Eng. R. Cas. (N. S.) 507; 40 Ohio L. J. 167; 31 C. C. A. 255; 87 Fed. Rep. 849; *Goheen v. Texas &c. R. Co.*, 3 Cent. L. J. 382; s. c. *sub nom.* *Gohen v. Texas &c. R. Co.*, 10 Fed. Cas. 537; 1 Tex. L. J. 97; 23 Int. Rev. Rec. 393; *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476.

⁷ *Ante*, § 3768, *et seq.*

⁸ *Hewitt v. Flint &c. R. Co.*, 67 Mich. 61; s. c. 11 West. Rep. 148; 34 N. W. Rep. 659.

have prevented a collision between an engine and a flat-car upon the siding.⁹ In conformity with this view, it has been held that the question whether there has been negligence on the part of a railway company, in the case of an injury to a yard-master by reason of the defective condition of a *guard-rail*, cannot be resolved alone upon an inquiry as to how many railroad companies block their guard-rails.¹⁰

§ 4256. Liability Satisfied by Furnishing a Track as Safe as Those in General Use.—Such a company is not, in the absence of a special agreement with its employes to the contrary, bound to furnish a better track for the purpose of promoting their safety than such as are in general use by other such companies.¹¹

§ 4257. This Duty an Absolute and Unassignable Duty.—This duty is of such an *absolute nature* that it makes no difference by whom the railroad company undertakes to perform it, whether by an independent contractor or by a superior or an inferior servant: it will be in any case liable for the want of care of such agent or servant in its non-performance;¹² and the knowledge of a defect in its track possessed by such servant or agent is the knowledge of the company.¹³ But if, after an *independent contractor*, to whom the construction or repair of its road-bed has been committed, abandons the contract to the company, the company itself completes the work, then it has been supposed, though erroneously, that the liability of the company is *still more clear*.¹⁴

§ 4258. Defective Construction of Track and Negligence of Fellow Servant Concurring to Produce Injury—Company Liable.—Moreover, on a principle elsewhere considered,¹⁵ the company will be liable for an injury to a servant happening in part through the defective construction of its roadway, and in part through the negligence of a fellow servant.¹⁶

§ 4259. Railway Trainmen Under No Duty of Inspecting the Track.—Another principle in dealing with this subject is that the

⁹ *Hewitt v. Flint &c. R. Co.*, 67 Mich. 61; s. c. 11 West. Rep. 148; 34 N. W. Rep. 659.

¹⁰ *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440; s. c. 10 West. Rep. 405; 4 S. W. Rep. 937.

¹¹ *Atchison &c. R. Co. v. Alsdurf*, 47 Ill. App. 200.

¹² *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239; *Carlson v. Oregon &c. R. Co.*, 21 Or. 450; s. c.

28 Pac. Rep. 497; *Krogg v. Atlanta &c. R. Co.*, 77 Ga. 202; s. c. 4 Am. St. Rep. 79; *Texas &c. R. Co. v. Kirk*, 62 Tex. 227.

¹³ *Speed v. Atlantic &c. R. Co.*, 71 Mo. 303; *ante*, § 3797.

¹⁴ *Savannah &c. R. Co. v. Phillips*, 90 Ga. 829; s. c. 17 S. E. Rep. 82.

¹⁵ *Post*, § 4856, *et seq.*

¹⁶ *Elmer v. Locke*, 135 Mass. 575.

brakeman or other men employed to operate trains upon a railway are under no duty of inspecting the track for the purpose of seeing whether it is safe; but they have the right to rely upon the assumption that the railway company has done its duty in this respect.¹⁷

§ 4260. Trainmen Do Not Ordinarily Assume Risk of Defective Track.—Casualty from such a cause is not one of the ordinary perils which, in presumption of law, everyone voluntarily assumes who takes service with the company.¹⁸

§ 4261. Care Demanded of Railway Company Varies with Increase or Diminution of the Risk.—The ordinary care in respect of the safety of its track which the law thus puts upon a railway company in favor of its servants, varies, as in other cases, with the risk or danger;¹⁹ so that the care, in order to be deemed reasonable, must increase as the risk increases, and may diminish as the risk diminishes. For example, it exacts an increased degree of care in making provision against the increased risk arising from the fact of the railway being built in proximity to a mountain-range.²⁰ In other words, if the danger to employes is so great that the exercise of the greatest care and skill is necessary to avert it, then it is the duty of the company to exercise this degree of care and skill; for under the circumstances it is no more than reasonable care.²¹

§ 4262. Notice or Knowledge of the Defect on the Part of the Company.²²—It has been held that a railroad company is not liable for an injury to an employé caused by defects—in this case, a hole—in the switch-tracks in its yards, unless it had actual knowledge of such defects, or they had existed for such a length of time that knowledge might be inferred; and that the burden of proving that the company had or ought to have had knowledge is on the plaintiff.²³

¹⁷ *Houston &c. R. Co. v. McNamara*, 59 Tex. 255. See *post*, §§ 4649, 4650, 4742.

¹⁸ *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239. This view, given by Agnew, J., in the opinion of the court, was thought by Read, J., to require a large qualification as to servants engaging as such with a full knowledge of the state and condition of the track; and this last view is clearly the correct one: *Indianapolis &c. R. Co. v. Love*, 10 Ind. 554. See *post*, § 4743.

¹⁹ Vol. I, § 25; *ante*, § 3772.

²⁰ *Union Pac. R. Co. v. O'Brien*, 4

U. S. App. 221; s. c. 49 Fed. Rep. 538. See also, *Bean v. Western &c. R. Co.*, 107 N. C. 731; s. c. 12 S. E. Rep. 600; *Britton v. Northern &c. R. Co.*, 47 Minn. 340; s. c. 50 N. W. Rep. 231.

²¹ *Galveston &c. R. Co. v. Croskell*, 6 Tex. Civ. App. 160; s. c. 25 S. W. Rep. 486.

²² See *ante*, §§ 3782, 3795, *et seq.*

²³ *Atchison &c. R. Co. v. Swarts*, 58 Kan. 235; s. c. 48 Pac. Rep. 953. *Doster, C. J.*, who wrote the majority opinion, dissented as to this proposition on the ground that, the defect being in a *yard*, and, conse-

§ 4263. **Care Required of Construction Companies.**—It is a just application of this principle that a *construction company*, engaged in building a railroad-track and road-bed, is not required to furnish its employes working on its material-train as safe a road-bed as the railway company will be required to do after the road is completed.²⁴ But the general duty of a railroad company to use reasonable care and skill to the end that the appliances that it puts into the hands of its servants shall be safe, exists while the road is in process of construction as well as after it has been put into operation.²⁵

§ 4264. **Care Required in Discovering and Removing Obstructions Caused by Trespassers.**—The fact that a defect or obstruction by which an employé of the company is injured was caused by a trespasser, will not relieve the company from liability, where it is not remedied or removed within a reasonable time after notice, or where a knowledge of it might have been acquired by a reasonable inspection;²⁶ but otherwise where it was so recent that a knowledge of it cannot justly be imputed to the company.^{26a}

quently, directly and constantly under the eye and supervision of the company's managing agents, the presumption arises that the company knew of it; and the burden is on the company to prove that the defect *had not existed* for a sufficient length of time to charge it with knowledge. He says further: "It is incredible that such a hole could exist at that place and not be known to some one whose duty it was to fill it up. * * * If caused by the elements, it must have been of gradual deepening and widening;—it was not blown out or washed out in the course of a few hours' time. If produced by some unusual or extraneous circumstance, it rested upon the company to prove it": *Atchison & C. R. Co. v. Swarts, supra*.

²⁴ *Walling v. Congaree Constr. Co.*, 41 S. C. 388; s. c. 19 S. E. Rep. 723.

²⁵ *Madden v. Minneapolis & C. R. Co.*, 32 Minn. 303. It has been held that a person engaged in work upon the construction of a railroad, who is injured by reason of defective implements furnished, may maintain an action against the railroad corporation, although the work is executed under a contract assigned by the original contractor to the president of the railroad corpora-

tion in his individual capacity,—the injured workman, however, supposing himself to be in the employ of the corporation, and being led so to suppose from the fact that no publicity was given to the arrangement under which the president assumed the responsibility of the work: *Solomon R. Co. v. Jones*, 30 Kan. 601.

²⁶ *Highland Ave. & C. R. Co. v. Walters*, 91 Ala. 435; s. c. 8 South. Rep. 357; *Mire v. East Louisiana R. Co.*, 42 La. An. 385; s. c. 7 South. Rep. 473; *Marcom v. Raleigh & C. R. Co.*, 126 N. C. 200; s. c. 35 S. E. Rep. 423.

^{26a} *Illinois & C. R. Co. v. Quirk*, 51 Ill. App. 607. Where a tie was left alongside of a railroad-path used by flagmen in the discharge of their duties, and a flagman passed and repassed the track for four or five days in discharge of such duty, and the railroad company had no knowledge that an unknown person had moved the tie so as to place it across the path, the failure of the railroad company to foresee such act of the unknown person was not negligence rendering it liable to the flagman injured by falling over the tie: *Neider v. Illinois Cent. R. Co.*, 108 La. 154; s. c. 32 South. Rep. 366.

§ 4265. **Injuries to Railway Servants in Consequence of Derailments.**—Such a company is liable for injuries to a switchman properly riding on the footboard of an engine, from the *derailing* of the engine, though one of extraordinary size, at a curve of fourteen degrees, constructed without elevating the outer or depressing the inner rail, *where frequent derailments have occurred at the same place*;²⁷ or for an injury to an employé caused by the falling of a tower in which he was employed, by the striking of a car which has run off the track because of a defect therein, although the company did not have actual notice of such defect, if it might have known thereof by the exercise of reasonable diligence;²⁸ where an engineer was killed by the derailment of his engine caused by the removal of a rail by the trackmen of the company in consequence of their failing to comply with a rule of the company that, when a rail was removed, a flagman or a red flag was to be stationed and torpedoes placed on the rail on the engineer's side,—the court taking the view that the obligation of furnishing a safe track being a non-assignable duty, the question of the negligence of fellow servants of the engineer was eliminated;²⁹ where an employé was killed by the *tipping over* of an engine because of the rottenness of the ties, although it had been previously been *derailed* by a collision with a horse without any negligence on the part of the company;³⁰ where a brakeman was killed in consequence of a derailment of the train which took place through the *tender* of the engine jumping the track at a place where the road-bed was in good condition, and being dragged along until it struck some rotten cross-ties, breaking off the ends of them and spreading the rails, which caused the *train* to become derailed,—the question of negligence being for the jury, and the court taking the view that the fact that the derailment of the *tender* was not due to the negligence of the company was immaterial, if the *train* would not have been derailed but for the fact of the cross-ties being rotten.³¹ Railroad companies have been exonerated from liability to their employés who have sustained injuries through the derailment of the train, caused by the spreading of a reasonably safe track by the passage of a train so immediately preceding

²⁷ St. Louis Bridge Co. v. Fellows, 52 Ill. App. 504. The track may have been sufficient for engines such as were in ordinary use when it was built; but the evidence tended to show that it was unsuitable for longer and heavier engines than ordinary, such as the one in question: St. Louis Bridge Co. v. Fellows, *supra*.

²⁸ Lake Shore & C. R. Co. v. Con-

way, 67 Ill. App. 155; s. c. aff'd, 169 Ill. 505.

²⁹ Chicago & C. R. Co. v. Eaton, 96 Ill. App. 570; s. c. aff'd, 194 Ill. 441; 62 N. E. Rep. 784.

³⁰ Texas & C. R. Co. v. Magrill, 15 Tex. Civ. App. 353; s. c. 40 S. W. Rep. 188.

³¹ Wright v. Southern R. Co., 122 N. C. 959; s. c. 30 S. E. Rep. 348.

the accident that the trackmen could not have notice of the defect in the track; otherwise if the defect was the result of rotten and unsafe ties, which would have been discovered by a reasonable inspection;³² and through a derailment, caused by a sudden fall of rain saturating the earth, already moist, so that the cross-ties sank on one side under the weight of the engine, turning it over, where there had been a recent inspection, not disclosing the danger, and three trains had previously passed over it the same day.³³

§ 4266. **Burden of Proof and Evidence of Negligence in Case of Injuries from Derailments.**—On this subject it has been held that it is the positive duty of every railroad company, imposed by law, to provide and maintain a safe road-bed, and its failure to do so raises a presumption of negligence. The burden of proving such a failure of legal duty rests on the plaintiff, but when that fact is proved or admitted, the burden of proving such facts as will excuse its failure rests on the defendant. So, where the derailment of an engine resulted in the death of the fireman, and it is admitted in the pleadings that the derailment was owing to a misplaced rail, the burden is on the defendant to show that the rail was not misplaced through its negligence.³⁴ Here, as in other cases, the negligence of the defendant may be proved by circumstances; and it has been held that an inference that a defect in a railroad-track arose from, or had not been discovered or remedied owing to the negligence of the company or of some employé entrusted by the company with the duty of seeing that the track was in proper condition, may be drawn from the character of the defect.³⁵ Evidence on the part of the plaintiff tending

³² *Gulf & C. R. Co. v. Pettis*, 69 Tex. 689; s. c. 7 S. W. Rep. 93.

³³ *Binns v. Richmond & C. R. Co.*, 88 Va. 891; s. c. 16 Va. L. J. 211; 14 S. E. Rep. 701. In the case of a derailment it has been ruled that the fact that railroad-ties were not strong enough to support an engine when derailed is not evidence of negligence, in respect to the engineer, where it is not claimed that they were not sufficiently strong to support the engine and cars as long as they remained on the rails: *Ward v. Bonner*, 80 Tex. 168; s. c. 15 S. W. Rep. 805. It has been held that a railway company was not liable for allowing ice and snow to accumulate between its tracks, where a subsequent derailment was not shown to have been caused

thereby: *McClarney v. Chicago & C. R. Co.*, 80 Wis. 277; s. c. 48 Am. & Eng. R. Cas. 132; 49 N. W. Rep. 693.

³⁴ *Marcom v. Raleigh & C. R. Co.*, 126 N. C. 200; s. c. 35 S. E. Rep. 423; *Wilkie v. Raleigh & C. R. Co.*, 127 N. C. 203; s. c. 37 S. E. Rep. 204. In the first of these cases the defendant proved to the satisfaction of the jury that the rail was misplaced through the malicious act of a trespasser, and that it was in no way negligent. The plaintiff excepted to a charge to the above effect as to the burden of proof!

³⁵ *Alabama & C. R. Co. v. Bailey*, 112 Ala. 167; s. c. 20 South. Rep. 313 (brakeman injured by derailment of train due to rotten cross-ties).

to show that there was no defect in the car, but that there was a sharp curve in the track, and that the car was derailed at the sharpest part of the curve, where the rails were old, secondhand rails, of different length, mashed and stringy, that the joints were low, that the ties were loose, that the road was out of alignment, that the curve was a very irregular curve, of about twenty degrees, and that the track was rough,—is sufficient evidence of negligence to sustain a verdict for the plaintiff.³⁶ So, evidence that the accident occurred at a cattle-guard at the end of a switch, and was caused by the cattle-guard being low, and the timbers in it rotten, causing it to sink under the weight of the engine, and the pilot to strike the guard-rail and move the switch,—is sufficient to require the submission of the case to the jury.³⁷ So, evidence that water had previously on several occasions overflowed the track of a railroad company at a certain point, has been held sufficient to justify a finding that the company, by failing to keep its track in proper condition, had neglected its duty to a fireman upon one of its engines, whose death was caused by the sinking of the rails at that point, caused by a washing out of the earth.³⁸ But it has been held that a railroad company is not liable to an engineer for an injury caused by the breaking of a rail having no visible defect, occasioned by frost.³⁹ Ignoring this case, the question should be whether a railroad company ought not to have its road made with rails heavy enough and strong enough not to break from the effect of frost. In another case, a railroad company was held not liable for injuries sustained by an employé by the sliding out or giving way of the foundation on which an embankment rested, where it was made by a different company forty years before the accident, and there was no obvious defect in its construction, and there was no evidence from which it could be inferred how it might or ought to have been discovered by the defendant, and the cause of the accident was obscure.⁴⁰ Another case holds that where it is shown that a track-inspector and

³⁶ *Peters v. McKay*, 136 Cal. 73; s. c. 68 Pac. Rep. 478.

³⁷ *Bach v. Iowa &c. R. Co.*, 112 Iowa 241; s. c. 83 N. W. Rep. 959 (action by railway fireman injured by derailment of train).

³⁸ *Stoher v. St. Louis &c. R. Co.*, 105 Mo. 192; s. c. 16 S. W. Rep. 591.

³⁹ *Devlin v. Wabash &c. R. Co.*, 87 Mo. 545; s. c. 4 West. Rep. 54.

⁴⁰ *Norfolk &c. R. Co. v. Pool*, 100 Va. 148; s. c. 4 Va. Sup. Ct. Rep. 42; 40 S. E. Rep. 627. This decision ignores the principle—in this relation so salutary and important—that the

accident itself demonstrates negligence *prima facie* under the rule of *res ipsa loquitur*, and that it was not for the plaintiff, but for the defendant, to show how the defect might or ought to have been discovered. Under the excuse afforded them by such decisions as this, railroad companies are encouraged to wait until some death-dealing accident demonstrates a defect in their track, without discovering it beforehand by the making of proper inspections.

his gang carefully examined and repaired a curve about two or three weeks before an accident, an employé of the railroad company working upon an engine cannot recover for injuries received in a derailment *alleged* to be due to a defect in the rails at that place, where no negligence is shown, or no defect in the rails, or incompetency on the part of the trackmen or negligence in the manner in which the work was done.⁴¹ Negligence on the part of a railroad company as towards its employés cannot be predicated of the location of a switch on a grade and curve in its track, when, with proper care, its road may be operated as safely with the switch there as elsewhere; but if in consequence of the switch being so located the danger to its employés in the operation of the road is increased, it must exercise a correspondingly increased degree of care at that point.^{41a}

§ 4267. Failure to Build a Bumper at the End of an Inclined Track.—The writer states with the greatest confidence that, on principle, the failure of a railroad company to build a bumper at the end of an inclined track, and especially where the track ends at a considerable elevation above the ground, is negligence; but an unaccountable decision is noted in the margin which seems to hold the contrary.⁴²

⁴¹Burrell v. Gowen, 134 Pa. St. 527; s. c. 19 Atl. Rep. 678 (some witnesses stated outer rail was worn away $\frac{1}{4}$ inch; others said $\frac{3}{4}$ inch; while other witnesses for plaintiff said the curve was in good condition. There was also evidence that one or more new rails were laid at the place of the accident shortly after it happened).

^{41a}International &c. R. Co. v. Johnson, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772.

⁴²In the case referred to it appeared that the defendant operated a railroad to carry clay from its pits to its refining-works. The track descended on a trestle about thirteen feet high, with a grade for three hundred feet of the distance of about six feet. The trestle was built by a contractor under the direction of the superintendent. It was not shown that the superintendent had complete supervision of the work, with the right to select and discharge workmen, and power to procure machinery necessary to perform the work. It was held that the evidence failed to show the superintendent was more than a fel-

low servant, and hence did not charge defendant with liability for an accident alleged to have been caused in part by the absence of a bumper at the end of the trestle, the result of the negligence of such superintendent: Maryland Clay Co. v. Goodnow, 95 Md. 330; s. c. 51 Atl. Rep. 292; Pearce, J., dissenting. The contractor warned the superintendent of the danger of not having a bumper at the end of the trestle. Plaintiff was unloading cars at the end of the trestle, when a train of five cars and an engine, only two of the cars having brakes, and one of these brakes being broken, ran down the trestle and struck the cars plaintiff was unloading, pushing one car over the end of the trestle, and causing one of the stationary cars to run over plaintiff, which could not have happened had there been a bumper. The court held that as there were three other cars with good brakes that might have been used, the negligence in using cars with defective brakes instead was that of fellow servants: Maryland Clay Co. v. Goodnow, *supra*.

§ 4268. **Objects Falling upon the Track: Snow-Slides, Gravel-Slides, Falling Rock, Stick of Wood Falling from Tender.**—A snow-slide coming down upon a railroad-track forms a dangerous obstruction different from a mere snowdrift, because the snow which comes down is generally mingled with gravel and stones. It need not be said that it is the duty of a section-foreman who has knowledge that such obstruction has come upon the track to report it at once to the proper officials of the road, and also to the conductor of an approaching train, if he has an opportunity to do so; and that it is the duty of the company to make reasonable exertions to clear it away; and that for an injury to a trainman for its negligence in failing so to do, it will be liable in damages.⁴³ For the purpose of charging a railroad company with responsibility for negligence, it has been quite reasonably held that notice to its section-master of a rock dangerously overhanging the track is notice to the company.⁴⁴ Evidence that fires had been prevailing for several days upon a mountain-side, immediately above a railroad-track, for a distance of several miles in the immediate vicinity of the place where an accident happened, and that stones, sticks and logs were rolling down upon the track by reason of the fires, and that this condition of affairs was known to the company, is sufficient to take the question to the jury whether it was not negligent in failing to have track-walkers in that vicinity in order to guard against accidents to trains passing over the track in the night.⁴⁵

§ 4269. **Tracks Dangerously Near Together.**—The duty of a railway company towards its employes to so construct its tracks that they

⁴³ *Fisher v. Oregon &c. R. Co.*, 22 Or. 533; s. c. 16 L. R. A. 519; 12 Rail. & Corp. L. J. 139; 30 Pac. Rep. 425 (recovery for injuries to a conductor of a freight-train, caused by the train running into the slide, sustained,—the track foreman having failed to report it, though he had ample opportunity).

⁴⁴ *Baltimore &c. R. Co. v. McKenzie*, 81 Va. 71.

⁴⁵ *Denver &c. R. Co. v. Wilson*, 12 Colo. 20; s. c. 20 Pac. Rep. 340; 2 Denv. Leg. N. 73 (recovery by fireman). It has been held that a laborer on a work-train of a railroad company cannot recover damages for an injury caused by the derailment of one of its cars by a small stick of firewood which evidently fell from the tender of a locomotive upon the track, without showing that it was there

through the direct and immediate fault of the employes of the company. The plaintiff failed to show that the stick of firewood fell either through improper loading or through improper handling by the fireman: *Smith v. Louisiana &c. R. Co.*, 49 La. An. 1325; s. c. 22 South. Rep. 359. The decision is plainly erroneous in that it ignores the view that the presence of the stick of wood upon the track, which it was the duty of the defendant to keep clear and safe, demonstrates negligence *prima facie*, at least under the rule of *res ipsa loquitur*, casting upon the defendant the burden of explaining its presence consistently with the conclusion of its own innocence, and making its negligence a question for the jury.

shall be reasonably safe, is violated where they are so near together that an employé engaged in his duties on the side of the car is liable to be brought into contact with cars on the other track and killed or injured.⁴⁶ This assumes that the injured brakeman is ignorant of the proximity of the cars on the other track and is not imputable with contributory negligence.⁴⁷ This species of defect is frequently found at places where the tracks near each other curve sharply, so that the end of a car on the inside track in rounding the curve projects so far beyond the track as to be brought dangerously close to a car on the outside track. Here the danger would not be obvious to an ordinary person unless his attention were particularly called thereto; he would not therefore be imputable with contributory negligence because of a failure to know and appreciate the danger, though he would be if he were injured while riding on the side of the car unnecessarily, and contrary to the rules.⁴⁸ The same defect is sometimes discovered in street-railroads, the cars of which have running-boards along which the conductors are obliged to walk in collecting fares. In such a case, if a conductor on one car has not been warned of the dangerous proximity of the other track at a particular point, in consequence of which, while standing on the running-board in the discharge of his duties, he is struck by a car passing thereon,—the company will be liable for his injury.⁴⁹

§ 4270. Side-Tracks Dangerously Near Main Track.—Actionable negligence is imputable to a railway company where it so constructs

⁴⁶ *Mohr v. Lehigh Valley R. Co.*, 55 App. Div. (N. Y.) 176; s. c. 66 N. Y. Supp. 899; *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383; s. c. 75 N. Y. Supp. 216; *Vorhees v. Lake Shore & c. R. Co.*, 193 Pa. St. 115; s. c. 44 Atl. Rep. 335.

⁴⁷ *Vorhees v. Lake Shore & c. R. Co.*, 193 Pa. St. 115; s. c. 44 Atl. Rep. 335 (brakeman injured while descending a side-ladder to close a switch).

⁴⁸ *Mohr v. Lehigh Valley R. Co.*, 55 App. Div. (N. Y.) 176; s. c. 66 N. Y. Supp. 899.

⁴⁹ *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 383; s. c. 75 N. Y. Supp. 216. It has been badly reasoned that the construction and proximity of tracks in a railroad-yard, used by railroad employés in their daily work, is a question of engineering, and that it is not for the jury to say whether their closeness is negligence on the part of the railroad: *Mobile & c. R. Co. v.*

Healy, 100 Ill. App. 586. It has been held that it is not negligence, by reason of which an employé can recover for injuries caused thereby, for a street-car company so to construct its tracks leading out of its car-shed, that the ends of two cars standing on opposite curves will come together, whereby an employé is crushed and injured, although it would have been safer to make the curves further apart: *Goldthwait v. Haverhill & c. St. R. Co.*, 160 Mass. 554; s. c. 36 N. E. Rep. 486. Nor for a railroad company so to lay a spur-track that cars must be pushed along by means of a stake on to the main track when taken down an incline behind the engine, when done for the purpose of diminishing danger, and the choice remains to do that way or take the cars down in front of the engine: *Watts v. Hart*, 7 Wash. 178; s. c. 34 Pac. Rep. 423, 771.

its tracks that cars on the main line cannot pass cars on the *side-track* without endangering the lives of its employés.⁵⁰

§ 4271. **Defects in Railway-Tracks Dangerous to the Feet of Employés.**—Railroad companies are not in general liable for failing to construct their tracks so that they will be so smooth as to exclude all danger of brakemen being hurt through slipping into the spaces between the ties, while engaged in their duties of coupling and uncoupling cars; and the corresponding theory is that the brakeman has no right to rely on the supposition that the track is smooth, and to slip between the ties without looking.⁵¹ It is a part of this theory that a railway-track is not ballasted for the purpose of making it safe for a brakeman to walk upon, but in order to make it firm and safe for the passage of trains.⁵² On the same line of thought it is held that a railway company is not liable for an injury received by its employé in falling over a piece of clinker of unusual size, when descending from an engine;⁵³ or in making a coupling;⁵⁴ or in stumbling upon a pile of ashes between the rails, after he has been thrown off a moving car by a jar, although he could have saved himself but for the presence of the ashes.⁵⁵ But the doctrine that a railway company may require its employés to go upon its track, especially in the nighttime, in the discharge of their duties, and that it is under no obligation to keep the track safe from pitfalls, may well be questioned.

§ 4272. **Further of Defects in the Track Dangerous to the Feet of Employés.**—It has been held evidence of negligence taking the question to the jury for a railroad company unnecessarily to suffer certain ties to project a foot beyond the regulation ties, their ends being more or less uneven and raised above the surface of the ground, in

⁵⁰ *Pennsylvania Co. v. McCormick*, 131 Ind. 250; s. c. 30 N. E. Rep. 27. Where the regulation distance between the parallel tracks on the defendant's road was from seven feet to seven feet and two inches, the construction of a siding only five feet and a half to six feet from the next track, leaving a space between the two tracks not wide enough to allow a brakeman upon a freight-train to safely descend a side-ladder in the discharge of his duties when cars are on the siding, is evidence of negligence to go to a jury in a case where a brakeman has been injured while so acting, he not being informed of the narrowness of the space and being free

from contributory negligence: *Vorhees v. Lake Shore & C. R. Co.*, 193 Pa. St. 115; s. c. 44 Atl. Rep. 335.

⁵¹ *Rogon v. Toledo & C. R. Co.*, 97 Mich. 265; s. c. 56 N. W. Rep. 612.

⁵² *Finnell v. Delaware & C. R. Co.*, 129 N. Y. 669; s. c. 42 N. Y. St. Rep. 354; 29 N. E. Rep. 825; *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98; s. c. 44 Atl. Rep. 1069.

⁵³ *Lee v. Central R. Co.*, 86 Ga. 231; s. c. 12 S. E. Rep. 307.

⁵⁴ *Welch v. New York & C. R. Co.*, 43 N. Y. St. Rep. 958; s. c. 17 N. Y. Supp. 342.

⁵⁵ *Costello v. Philadelphia & C. R. Co.*, 2 Pa. Dist. Rep. 453; s. c. 32 W. N. C. (Pa.) 134.

consequence of which a freight-conductor was injured in alighting from his train at night, when there were two inches of sleety snow on the ground;⁵⁶ for a railroad company to permit spaces between the ties to remain unfilled at places where there are no movable switches requiring such unfilled spaces;⁵⁷ to leave the planking at a highway crossing so uneven that a switchman endeavoring to make a coupling at that place catches his foot or slips thereon and is thrown under the cars;⁵⁸ unnecessarily to leave open and unguarded a temporary ditch across a tramway-track frequently used by employes in pushing cars loaded with lumber, in such a manner that a person so pushing cars would have little opportunity to perceive the danger;⁵⁹ negligently to leave rubbish on the track over which a conductor, in the discharge of his duties, stumbles and is killed.⁶⁰ It has been held that a railroad company which obtains its right to cross streets in a city upon condition that it will *plank between its rails*, is under an obligation to do the work, and maintain it when done, in such a way that it will be reasonably safe to its employes who may be required to pass over

⁵⁶ *Whitcher v. Boston & C. R. Co.*, 70 N. H. 242; s. c. 46 Atl. Rep. 740. In this case it appeared that the plaintiff, a freight-conductor, in alighting from a slowly-moving train when there were two inches of sleet on the ground, struck his foot on some hard object, causing him to slip and fall. The exact spot where his foot touched the ground could not be determined, but a mark made on the rail shortly afterwards by fellow employes to indicate the spot where he fell was found to be opposite four ties projecting a foot beyond the regulation ties, and far enough out so that one alighting from a train would step on them. Way-bills which he held in his hand, and blood from his injuries, were found on and about the ties. There were no other objects on which he could have stepped. It was held that the question as to whether or not the projecting ties were the cause of plaintiff's injury should have been submitted to the jury: *Whitcher v. Boston & C. R. Co.*, *supra*.

⁵⁷ *Illinois & C. R. Co. v. Cozby*, 69 Ill. App. 256; s. c. *aff'd*, 174 Ill. 109; 50 N. E. Rep. 1011.

⁵⁸ *Herrick v. Quigley*, 101 Fed. Rep. 187; s. c. 41 C. C. A. 294 (as he slipped, decedent grasped the grab-iron, and endeavored to jump out

from under the car, and was about to accomplish this, when his foot slipped into a hole between the ends of two ties, and he was run over by the cars and killed; the court properly left it to the jury to determine whether the condition of the plank at the crossing was the proximate cause of the injury).

⁵⁹ *Sadowski v. Michigan Car Co.*, 84 Mich. 100; s. c. 47 N. W. Rep. 598 (ditch had been dug by order of superintendent in order to lay a water-pipe).

⁶⁰ *Linck v. Louisville & C. R. Co.*, 107 Ky. 370; s. c. 54 S. W. Rep. 184. But it has been held that the fact of a custom, in ballasting its tracks, to make a crown in the center sloping off each way toward the rails, leaving an inch or an inch and a half under the rails for the escape of water, does not relieve such a company from liability for injuries to an employe who caught his foot under a rail and was run over by a car in a switching-yard, unless such method of ballasting in switch-yards is reasonably safe for employes: *Lake Erie & C. R. Co. v. Morrissey*, 177 Ill. 376; s. c. 5 Am. Neg. Rep. 120; 12 Am. & Eng. R. Cas. (N. S.) 624; 52 N. E. Rep. 299; *aff'g* s. c. 75 Ill. App. 466; 30 Chic. Leg. N. 342.

it in the discharge of their duties, although it owed no duty to them to put down or maintain the planks in the first instance.⁶¹

§ 4273. **What Defects Dangerous to the Feet of Employés do Not Afford Evidence of Negligence.**—Railway companies have the right to exercise reasonable discretion in the construction of their roadbeds, rails, and safety-appliances. Therefore, where a railroad company used a piece of lumber larger in every way than the customary blocking between a guard-rail and a main-rail, it was but the rightful exercise of the judgment of the company, and was no evidence of negligence, or ground of liability for an injury resulting from a brakeman's stumbling over it.⁶² The same judicial complacency has relieved a railroad company from liability for damages to an employé who was injured in consequence of the company allowing a frog to project several inches above the track, the defective condition being apparent to casual observation, where the employé was required to walk over or near the point in the performance of his work and had ample opportunity to learn of the danger.⁶³ In the opinion of another court evidence that a section-man was riding on the front end of a hand-car with his feet hanging down four inches from the ties, and that his attention was attracted by something, and that as he was turning his head his foot was caught, throwing him on the track,—was not sufficient to support a finding that he was injured *because* of the defective condition of the track, though the evidence tended to show that the track was in fact defective in some respects.⁶⁴ In the opinion of another court a railroad company owes no duty to its employés to maintain a safe footway along its roadbed. Hence, a brakeman injured by falling into a hole left between two ties, caused by the ballast washing out, has no cause of action against the company; nor does the fact that the accident occurred upon a side-track or in a yard change the rule. The court, speaking through Dean, J., says that an unballasted track has been consistently held to be "reasonably safe" for employés in Pennsylvania.⁶⁵ Another court holds that where a railway brakeman, suddenly called to supper by the conductor, slipped on *snow and ice accumulated on the station platform*, and was injured, the company was not liable, since it was

⁶¹ *Monsarrat v. Keegan*, 58 U. S. App. 377; s. c. *sub nom.* Valley R. Co. v. Keegan, 11 Am. & Eng. R. Cas. (N. S.) 507; 40 Ohio L. J. 167; 31 C. C. A. 255; 87 Fed. Rep. 849.

⁶² *Morris v. Duluth & C. R. Co.*, 108 Fed. Rep. 747; s. c. 47 C. C. A. 661.

⁶³ *Walker v. Atlanta & C. R. Co.*, 103 Ga. 820; s. c. 4 Am. Neg. Rep.

26; 11 Am. & Eng. R. Cas. (N. S.) 498; 30 S. E. Rep. 503.

⁶⁴ *St. Louis & C. R. Co. v. Denny*, 5 Tex. Civ. App. 359; s. c. 24 S. W. Rep. 317.

⁶⁵ *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98; s. c. 44 Atl. Rep. 1069. This decision seems to be grossly untenable and unjust.

under no duty to clear away snow and ice from near the station any more than along the whole line; and since such a sudden call from the conductor was not such an improper or negligent command that the brakeman could recover for an injury sustained in consequence of hastily obeying it.⁶⁶ Another court, dealing with the question of an accident to a brakeman through the sinking of the track and consequent alteration of the height of the deadwoods, which caught his arm before he could adjust it to the changed conditions, applies the doctrine of proximate and remote cause, with the conclusion that the failure of the company to keep the track in repair so as to prevent such an accident must have been the result of negligence, and the defect must have been such that a person of ordinary intelligence and prudence would have expected, as a result of it, that such an injury as that which befell the brakeman would occur.⁶⁷ A railroad company has been held not liable for an injury which occurred through leaving a splinter on the inside of a rail, whereby the foot of an employé was caught, unless the company knew or by the exercise of a reasonable inspection would have known of the defect;⁶⁸ and through the breaking out of a piece of the flange of one of the rails, unless the company has been negligent in not discovering and repairing it.⁶⁹

⁶⁶ *Piquegno v. Chicago & C. R. Co.*, 52 Mich. 40; s. c. 50 Am. Rep. 243. A master is not liable for injuries to an employé from a platform which was constructed with reasonable care and caution, and it is error to refuse so to charge, especially where there is some testimony demanding it: *Missouri & C. R. Co. v. Baker* (Tex. Civ. App.), 37 S. W. Rep. 94 (no off. rep.) ("run" or platform constructed across ditch to freight-cars, for purpose of loading ties).

⁶⁷ *McGowan v. Chicago & C. R. Co.*, 91 Wis. 147; s. c. 64 N. W. Rep. 891. Defendant asked the court to submit the following question: "Did the defendant have any reason to apprehend such a sinking of the road-bed and track thereon?" which was refused. The Supreme Court held that, as plaintiff had attributed his injury to such a cause, the question was proper, as going to the determination of whether defendant's negligence was the proximate cause of the accident: *McGowan v. Chicago & C. R. Co.*, *supra*.

⁶⁸ *Doyle v. St. Paul & C. R. Co.*, 42 Minn. 79; s. c. 43 N. W. Rep. 787; 41 Am. & Eng. R. Cas. 376.

⁶⁹ *Chicago & C. R. Co. v. Dunn*, 23 Ill. App. 148. A railroad company may be held liable for an injury to a brakeman occasioned by the proximity of a pitfall, like an uncovered culvert at and about a switch, where he may be expected to alight from the train for the purpose of turning the switch, where the presence of such culvert is unknown to the employé at the time, or if, though exposed to view where he might see and avoid it, his attention is diverted for the moment upon the immediate work upon which he is engaged: *West v. Southern Pac. Co.*, 85 Fed. Rep. 392; s. c. 56 U. S. App. 323; 29 C. C. A. 219 (but the culvert in question was 281 feet beyond the switch, the plaintiff having got off at that point because the train overran the switch—no recovery). A ground-switch, of a form in common use, was placed in a railroad-yard, in a 6-foot space between two tracks; the lock of the switch was in the middle of the space; and the handle, when lying flat, extended to within a foot of the adjacent rail, and the whole apparatus could be safely and effectively worked by

§ 4274. **To What Companies or their Representatives this Liability for Injuries from Defective Tracks Ascribed.**—The obligation of maintaining a safe track for the protection of the servants employed in the operation of the railway, is ascribed to every proprietor operating a railway of whatever description, and it is quite immaterial that the person or corporation operating the railway is not the owner of it.⁷⁰ It has been ascribed to a *court receiver*, having under his control and management branch roads leased by him from other companies, whether the person injured was his own employé or not, and whether or not he was paid for his services by the receiver or by the lessor company.⁷¹ It has been ascribed to the owners of a *private railway-track*, occasionally employed by a railroad company for a special use,

standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, stood at the end of the handle, instead of in the middle of the space, and was struck by an engine on the other track. It was held that there was no proof of such fault on the part of the railroad company, in the construction and arrangement of the switch, as would support an action against it for the injury: *Randall v. Baltimore & C. R. Co.*, 109 U. S. 478; s. c. 27 L. ed. 1003. An *instruction* is not erroneous which charges that it is the duty of a railroad company to exercise greater care to keep the spaces between ties filled, and the ground level, in large switch-yards, where trains are made up and much switching done, than would be required out in the country, where there is less occasion to make couplings: *Choctaw & C. R. Co. v. Tennessee*, 116 Fed. Rep. 23. Where the rules of a railroad company required an eastbound train to take a siding at the western switch; and the eastbound train on which the plaintiff was employed as brakeman proceeded past the siding in order to back into the eastern switch, in violation of the rules, but overran the switch some distance; and the brakeman, not alighting until the train had stopped, started to walk back to the switch and fell into an uncovered culvert 281 feet from the switch; and it appeared that in the proper use of such switch the duty would devolve upon the head brakeman of a westbound train to op-

erate it, and that, presumptively, the engine having halted near the switch, the brakeman would alight from the train at a point far within the bounds of 281 feet,—the plaintiff could not recover damages from the company on the ground that it had been negligent in leaving the culvert uncovered at such point: *West v. Southern Pac. Co.*, 85 Fed. Rep. 392; s. c. 56 U. S. App. 323; 29 C. C. A. 219 (plaintiff knew rule was frequently violated and that culverts on road were uncovered). According to a disgraceful decision, a switchman who was injured, while coupling cars on a repair-track, by stepping on a small spiral car-spring which was *hidden in the grass growing between the rails*, could not recover damages from the company without showing that the inspector of the tracks knew, or by ordinary care should have known, that the spring was on the track, where the grass had been allowed to grow upon the track for years to the switchman's knowledge, and he knew that in repairing cars small pieces of wood and iron were liable to fall on the track and become concealed in the grass, which the closest inspection might not discover: *Williams v. St. Louis & C. R. Co.*, 119 Mo. 316; s. c. 24 S. W. Rep. 782.

⁷⁰ *Wisconsin & C. R. Co. v. Ross*, 142 Ill. 9; s. c. 12 Rail. & Corp. L. J. 81; 31 N. E. Rep. 412. Compare Vol. III, § 3389.

⁷¹ *Dillingham v. Crank*, 87 Tex. 104; s. c. 27 S. W. Rep. 93. Compare Vol. III, § 3390.

such owners having negligently suffered it to remain in a dangerous condition for such use, though trains are run upon it slowly and carefully.⁷² It has been ascribed in Texas to the *lessor* of a railway property, without especial reference to the question whether the lease was or was not authorized by an act of the Legislature.⁷³ In the case where a *railway-track is used indiscriminately by several companies*, so that the implication is that they all contribute jointly toward keeping it in repair, the servant of one such company, injured by the non-repair of the common track, may have an action for damages against one of the other companies.⁷⁴

§ 4275. Construction and Safety of Logging-Railroads.—Though a logging-railroad is not expected or required to be laid with the same care and security, nor to be operated with the same degree of prudence, as is demanded in the construction and operation of railroad-tracks in the use of common carriers, nevertheless such road should be so constructed and operated as to render it reasonably safe for those whose employment necessitates their going upon such road and performing service in connection with the same. Therefore, where plaintiff was injured while attempting to couple two cars of unequal height, which the evidence showed could not be coupled on a level track, of which fact plaintiff was ignorant and had not been warned, the company was liable.⁷⁵ A lumber manufacturer who owns and conducts a railroad running from his mill to the timber is liable to an employé for an injury upon a train thereon, caused by a defective roadbed; and this is so even if the train was going out to *repair* the track at a *certain point*, where the accident happened before reaching there.⁷⁶

§ 4276. Cases of Injuries from Defective Railway-Tracks where the Company was held Liable.—In the application of these principles railway companies have been held liable for the following defaults:—Failing to keep a *bridge-guard* in repair, in consequence of which a

⁷² Stetler v. Chicago & C. R. Co., 49 Wis. 609.

⁷³ Trinity & C. R. Co. v. Lane, 79 Tex. 643; s. c. 15 S. W. Rep. 477; rehearing denied, 79 Tex. 648; s. c. 16 S. W. Rep. 18. Compare Vol. III, § 3385.

⁷⁴ Missouri Pac. R. Co. v. Bond (Tex. Civ. App.), 20 S. W. Rep. 930 (no off. rep.). Compare Vol. III, § 3380; *ante*, §§ 3730, 3735.

⁷⁵ Lynn v. Antrim Lumber Co., 105 La. 451; s. c. 29 South. Rep. 874.

⁷⁶ Bowman v. White, 110 Cal. 23; s. c. 42 Pac. Rep. 470 ("bound to keep his road in good repair after construction, and this was a duty he owed to his employes as fully and completely as to his passengers if he had been engaged as a common carrier of such. If not absolutely bound to do so, he was at least required to exercise that degree of care * * * demanded by the law").

brakeman was injured;⁷⁷ allowing its track to get *out of repair*, so that an engineer was hurt through being obliged to reverse his engine, which was leaving the track;⁷⁸ allowing a mass of *loose rock* to remain over and near its track in such a position as to slide and fall upon the track when detached, the danger being known and obvious,—and this although the place was examined by a track-walker just after a train had passed;⁷⁹ maintaining in a defective condition a set of *platform-scales* over which a spur-track ran;⁸⁰ allowing an obstruction in the shape of *fallen timber* to lie near its track, over which a brakeman, in the exercise of his duty, falls and is injured;⁸¹ allowing a *raised plank* to remain two inches above the station-platform, so that a brakeman, running along from the front part of the train to get orders and get on the rear part of the train while it is passing the station, not knowing of the obstruction, falls over it and is injured;⁸² failing to guard against the danger accruing from *ice being forced upon its track* by high water, at a point where a stream has frequently risen above the track, and where the track has once been washed away, although no ice has previously been forced on the track;⁸³ the single-spiking of three ties and an entire failure to spike the fourth on a curve of five or six degrees;⁸⁴ the defective construction, under the superintendence of its road-master, of a *temporary track* around a wreck, causing a derailment;⁸⁵ the giving way of a *culvert* caused by the breaking of a dam above on an adjoining property, where the negligent manner in which the culvert was constructed contributed to the accident;⁸⁶ failing to exercise a degree of care in proportion to the great risk, in so constructing its *sidings on the mountain-side* as to prevent the escape of loose cars placed thereon,—as by using a stub or safety-switch so constructed as to cause loose cars to run off the track before reaching the main track;⁸⁷ allowing a rail to become so worn and defective that a train is derailed and the fireman injured, although the derailment would not have taken place if the engineer had not been running the train at an improper rate of speed,⁸⁸—an illustration of the doc-

⁷⁷ Warden v. Old Colony R. Co., 137 Mass. 204.

⁷⁸ Knapp v. Sioux City &c. R. Co., 71 Iowa 41; s. c. 32 N. W. Rep. 18.

⁷⁹ Bean v. Western &c. R. Co., 107 N. C. 731; s. c. 12 S. E. Rep. 600.

⁸⁰ Little Rock &c. R. Co. v. Cagle, 53 Ark. 347; s. c. 14 S. W. Rep. 89.

⁸¹ Southern &c. R. Co. v. Markey (Tex.), 19 S. W. Rep. 392 (no off. rep.).

⁸² Brown v. Ohio &c. R. Co., 138 Ind. 648; s. c. 37 N. E. Rep. 717.

⁸³ Scagel v. Chicago &c. R. Co., 83 Iowa 380; s. c. 49 N. W. Rep. 990.

⁸⁴ Colorado &c. R. Co. v. Naylor, 17 Colo. 501; s. c. 30 Pac. Rep. 249.

⁸⁵ Atchison &c. R. Co. v. Wilson, 4 U. S. App. 25; s. c. 48 Fed. Rep. 57.

⁸⁶ Bonner v. Mayfield, 82 Tex. 234; s. c. 18 S. W. Rep. 305.

⁸⁷ Galveston &c. R. Co. v. Croskell, 6 Tex. Civ. App. 160; s. c. 25 S. W. Rep. 486.

⁸⁸ Clyde v. Richmond &c. R. Co., 59 Fed. Rep. 394.

trine that the master will be liable where his negligence concurs with that of a fellow servant.⁸⁹

ARTICLE III. INJURIES TO RAILWAY EMPLOYEES FROM OBJECTS TOO NEAR THE TRACK.

SUBDIVISION I. *In General.*

SECTION

4280. Liability of railroad companies for injuries to employes from objects too near their tracks.
4281. Statutory construction—Dangerous structure too near the track not negligence “in the running of trains.”

SECTION

4282. Accepting the risk of such dangers, and contributory negligence with respect thereto.
4283. Negligence of fellow servant no excuse.
4284. Cases of this kind where the company has been excused.

§ 4280. **Liability of Railroad Companies for Injuries to Employes from Objects Too Near their Tracks.**—It is actionable negligence on the part of a railway company to suffer obstructions to remain so near their tracks that their trainmen, engaged in their ordinary duties, are liable to come in contact with them and be killed or injured while in the exercise of due care,¹—as where the railroad company builds a *shed* so near its track as to be dangerous to its employes;² or where a *bank of earth* is left so near a track as to be dangerous to employes engaged in pushing cars along the track, although the track is unfinished,—especially where they are ordered to do this work and no notice is given to them of the danger;³ or where a *loaded car* is left standing in dangerous proximity to an adjacent track, although it suited the convenience of the consignee of the goods therein to unload it at that place;⁴ or where a *stump* was left standing dangerously near the track, and a brakeman unfamiliar with the fact was ordered, without warning of its proximity, to see if the wheels were sliding, and while, in compliance with this order, looking with his head outside the car, was struck thereby;⁵ or where a railroad company permits

⁸⁹ *Ante*, § 4258; *post*, 4856, *et seq.*

¹ *Kearns v. Chicago &c. R. Co.*, 66 Iowa 599; *Illinois &c. R. Co. v. Whalen*, 19 Ill. App. 116; *Kansas City &c. R. Co. v. Burton*, 97 Ala. 240; s. c. 12 South. Rep. 88; 53 Am. & Eng. R. Cas. 115; *Johnson v. St. Paul &c. R. Co.*, 43 Minn. 53; s. c. 44 N. W. Rep. 884; 30 Cent. L. J. 462; 41 Am. & Eng. R. Cas. 293.

² *Kelleher v. Milwaukee &c. R. Co.*, 80 Wis. 584; s. c. 50 N. W. Rep. 942.

³ *Stackman v. Chicago &c. R. Co.*, 80 Wis. 428; s. c. 50 N. W. Rep. 404.

⁴ *Kansas City &c. R. Co. v. Burton*, 97 Ala. 240; s. c. 53 Am. & Eng. R. Cas. 115; 12 South. Rep. 88.

⁵ *Riley v. West Virginia &c. R. Co.*, 27 W. Va. 145.

piles of sand and gravel to remain alongside its track at a place where it sends a special policeman in its employ to arrest men trespassing on trains, and over which he stumbles and falls under the wheels of the cars, and is killed, while in the discharge of his duty, in attempting to board a moving train for the purpose of making arrests, with the conclusion that this may reasonably be found by the jury to be negligence, and the proximate cause of his death.⁶

§ 4281. Statutory Construction—Dangerous Structure Too Near the Track Not Negligence “in the Running of Trains.”—An injury to a railroad employé by a dangerous structure placed too near the track is not an injury caused by negligence “in the running of trains,” within the meaning of the Georgia statute⁷ which declares that railroad companies are liable as common carriers, and that, as they have many employés who cannot control those who should exercise care in the running of trains, they shall be liable to such employés as to passengers for injuries arising from the want of care and diligence on the part of the train employés.⁸

§ 4282. Accepting the Risk of such Dangers, and Contributory Negligence with Respect thereto.—While, as hereafter seen, there is difficulty in applying, in this situation, the doctrine that the railway employé accepts the risks of such dangers if he knows them, and is guilty of contributory negligence in neglecting them if he knows them,⁹ yet it is clear on principle and on the better authority that he is under no duty of inspection to ascertain whether such dangers exist, but may reasonably rely upon the duty of his employer to see that they do not exist, or to warn him of them if they do, and consequently that their existence is not one of the perils which he assumes by virtue of his employment.¹⁰ Clearly, if he did not know, or could

⁶ *Chicago &c. R. Co. v. Kinnare*, 91 Ill. App. 508; s. c. aff'd, 190 Ill. 9; 60 N. E. Rep. 57. But it has been held that the fact that gravel, intended for ballast, had been deposited along a railroad-track, and was permitted to remain there for several weeks, in piles a few inches high, does not constitute negligence which will authorize a recovery for the death of a person thrown from the train, on the theory that such person might have been prevented by the gravel from escaping injury, and particularly where the circumstances indicate that his death could not be attributed to such a

cause: *Crawford v. New York &c. R. Co.*, 23 Ohio C. C. 207 (evidence tended to show that deceased fell between the cars and was instantly killed; that he could not have escaped even had there been no gravel by the track).

⁷ Ga. Code, § 2083.

⁸ *Central Trust Co. v. East Tennessee &c. R. Co.*, 69 Fed. Rep. 353.

⁹ *Post*, § 4747, *et seq.* That the want of ordinary care in avoiding such a danger will preclude a recovery,—see *Gould v. Chicago &c. R. Co.*, 66 Iowa 590.

¹⁰ *Kansas City &c. R. Co. v. Burton*, 97 Ala. 240; s. c. 12 South.

not have discovered by the exercise of ordinary care, the dangerous proximity of the obstruction which has injured him, he will not be precluded from recovering damages on the ground of contributory negligence.¹¹ Such a company has been held responsible in damages to an employé for an injury resulting, without his negligence, from a tank or other appendage of the road, so negligently constructed as to subject the employé to unnecessary and extraordinary danger, which he could not reasonably anticipate or know of, and of which he, in fact, was not informed.¹² On the same grounds, where a conductor of a freight-train was struck and killed by the projecting roof of a depot-building, and it appeared that the defendant had lived for many years at the place of injury; that he had for a long time been familiar with the road, passing over it daily; and it did not appear that any change had been made in the building, or in the road, since he became an employé on the road, it was held that there could be no recovery of damages. In entering upon the service, the servant assumed the risk of premises as he found them.¹³

§ 4283. **Negligence of Fellow Servant No Excuse.**—Nor will it be any excuse on the part of the railway company that the dangerous obstruction was placed there by a fellow servant of the servant who sustained injuries from it, or even by a stranger, provided the company knew, or might have become aware, by the exercise of reasonable care, of its dangerous proximity, and failed to remove it.¹⁴

§ 4284. **Cases of this Kind where the Company has been Excused.**—Railway companies have been excused from liability to their employés for injuries sustained through coming in contact with objects in dangerous proximity to their tracks, under the following circumstances:—Where the *cars* of another company, which was allowed to use the yard of the defendant company, were left so close to the track upon which a train was coming in the night-time, and but a few minutes before its arrival, as to injure one of the trainmen thereon,—the failure of the yardmaster and of the engineer to discover their dangerous proximity being excused under the circumstances;¹⁵ where a line of

Rep. 88; 53 Am. & Eng. R. Cas. 115; Johnson v. St. Paul & C. R. Co., 43 Minn. 53; s. c. 30 Cent. L. J. 462; 44 N. W. Rep. 884; 41 Am. & Eng. R. Cas. 293.

¹¹ Bonner v. La None, 80 Tex. 117; s. c. *sub nom.* Bonner v. La Noue, 15 S. W. Rep. 803.

¹² Houston & C. R. Co. v. Oram, 49 Tex. 341.

¹³ Gibson v. Erie R. Co., 63 N. Y. 449; rev'g s. c. 5 Hun (N. Y.) 31 (Miller, J., dissenting).

¹⁴ Texas & C. R. Co. v. Hohn, 1 Tex. Civ. App. 36; s. c. 21 S. W. Rep. 942. See *post*, 4856, *et seq.*

¹⁵ Martin v. Louisville & C. R. Co., 95 Ky. 612; s. c. 26 S. W. Rep. 801; 16 Ky. L. Rep. 151.

telegraph-poles stood along the right of way of a railroad, and one of the *wires* struck the head of an unusually tall brakeman standing on the top of a freight-car which was somewhat above the ordinary height, and the blow broke the insulator of the telegraph-pole, causing the wire to fall and catch on the brake-handle of the moving car and coil about the body of the decedent, who stood, in the line of his duty, on a flat-car on a side-track twenty-five feet from the main track, dragging him from the car and causing instant death,—it not being shown that the railroad company had omitted any precaution which prudent persons engaged in a like business would have taken;¹⁶ where the conductor of an electric street-railway company was caught between the side of a trail-car and the *doorway or pier of the powerhouse*, through which he assisted in pushing the car, because there were only three and one-half inches of space on each side between the car and the door,—the danger of attempting to pass between the car and pier being obvious, and everything about the construction being open and apparent, and the injury occurring because he failed to let go of the car when he came to the doorway;¹⁷ where a steam-railway company placed *wing-fences at a cattle-guard*, three feet ten inches from the rails at the bottom, and inclining slightly outward at the top, causing the death of a brakeman while hanging low on the side of a freight-car, looking under it to discover what was causing stones to fly therefrom, where no such accident had ever happened before on the road or been anticipated, and no complaint has been made of the fences;¹⁸ where the *ash-pit and water-plug* in a railroad-yard were so located that an engine could simultaneously take in water and have its ashes dumped, there being no proof that an injury to an employé, whose leg was crushed by an engine while he was attempting to get out of the ash-pit, was due to that fact.¹⁹

¹⁶ Wabash &c. R. Co. v. Locke, 112 Ind. 404; s. c. 11 West. Rep. 877; 14 N. E. Rep. 391.

¹⁷ Jennings v. Tacoma R. &c. Co., 7 Wash. 275; s. c. 34 Pac. Rep. 937.

¹⁸ McKee v. Chicago &c. R. Co., 83 Iowa 616; s. c. 13 L. R. A. 817; 10 Rail. & Corp. L. J. 472; 48 Am. & Eng. R. Cas. 154; 50 N. W. Rep. 209. Compare Murphy v. Wabash R. Co., 115 Mo. 111; Central Trust Co. v. East Tennessee &c. R. Co., 73 Fed. Rep. 661.

¹⁹ Reichel v. New York &c. R. Co. 130 N. Y. 682; s. c. 42 N. Y. St. Rep. 510; 29 N. E. Rep. 763

That the dangerous proximity of a car or other foreign body or substance to the track of a railway does not constitute a defect in the company's "ways," under the Alabama Employers' Liability Act, so as not to prevent a recovery because of negligence in placing it there except on a complaint stating a case of defect in the company's ways, works, or machinery, —see Kansas City &c. R. Co. v. Burton, 97 Ala. 240; s. c. 53 Am. & Eng. R. Cas. 115; 12 South. Rep. 88.

SUBDIVISION II. *An Alphabetical Catalogue of such Objects—Company Liable or Not Liable.*

SECTION	SECTION
4286. Cattle-chutes.	4296. Rock: projecting ledge of rock.
4287. Cattle-guards.	4297. Roofs: projecting roofs of station-houses.
4288. Clearance-post between main track and switch-track.	4298. Signal-posts.
4289. Coal-shed.	4299. Station-limit board.
4290. Derricks.	4300. Stones, pile of.
4291. Girder between pillars of an elevated-railroad structure.	4301. Switch-stand, switch-target.
4292. Lumber, pile of near side-track.	4302. Telegraph-poles.
4293. Mail-cranes.	4303. Timber: projecting timber.
4294. Oil-box.	4304. Trees.
4295. Overhead wires.	4305. Water-tank, water-spout, water-plug.

§ 4286. **Cattle-Chutes.**—It is negligence for a railroad company to erect and maintain a cattle-chute in dangerous proximity to its tracks, notwithstanding it may be more convenient for the loading of cattle than if at a greater distance;¹ or so as to endanger the lives of brakemen in using the ladders on the side of the cars.²

§ 4287. **Cattle-Guards.**—A locomotive-engineer, while hanging to the side of the tender in order to tighten a nut underneath, through which water was escaping, was struck by a fence at a cattle-guard and injured. The evidence tended to show that there was a space between the fence and the tender of six or eight inches at the bottom, and sixteen or eighteen inches at the top; and that it was not unusual for engineers to make similar repairs without stopping their trains. The plaintiff had made but two trips in daylight over the part of the road where he was injured; and he testified that he did not know how close the fences along the road were to the track, and did not know they were close enough to strike him. It was held that there was evidence from which a jury might fairly infer that he was in the line of his duty in taking such a position on the side of the tender; and hence, that they might find that the accident was one which the com-

¹ Allen v. Burlington &c. R. Co., 57 Iowa 623.

² Keist v. Chicago &c. R. Co., 110 Iowa 32; s. c. 81 N. W. Rep. 181 (whether the brakeman knew of the danger, or, if he did, whether, under the circumstances, he had the

danger in mind, and ought to have avoided it, was a question for a jury, under proper instructions from the court; and for error in refusing to submit this question, among other errors, a judgment for defendant was reversed).

pany, in the exercise of ordinary prudence, would have guarded against; and that the question was properly submitted to the jury.³

§ 4288. **Clearance-Post between Main Track and Switch-Track.**—The office of this device is to indicate the point beyond which standing cars on the side-track are to be considered free from danger of interference with passing trains. It is said to be a common and necessary appliance to railroads, and its use is held not to be negligence. It was so held where an employé was injured by coming in contact with it after alighting to operate a switch.⁴

§ 4289. **Coal-Shed.**—For six years a railroad company maintained a coal-shed which stood twenty-eight and a half inches from the ladders of passing freight-cars. There was a footboard seven feet from the ground attached to the shed, which was only sixteen and a half inches from such ladders. This board was used by the employés at the coal-chute, but the trainmen had no connection with operating it. A brakeman, while descending a ladder on a freight-car passing the coal-shed, in the discharge of his duties, was struck by the end of the board and thrown to the ground and mortally injured. The evidence was held to be sufficient to show that the structure was dangerous to persons operating freight-trains in the usual and ordinary manner; and hence a finding of the jury to this effect was sustained. The question whether the brakeman knew or was chargeable with knowledge of the presence of the obstruction was held to be a question for a jury; and a verdict and judgment for the plaintiff were sustained.⁵

§ 4290. **Derricks.**—Negligence has been imputed to a railroad company for erecting a derrick beside its track without putting it in the care of a competent person charged with the duty of keeping it properly fastened.⁶

³Murphy v. Wabash R. Co., 115 Mo. 111. Compare McKee v. Chicago & C. R. Co., 83 Iowa 616; s. c. 13 L. R. A. 817; 10 Rail. & Corp. L. J. 472; 48 Am. & Eng. R. Cas. 154; 50 N. W. Rep. 209.

⁴Scidmore v. Milwaukee & C. R. Co., 89 Wis. 188; s. c. 61 N. W. Rep. 765.

⁵Chicago & C. R. Co. v. Stevens, 189 Ill. 226; s. c. 59 N. E. Rep. 577; aff'g s. c. 91 Ill. App. 171.

⁶Gates v. Chicago & C. R. Co., 2 S. D. 422; s. c. 50 N. W. Rep. 907. And this although the company did not know that the derrick was un-

fastened at the time of the accident, and although it had remained unfastened for a short time only: Gates v. Chicago & C. R. Co., *supra*. A brakeman on a freight-train was killed by the falling of derricks placed on each side of the track, and used by an independent contractor to unload heavy stone from the cars on the track. The derricks were fastened together by overhead wires, and were kept in position by guy-ropes fastened to fence-posts, one of which was decayed. The fall was caused by the breaking and pulling up of such

§ 4291. **Girder between the Pillars of an Elevated-Railroad Structure.**—A street-railway company is not guilty of negligence toward a workman employed by it upon a temporary track, in locating such track so close to the girder between the pillars of an elevated-railroad structure that one cannot stand between a horse-car passing on the track and such girder, where there is nothing to prevent the workman from stepping to the other side of the track upon the approach of the car but he chooses to stand by the girder and is crushed.⁷

§ 4292. **Lumber, Pile of Near Side-Track.**—For a railroad company to allow a pile of lumber to remain within a few feet of a side-track in its yards so as to obstruct the moving of cars along the side-track, in consequence of which its employes are injured, has been held to be evidence of negligence to go to the jury.⁸

§ 4293. **Mail-Cranes.**—Where a railroad company permitted a mail-crane to become and remain so loose on its foundation that, when loaded with a mail-sack, it leaned towards the track, so as to come within from seven to twelve inches of the locomotive-cab, it was held that such act was negligence, for which the widow of the locomotive-fireman, killed while in the discharge of his duties by striking such crane in passing, was entitled to recover, he being free from contributory negligence.⁹ So, it was held by the Supreme Court of New York that a railway company which so erects a mail-crane that it projects within twelve inches of the side of a car, when it might have been twice as far away, whereby a brakeman is injured while climbing upon the side of the car,—is guilty of negligence, and ought to pay damages to the injured brakeman;¹⁰ but, reversing this decision, the Court of Appeals of New York took into consideration the fact that the crane was properly constructed; that similar cranes were extensively used on other lines of the road; that the crane could not be placed further from the track and perform the service for which

posts. It was held that the railroad company was negligent, as it should not have allowed the derricks to be used in that condition over its tracks and men, without taking some care at least to discover and guard against the danger: the duty to furnish its men a reasonably safe place to work being implied in the contract of employment, and requiring the exercise of reasonable care and diligence to discharge it: *Gulf & C. R. Co. v. Delaney*, 22 Tex. Civ. App. 427; s. c. 55 S. W. Rep. 538.

⁷ *Sullivan v. Third Ave. R. Co.*, 19 App. Div. (N. Y.) 195; s. c. 45 N. Y. Supp. 1033.

⁸ *Bessex v. Chicago & C. R. Co.*, 45 Wis. 477 (and trial court erred in refusing to submit the case to the jury).

⁹ *Malott v. Laufman*, 89 Ill. App. 178 (it was the fireman's duty when passing the above station to keep a sharp lookout in front and toward the rear of the train).

¹⁰ *Sisco v. Lehigh & C. R. Co.*, 75 Hun (N. Y.) 582; s. c. 59 N. Y. St. Rep. 162; 27 N. Y. Supp. 671.

it was designed, although some other railroads use a crane with a movable arm which rises and falls automatically when not in use, while the cranes with stationary arms were preferable to the others because they permit a greater space between the end of the arm and the side of the car,—found no negligence in the act of the railroad company in placing and maintaining the crane where it did.¹¹

§ 4294. Oil-Box.—A railroad-engineer, and consequently the company, whose representative he is, is not negligent toward a switchman on the footboard of a switch-engine, so as to charge the company with liability for injuries to the latter, in running by an oil-box near the track, but far enough away to permit the engine to pass safely, unless he knows or has reason to believe that the switchman is in such a position that he may be injured in passing such box; and a complaint which fails to aver that the engineer knew or had reason to believe that the plaintiff was in such position is demurrable.¹²

§ 4295. Overhead Wires.—A steam-railway company has been held chargeable with negligence toward its employes in permitting an electric street-car company to construct and maintain over the tracks of the steam-railway company a guy-wire, suspended so low as to endanger the lives of the employes of the steam-railway company;¹³ and in placing a wire strung across a side-track at a station some miles from the company's shops, so low as to strike an employé while making repairs on the roof of a passenger-car, if it could be reasonably anticipated by the company that at some time such siding might be used for such a purpose, and that a passenger-car might pass under the wire while such repairs were being made.¹⁴

¹¹ *Sisco v. Lehigh &c. R. Co.*, 145 N. Y. 296; s. c. 64 N. Y. St. Rep. 708; 39 N. E. Rep. 958; rev'g s. c. 75 Hun (N. Y.) 582; 59 N. Y. St. Rep. 162; 27 N. Y. Supp. 671.

¹² *Louisville &c. R. Co. v. Bouldin*, 110 Ala. 185; s. c. 20 South. Rep. 325.

¹³ *Erslew v. New Orleans &c. R. Co.*, 49 La. An. 86; s. c. 21 South. Rep. 153. But another court has held that a railroad company is not chargeable with negligence toward a brakeman injured by coming in contact with a sagging wire maintained by a third person over its tracks, where it had no connection with, and did not know of or consent to, the placing of the wire across its property, which appeared

to be properly strung, but had been sagged down and the fastenings broken in a storm occurring an hour before the injury to plaintiff: *Richmond v. New York &c. R. Co.*, 8 App. Div. (N. Y.) 382; s. c. 40 N. Y. Supp. 812; 75 N. Y. St. Rep. 196.

¹⁴ *Stoltenberg v. Pittsburg &c. R. Co.*, 165 Pa. St. 377; s. c. 25 Pitts. L. J. (N. S.) 295; 36 W. N. C. (Pa.) 87; 30 Atl. Rep. 980 (submission of question to jury approved, and judgment for plaintiff affirmed). A wire cable, running between two of the defendant oil company's buildings, and over a railroad-track, was lowered for repairs. There was an engine working on the track, and the defendant's superintendent di-

§ 4296. **Rock: Projecting Ledge of Rock.**—Negligence has been imputed to a railroad company where it allows a *projecting rock* to remain so near the track as to injure a brakeman climbing to the top of its freight-cars in the customary manner, in the discharge of his duties.¹⁵ But another court denied a recovery under the condition of evidence stated in the marginal note on the ground that there was no evidence that the brakeman was killed by being brought in contact with a *projecting ledge of rock in a cut* in the night-time, which was the theory of the action,—the court plainly undertaking to perform the office of a jury.¹⁶

§ 4297. **Roofs: Projecting Roofs of Station-Houses.**—It need not be said that a railroad company is guilty of negligence if it extends the roofs or eaves of its station-houses so far out toward its tracks as to knock or scrape its employés off its cars when engaged in their duties. But one decision is found which, in the teeth of the statute providing that no person or corporation can by special contract with its employés become exempt from its liability to them for injuries suffered by them in their employment which result from the employer's own negligence, or that of any other person in its employ,—holds that a servant who, by his contract of employment, undertook

rected the man in charge of the work to wait until the engine was out of the yard, and station a man to stop the engine, and warn the workmen, if it returned. The watchman was not so stationed. The engine returned, struck the lowered cable, and killed the plaintiff's husband, who was employed by the defendant, while he was engaged in helping to repair the cable. It was held that the defendant was negligent in not furnishing a watchman or seeing that he was stationed so as to stop the engine: *Burns v. Merchants & Co. Oil Co.*, 26 Tex. Civ. App. 223; s. c. 63 S. W. Rep. 1061 (cable pulled to the ground a platform on which deceased was working).

¹⁵ *Chicago & C. R. Co. v. Davis*, 92 Ala. 300; s. c. 9 South. Rep. 252.

¹⁶ *Wintuska v. Louisville & C. R. Co.*, 14 Ky. L. Rep. 579; s. c. 20 S. W. Rep. 819 (no off. rep.). It appeared that no one knew of the accident until the train had proceeded some miles; that it occurred on a dark night; and that deceased was last seen on a car, going in the

direction of a flat-car, to reach which he would have been obliged to descend a ladder on the side. There was evidence that in doing this he would have been in danger of coming in contact with the ledge. His body was found in the cut where the ledge of rock projected, with a cut upon the right side of his head, which was the side upon which his head would most likely have been struck had he come in contact with the ledge, the ladder being on the right side of the car. His coupling-stick was found lying upon a projecting part of the ledge, ten feet from the ground. The court thought it quite as likely that he became dizzy while walking along the car, or stumbled in the darkness, and fell, striking his head on the ground, as that he was injured in attempting to descend the ladder; and that while "one may suspect" that it happened as alleged, there was no evidence tending to prove it, and a peremptory instruction for defendant was proper: *Wintuska v. Louisville & C. R. Co.*, *supra*.

to make a careful examination of all things near the tracks, so that he might understand the dangers attending them, undertook the risk of all those permanent structures which he had a chance to examine and which he undertook to examine, so that where he was struck and injured by the overhanging cornice of the roof of a station-house, he could not recover damages from the company.¹⁷

§ 4298. **Signal-Posts.**—It is the duty of a railroad company to place its signal-posts at a reasonably safe distance from its tracks, so as not to be dangerous to brakemen and other operatives on its trains, or to warn them of such dangers if they exist. Where it is clearly established, or obvious, that the railroad company has complied with this duty, and whether the employé has or has not been guilty of contributory negligence, the question is for the court; otherwise it is for the jury. A man who had been employed for about two weeks in defendant's yard, was killed by coming in contact with a signal-post while ascending the side-ladder of a freight-car. The post was four feet from the rail. There was evidence tending to show that it was too near the cars to be practically safe for operatives, unless aware of the danger, but there was no evidence that the deceased had ever been warned or notified of the danger. There was also evidence tending to prove that a signal-post was necessary at or near that point, and evidence showing the character of the duties of the deceased and the nature and extent of the defendant's business. It was held that whether the defendant had used reasonable care and diligence within the rule stated, was for the jury to say; and that the mere fact that the deceased had passed the post many times a day for two weeks, and that it was so prominent and so essential in the service that his attention must have been drawn to it, was not conclusive evidence of his negligence, but the question was likewise for the jury.¹⁸

¹⁷ *Quinn v. New York & C. R. Co.*, 175 Mass. 150; s. c. 55 N. E. Rep. 891. For another case where the evidence was deemed insufficient to sustain a verdict for negligently causing the death of a brakeman claimed to have been knocked off a car by coming in contact with the roof of a station-building constructed too near the track,—see *Houston & C. R. Co. v. Loeffler* (Tex. Civ. App.), 59 S. W. Rep. 558 (no off. rep.); s. c. on former appeal (Tex. Civ. App.), 51 S. W. Rep. 536 (no off. rep.). Under Mass. Rev. Laws 1902, ch. 111, § 184, requiring

railroad companies to erect "bridge-guards" wherever a bridge or any other structure *crosses or projects over* the track, it was held that a railroad company was not required to maintain a guard at a cornice of a roof over a station platform, where the line of the cornice was one foot and five inches outside the line of the nearest rail, since it neither "crossed" nor "projected over" the track: *Quinn v. New York & C. R. Co.*, 175 Mass. 150; s. c. 55 N. E. Rep. 891.

¹⁸ *Johnson v. St. Paul & C. R. Co.*, 43 Minn. 53.

§ 4299. **Station-Limit Board.**—A “station-limit board,”—which is understood to be a signboard marking the limit or boundary of the station-grounds,—when placed so near the railroad-track that an employé is liable to be struck by it in the proper, though unusual discharge of his duty, shows negligence on the part of a receiver of the railroad who so maintains it. In the particular case a fireman, instructed by the engineer to inspect a hot-box while the train was in motion, leaned out of the gangway and was struck. While the position he assumed was one that an employé would rarely assume, still, for the purpose, it was a proper position, and should have been anticipated in erecting the station-limit board.¹⁹

§ 4300. **Stones, Pile of.**—Where the duties of a switchman required him to jump on a moving engine, evidence that the railroad company left near the switch, which plaintiff had to throw, a pile of stones from eighteen inches to three feet high, and only eighteen inches from the track, and allowed them to remain there several months, whereby plaintiff was injured in attempting to jump on the engine, was sufficient to support a finding that defendant was guilty of negligence in not furnishing plaintiff a safe place to work.²⁰

§ 4301. **Switch-Stand, Switch-Target.**—Under this principle a railroad company is liable in damages to an employé, injured without his own fault, where the target or arm of an upright *switch-stand* is so near the track as to injure a switchman while riding, in the night, on the ladder of a box-car;²¹ or where it allows a *switch-stand* to be so near the track that it extends to within nine or ten inches of passing cars,—especially where one of its rules declares that no building or materials will be allowed nearer than six feet to the main track or five feet to side-tracks;²² or where it plants and maintains a *switch-*

¹⁹ Central Trust Co. v. East Tennessee &c. R. Co., 73 Fed. Rep. 661. Compare McKee v. Chicago &c. R. Co., 83 Iowa 616; s. c. 13 L. R. A. 817; 10 Rail. & Corp. L. J. 472; 48 Am. & Eng. R. Cas. 154; 50 N. W. Rep. 209; Murphy v. Wabash R. Co., 115 Mo. 111.

²⁰ Donahue v. Boston &c. R. Co., 178 Mass. 251; s. c. 59 N. E. Rep. 663.

²¹ Bonner v. La None, 80 Tex. 117; s. c. *sub nom.* Bonner v. La Noue, 15 S. W. Rep. 803; Boss v. Northern Pac. R. Co., 5 Dak. 308; s. c. 40 N. W. Rep. 590 (employé, standing on the step of a crowded car, and

struck by a switch-signal, which was nearer the track than usual and which leaned toward the cars so as to touch them—error to direct verdict for defendant).

²² Pidcock v. Union Pac. R. Co., 5 Utah 612; s. c. 1 L. R. A. 131; 19 Pac. Rep. 191. In this case, it appearing that the plaintiff, a yard-switchman, while riding on the side step of a flat-car in the discharge of his duty, was knocked off and injured by a switch-stand within nine or ten inches of the side of the car, and defendant had a rule, known to plaintiff, that no freight, material, or building of any

stand on the top of which there is an *arrow* seventeen inches long, which, when turned towards the main track, is only nine inches from the sides of freight-cars standing or passing thereon, which freight-cars have ladders on their sides on which brakemen are accustomed to ride when performing their duties; and the mere fact that a brakeman had seen and handled the switch-stand, which was seven feet high, did not necessarily charge him with knowledge that the arrow on the top of it was dangerously close to passing cars when turned toward the track.²³ It cannot be said as a matter of law that a railroad company is not imputable with negligence, where, from convenience, and not from necessity, it places a *switch-stand* so near the track that a brakeman going up the side of a moving car, and not notified of its proximity, is struck by it.²⁴

§ 4302. **Telegraph-Poles.**—The erection and maintenance of a telegraph-pole so near to a side-track as to expose railroad employés thereon to the risk of injury while performing their duties, constitutes negligence on the part of the railroad company as matter of law.²⁵

§ 4303. **Timber: Projecting Timber.**—Negligence was imputed to a railroad company where a *projecting timber* was allowed to remain in a temporary structure erected for the purpose of repairing a water-tank, whereby a brakeman was injured while ascending the ladder on the side of a car.²⁶ But in another case it was held that negligence on the part of a railroad company in leaving a timber in a dangerous position is not established by proof of the death of a brakeman under circumstances which leave it uncertain whether the death was caused by the timber or by coming in contact with the roof of a tunnel.²⁷

kind should be placed within six feet of the main track and within five feet of any side-track, and plaintiff did not know that the switch-stand was so near the track, —the questions of negligence and contributory negligence were properly left to the jury. The above rule of the company indicated a belief on the part of the company that due care required that no object, including switch-stands, should be any nearer the track; hence the jury were warranted in finding them negligent, the switch-stand having stood where it did for fourteen years: *Pidcock v. Union Pac. R. Co.*, *supra*.

²³ *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474; s. c. 46 Pac. Rep. 938.

²⁴ *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232; s. c. 52 Atl. Rep. 520.

²⁵ *Crandall v. New York & C. R. Co.*, 19 R. I. 594; s. c. 5 Am. & Eng. R. Cas. (N. S.) 543; 35 Atl. Rep. 307 [following *Whipple v. New York & C. R. Co.*, 19 R. I. 587]; *Chicago & C. R. Co. v. Russell*, 91 Ill. 298 (a telegraph-pole stood for three years within eighteen inches of passing cars, and a brakeman was struck as he was climbing down the side of the car without any negligence on his part, and killed).

²⁶ *Texas & C. R. Co. v. Hohn*, 1 Tex. Civ. App. 36; s. c. 21 S. W. Rep. 942.

²⁷ *Hughes v. Cincinnati & C. R. Co.*, 91 Ky. 526; s. c. 13 Ky. L. Rep. 72; 16 S. W. Rep. 275. The case

§ 4304. **Trees.**—It has been held that a street-railway company is not chargeable with negligence in failing to provide a safe place for its conductor to work by reason of a tree standing too close to the side of the car, along the side-step or running-board of which he is obliged to pass in collecting fares, where the location of the tracks was determined, not by the company, but by the selectmen and road commissioners of the town, and it not appearing that the company had any right to remove the tree.²⁸ But with respect to a steam-railroad company, where it appeared that for a year prior to the accident the railroad company had allowed the limbs of a tree near its right of way, but not on its property, to hang over the tracks in such a way as to be an obstruction dangerous to the lives of employes when on the top of freight-cars; and that such limbs were strong enough to push a man from the top of a car running from three to five miles an hour,—the company was chargeable with notice thereof, and a verdict based upon the company's negligence was justified; since the company not only had the right to remove such obstructions, but it was its duty to do so, in order to provide a safe place for its employes to work.²⁹

§ 4305. **Water-Tank, Water-Spout, Water-Plug.**—Negligence has been imputed to a railroad company where a *water-tank* was constructed so near the tracks as to injure a brakeman on the side-ladder of a car.³⁰ It need not be said that a railroad company is liable for

was, that after a freight-train had passed through several tunnels in close succession, in one of which loose timbers were hanging, a brakeman was found on one of the box-cars in a dying condition. Plaintiff claimed that the loose timber struck deceased, while defendant's theory was that deceased neglected to lie down, as was necessary, and came in contact with the roof. The evidence did not show the position of the loose timbers in the tunnel in which the accident was alleged to have occurred; nor that it did occur in such tunnel; nor that, if it did, it was caused by the hanging timbers. Therefore a peremptory instruction for defendant was held proper: *Hughes v. Cincinnati & C. R. Co.*, *supra*.

²⁸ *Hall v. Wakefield & C. St. R. Co.*, 178 Mass. 98; s. c. 59 N. E. Rep. 668.

²⁹ *Pittsburgh & C. R. Co. v. Parish*, 28 Ind. App. 189; s. c. 62 N. E. Rep. 514.

³⁰ *Davis v. Columbia & C. R. Co.*, 21 S. C. 93; *Houston & C. R. Co. v. Oram*, 49 Tex. 341 (but verdict for the plaintiff reversed, because jury were allowed to consider counsel fees in estimating damages). In another case, which was an action to recover damages for the death of a brakeman, the evidence tended to show that neither necessity nor convenience required the maintenance of a *water-spout* in dangerous proximity to passing cars, and that there was no such custom or usage on well-managed railroads as would justify such an unnecessarily dangerous projection. It was held that there was no error in an instruction stating that it is *negligence, of itself*, for a railroad so to construct such appliances as the one claimed to have been the cause of the brakeman's death, that they will injure brakemen at work on its trains: *Choctaw & C. R. Co. v. McDade*, 112 Fed. Rep. 888; s. c. 50

negligence in permitting a defective *water-spout* to hang down in a nearly horizontal direction over its track, by which a brakeman is knocked from the top of a car and is injured,—provided of course the defect has existed for such a length of time that the company would have acquired knowledge of it through its duty of maintaining a proper inspection.³¹

ARTICLE IV. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTIVE OR UNSAFE BRIDGES.

SECTION

4309. Liability of railway companies to their employes for injuries through unsafe bridges.

4310. This duty a primary and absolute one.

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SECTION

4313. Circumstances which constitute no defense for the failure to perform this duty.

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4315. Bridges too low or too near the track.

4316. Further of bridges too low or too near the track.

4317. Duty of company to adopt "whipping-straps" or "tell-tales" to warn trainmen of approach to a dangerous bridge.

§ 4309. Liability of Railway Companies to their Employes for Injuries through Unsafe Bridges.—Railway companies are bound, in favor of their employes, to exercise reasonable care to the end that the bridges erected upon their lines of railway are reasonably safe when built, and kept in a reasonably safe condition.¹

C. C. A. 591. For a case where an engineer was killed while leaning out of his cab to examine the machine, by being struck by a *water-plug* which was between the main-line tracks and less than fifty inches from the inside rail of the track on which the accident occurred, or, allowing for the swing of the engine, within eighteen or nineteen inches of the side of the gangway, and the court discovered no evidence of negligence on the part of the railroad company,—see *Murray v. New York & C. R. Co.*, 55 App. Div. (N. Y.) 344; s. c. 66 N. Y. Supp. 856.

³¹ *Northern Pac. R. Co. v. Perry*, 116 Fed. Rep. 609.

¹ *San Antonio & C. R. Co. v. Adams*, 6 Tex. Civ. App. 102; s. c. 24 S. W. Rep. 839. Where, while a construction-train was passing over a bridge, it gave way, and a track-layer, riding toward his lodging-place in one of the cars, to save his life jumped into the river, and injured himself, the company was held liable: *Bowen v. Chicago & C. R. Co.*, 95 Mo. 268; s. c. 14 West. Rep. 744; 8 S. W. Rep. 230. A railroad company is liable for an injury received by an employe (an express agent) while *riding in a*

§ 4310. **This Duty a Primary and Absolute One.**—On principles elsewhere discussed in this Title,² it is immaterial to whom the defect in such a bridge may be attributed, or what agent of the company may have been guilty of the negligence which has resulted in its remaining in a state of dilapidation. The duty is an *absolute duty* in such a sense that the law devolves upon the corporation itself the obligation to perform it, and it cannot escape liability for not performing it upon the ground that it devolved the duty upon someone else, and that it exercised due care in selecting such person.³

§ 4311. **Railroad Company Not an Insurer, but Liable Only for Failing to Exercise Ordinary Care.**—Moreover, a railway company will not be liable for failing to keep its bridges absolutely safe under all circumstances and for all purposes. For example, it will not be liable for the death of a brakeman, caused by his falling through a bridge, in process of repair, upon which the train had stopped at night.⁴ A railroad company which uses *ordinary care* to see that a bridge on its right of way is so constructed as to be reasonably safe, and subsequently employs competent and careful inspectors who use ordinary care in inspecting it, and in seeing that it is kept in a reasonably safe condition, is not liable to an employé for an injury received on such bridge, even though it was in fact defective in its original construction.⁵

§ 4312. **No Defense that the Bridge was Unsafe through the Negligence of a Vendor or Lessor.**—It is no defense that the bridge was unsafe by reason of the negligence of the *vendor* from whom the railway company purchased it, or by reason of the negligence of the *contractor* who built it; since the railway company which uses it is bound to make a reasonable inspection, and to continue such inspections from time to time, to the end of seeing that it is safe.⁶ In Texas, a railroad company is liable for the death of an engineer

baggage-car in which it was his duty to be, where such baggage-car was wrecked by the company's negligence in failing to provide a reasonably safe bridge, although if he had been riding in a passenger-car he would not have been injured: *San Antonio &c. R. Co. v. Adams*, 6 Tex. Civ. App. 102; s. c. 24 S. W. Rep. 839.

² *Ante*, §§ 3873, 4253.

³ *Galveston &c. R. Co. v. Daniels*, 1 Tex. Civ. App. 695; s. c. 20 S. W. Rep. 955.

⁴ *Koontz v. Chicago &c. R. Co.*, 65 Iowa 224; s. c. 54 Am. Rep. 5.

⁵ *Galveston &c. R. Co. v. Daniels*, 9 Tex. Civ. App. 253; s. c. 28 S. W. Rep. 548, 711.

⁶ A railroad company which, after purchasing a road, continues to use a bridge the defects in which are patent, is liable to an employé for an injury sustained by reason of the breaking down of the bridge: *Vosburgh v. Lake Shore &c. R. Co.*, 94 N. Y. 374; s. c. 46 Am. Rep. 148.

caused by the collapse of a bridge on its road, owing to the improper construction and defective materials and foundation, although at the time of the accident its road was being operated by a lessee company of which the engineer was an employé.⁷

§ 4313. **Circumstances which Constitute No Defense for the Failure to Perform this Duty.**—Nor will the fact that a bridge has become defective in consequence of an *unusual flood*, which could not have been reasonably anticipated, relieve the company from liability to a servant who has been injured thereby, where it has had time, in the exercise of reasonable care and diligence, to discover the injury to the bridge, and to prevent the accident.⁸ On clearer grounds, the company will be liable where the bridge broke down in consequence of its *piers being displaced by ice*, driven against them by a storm such as might reasonably have been anticipated.⁹ The fact that the plan of a bridge was a *standard plan* for permanent bridges, did not exonerate the company, where the bridge was a temporary one designed for the passage of trains and for the operation of a pile-driver, which caused the bridge to vibrate and throw the track out of line.¹⁰ The fact that the railway is in process of construction and is not yet open to travel does not, of course, exonerate a railway company from liability for an injury to a servant, caused by sending a train across an unsafe bridge.¹¹ On the other hand, if a railway-bridge is without fault as to plan, mode of construction, and character of materials, so that it was originally sufficient for all the purposes for which it was

⁷ *Galveston &c. R. Co. v. Daniels*, 9 Tex. Civ. App. 253; s. c. 28 S. W. Rep. 548, 711; citing *Trinity &c. R. Co. v. Lane*, 79 Tex. 643, to the effect that the duty of keeping its tracks in safe condition is imposed upon the company by its charter, and it owes the duty to all persons who travel upon or operate trains over the road, and a lease cannot lessen its responsibility. — — — The purchaser of a railroad, which has notice that one abutment of a bridge in such road is constructed of poor mortar, crumbling at the touch, and is so poorly built as to require it to be partially taken down to repair it, has no right, as to its employés, to assume, without inspection, that the other abutment, constructed at the same time and by the same contractor, is free from defects because none is visible, and that its trains may be operated by its employés thereon with

safety; since such a condition of one abutment would naturally lead a prudent inspector to doubt the safety of the other. Hence the question of defendant's negligence was properly submitted to the jury where such other abutment subsequently gave way during a flood and disclosed the same defects in construction as the former abutment contained: *Bogart v. Delaware &c. R. Co.*, 145 N. Y. 283; s. c. 64 N. Y. St. Rep. 702; 40 N. E. Rep. 17; aff'g s. c. 72 Hun (N. Y.) 412.

⁸ *Knahtla v. Oregon &c. R. Co.*, 21 Or. 136; s. c. 27 Pac. Rep. 91.

⁹ *Carney v. Caraquet R. Co.*, 29 N. B. 425.

¹⁰ *Bowen v. Chicago &c. R. Co.*, 95 Mo. 268; s. c. 14 West. Rep. 744; 8 S. W. Rep. 230.

¹¹ *Van Amburg v. Vicksburg &c. R. Co.*, 37 La. An. 650; s. c. 55 Am. Rep. 517.

designed, and if the company sees that it is afterwards properly inspected, at intervals sufficiently short, by competent and skillful men, who exercise ordinary care and diligence to keep it in repair, the company has discharged its duty, and is not liable to an employé for an injury caused by a defect in such structure, unless it is shown that the company had notice of such defect, and, after notice, failed to repair it.¹²

§ 4314. **Evidence of Negligence where a Bridge was Carried Away by a Flood.**—According to a comprehensive syllabus, to which the writer has added one or two amendments, the evidence in a suit for damages for wrongful death of a freight-conductor, caused by the breaking through a trestle of the engine on which he was riding, showed that a stream across which a railroad-bridge was built was rapid, and subject to sudden rises, and when at flood carried a large quantity of driftwood; that on three occasions within twenty-one years the stream had risen from twelve to fifteen feet above the bed, when large quantities of driftwood had been carried down the stream; that the railroad had maintained a truss-bridge over the stream, leaving one hundred feet space for driftwood, which had been replaced by a trestle-bridge, having bents twelve and a half feet apart, but, owing to the fact that the bridge was built at an angle athwart the stream, a clear space of only two or three feet (at a right angle to the direction of the channel and current) was left between the bents for the passage of driftwood; that the bents were placed on the rock bottom of the stream, set on mudsills, without any anchorage in the rock; that the next morning after the accident several of the bents were found some distance below the bridge, and also a large tree, which had not been there before, was cast up on the bank; that the railroad company had notice when they replaced the truss by the trestle that the stream was subject to a sudden rise of several feet, or might have known, upon reasonable inquiry; that the master carpenter and road superintendent knew of the character of the stream, and that the latter lived at the station within one mile of the trestle. It was held that, although the bridge was new and well constructed for a bridge of its kind, it was insufficient, owing to the character of the stream, and that the evidence showed negligence on the part of the railroad company sufficient to support a verdict for the plaintiff.¹³

¹² Goheen v. Texas &c. R. Co., 3 Cent. L. J. 382; s. c. *sub nom.* Goheen v. Texas &c. R. Co., 10 Fed. Cas. 537; 1 Tex. L. J. 97; 23 Int. Rev. Rec. 393.

¹³ Terre Haute &c. R. Co. v. Fowler, 154 Ind. 682; s. c. 56 N. E. Rep. 228.

§ 4315. **Bridges Too Low or Too Near the Track.**—As elsewhere seen,¹⁴ the law does not in all jurisdictions, in the absence of statute, impute negligence to a railroad company from the mere fact of building a bridge so low that a brakeman standing on top of a car of ordinary height in the discharge of his duties is liable to be struck by it and knocked off and killed. But accidents from this source have been so frequent as to lead to the conclusion that nothing short of absolute necessity ought to excuse a railroad company in maintaining this species of murder machine. It is gratifying that several modern courts are gradually coming around to this view. The modern and humane rule is, that it is negligence on the part of a railroad company to maintain an overhead bridge so low that a brakeman standing on the top of a train cannot pass through it in safety, and that the mere fact that the brakeman knew that the bridge was too low to allow him to do so, does not charge him with contributory negligence as matter of law, since he may, in the discharge of his duties, have forgotten it. It has been accordingly well held that, although a *railroad overhead bridge* is of such a height as to permit an ordinarily prudent brakeman to remain safely on top of a car by lying down when nothing intervenes to divert his attention from the necessity of stooping in order to pass through safely, still the company is guilty of negligence as to a brakeman killed by coming in contact with the bridge, when his attention was diverted by some emergency requiring prompt action.¹⁵ The rule applies in a case where a brakeman in the employ of the company owning the road and bridge is killed or injured by coming in contact with an overhead bridge while on the top of a "foreign" car,—that is to say, a car received from another railroad,—which car is of unusual height, where the railroad company whose servant he is, itself maintains and operates cars of the same height.¹⁶ The rule of this paragraph of course applies to cases where the *sides* as well as the top of the bridge are too near the track; and the doctrine of this paragraph may perhaps be summed up in a decision not officially reported, which is to the effect that where a locomotive-fireman was killed by striking a bridge, while leaning out of the cab of his engine, because of a defective condition of the bridge and track, of which he had no knowl-

¹⁴ *Post*, § 4752, *et seq.* See also, *Baylor v. Delaware & C. R. Co.*, 40 N. J. L. 23; *Devitt v. Pacific R. Co.*, 50 Mo. 302.

¹⁵ *Louisville & C. R. Co. v. Cooley*, 20 Ky. L. Rep. 1372; s. c. 49 S. W. Rep. 339; 5 Am. Neg. Rep. 399; 12 Am. & Eng. R. Cas. (N. S.) 553 (no off. rep.); *Chicago & C. R. Co.*

v. Johnson, 116 Ill. 206; s. c. 2 West. Rep. 388.

¹⁶ *Louisville & C. R. Co. v. Tucker*, 23 Ky. L. Rep. 1929; s. c. 65 S. W. Rep. 453 (no off. rep.) (it was therefore proper to allege negligence in that regard, rather than negligence in taking the high foreign car into the train).

edge, and there was no contributory negligence on his part, such killing was due to the negligence of the company, for which it was liable.¹⁷

§ 4316. **Further of Bridges Too Low or Too Near the Track.**—If a bridge is built so low that brakemen on the top of cars, who are required to pass under it in the discharge of their duties, cannot avoid being struck by it and killed, without keeping the fact of its existence constantly in their minds, so as to bend or stoop when the train passes under it, it is then, according to the best opinion, *per se* a dangerous nuisance; so that, if such an employé of a railway company is injured or killed by it, without fault on his part, the company will be liable to him in damages.¹⁸ The liability of the company is clear where the injured brakeman does not know of the existence of the bridge, or that it is built so low that he cannot pass under it while standing on the top of the car, where his duty requires him to be.¹⁹ It is not, however, an absolute rule, that the maintenance of a bridge so low that a brakeman standing on the top of a freight or other car cannot pass under it in safety, is negligence *per se*: there may be circumstances excusing it; and the question whether it is ex-

¹⁷ Texas &c. R. Co. v. Taylor (Tex. Civ. App.), 53 S. W. Rep. 362 (no off. rep.); s. c. on former appeal (Tex. Civ. App.), 44 S. W. Rep. 892 (no off. rep.). According to the strained and untenable view of one court, the essential fact that the death was caused by the bridge was not established by evidence that the deceased was standing apparently in good health on the top of a car just before the train passed under the bridge, which was from four feet seven inches to six feet three inches above the tops of the cars, and that immediately thereafter he was found lying on top of the same car, near the center, in a dying condition, without the production of or the effort to procure further evidence that he died from violence instead of disease, such as evidence tending to show a wound or a bruise upon his body: Fitzgerald v. New York &c. R. Co., 154 N. Y. 263; rev'g s. c. 88 Hun (N. Y.) 353; 34 N. Y. Supp. 824; s. c. on first appeal, 59 Hun (N. Y.) 225. The court thought that the failure to prove more than the mere fact of death was doubtless due to inadvertence, or to the absence of

witnesses on the second trial; but held that more must be proved. This reminds one of the successful argument of a French advocate where a German soldier had been shot and killed by a Frenchman in Alsace-Lorraine soon after the conquest of that part of France by Germany. It was proved that the defendant took aim at the deceased with a pistol and then fired it, and that the deceased immediately fell dead. But the patriotic advocate succeeding in convincing a complacent jury that the deceased might have died with heart disease during the interval between the firing of the pistol and the entering of the ball into his body.

¹⁸ Louisville &c. R. Co. v. Hall, 87 Ala. 708; s. c. 4 L. R. A. 710; 6 South. Rep. 277; Louisville &c. R. Co. v. Wright, 115 Ind. 394; s. c. 15 West. Rep. 320; 7 Am. St. Rep. 446; 17 N. E. Rep. 584; Hunter v. New York &c. R. Co., 57 Hun (N. Y.) 591; s. c. 32 N. Y. St. Rep. 713; 10 N. Y. Supp. 795; s. c. aff'd, 130 N. Y. 669; 29 N. E. Rep. 1034.

¹⁹ Louisville &c. R. Co. v. Wright, 115 Ind. 378; s. c. 13 West. Rep. 798; 16 N. E. Rep. 145.

eusable has been said to depend upon whether it was practicable to raise the bridge above the danger-line without too great inconvenience and injury to the public or to adjacent property-owners, and without too great expense to the railroad company; and the company is liable, where the expense of erecting a new and higher bridge is too insignificant to be weighed in the balance against the peril to human life.²⁰ The liability of the company rests upon the same ground where the bridge is so built, or where the track is so laid, that the sides of the cars in passing over the bridge come in such contiguity to the sides of the upper works of the bridge that a brakeman, in climbing a ladder on the car, in the discharge of his duty, is liable to be struck by such works and killed or injured; and where, in consequence of such a defect, a brakeman climbing a ladder on the side of a box-car on a dark, cold morning, in response to a signal and in the prudent discharge of his duty, was so struck and injured, the company was held liable.²¹ On the other hand, one court found no evidence of negligence in the construction of a bridge which was thirteen feet four inches wide between the trusses, and which had been in use for a number of years and was in good repair at the time of the accident.²²

§ 4317. Duty of Company to Adopt "Whipping-Straps" or "Tell-tales" to Warn Trainmen of Approach to a Dangerous Bridge.—Some railroad companies have resorted to the device of placing what are called "whipping-straps" or "tell-tales" in such a manner as to warn trainmen of the approach of the train to a bridge which will come into dangerous proximity to the cars. Concerning the obligation of a railroad company to adopt this means of promoting the safety of its employes, the question has been said to be not alone whether the device is serviceable in giving notice of danger ahead, but whether it is so manifestly serviceable as to command the consensus of intelligent railroad-men so generally that it cannot be ignored or reasonably disregarded; so that if it appears that many railroads having such bridges abstain from the use of this device, the failure to use it will not be evidence of negligence.²³ It is submitted that, in view

²⁰ Louisville & C. R. Co. v. Hall, 91 Ala. 112; s. c. 8 South. Rep. 371.

²¹ Fort Worth & C. R. Co. v. Graves (Tex. Civ. App.), 21 S. W. Rep. 606 (no off. rep.).

²² Illick v. Flint & C. R. Co., 67 Mich. 632; s. c. 12 West. Rep. 440; 35 N. W. Rep. 708 (brakeman injured while climbing a side-ladder to set brakes. He had crossed the bridge 200 times, and could have waited until after crossing the

bridge to set the brakes on the particular car. There was a clear space of two feet three inches between the bridge and the ladder. The conductor testified that in the position in which the brakeman had placed himself on the ladder, he would have struck the bridge if it had been sixteen feet wide).

²³ Louisville & C. R. Co. v. Hall, 87 Ala. 708; s. c. 4 L. R. A. 710; 6 South. Rep. 277.

of the extraordinary dangers from such bridges, it is the duty of railroad companies to exercise a high degree of care to advise their employes of the same;²⁴ and that if any practicable device will accomplish this purpose they are bound to adopt it, and their negligence in failing to adopt it is not excused by the fact that other railroad companies have been equally negligent. These "whipping-straps," it is to be understood, are hung to a horizontal bar suspended across the track at such a height that a man standing on the top of the cars will pass safely under the bar, while the suspended straps come in contact with his body. Where the cross-bar is bent so low that the tallest man on the top of the highest car cannot pass under it without coming in contact with it, then it becomes a source of danger similar to that which it is devised to avert; and for an injury sustained by a construction of it at such an insufficient height the company will be liable,—and this although it was sufficiently high to allow men to pass safely under it on some of the cars used by the company, though not upon others.²⁵ It has been held that a railroad company is not liable for the death of a brakeman because of its failure to provide whipping-straps for the purpose of giving warning of the approach to a bridge, where there is sufficient room for a man standing erect at the center of a car, where a brakeman's duty requires him to be, and such brakeman was killed while sitting on the side of the car with his feet hanging over the edge, in a position where such straps would be of no service, and was familiar with the condition of the bridge.²⁶

ARTICLE V. INJURIES TO RAILWAY EMPLOYES FROM FAILING TO MAINTAIN SAFE AND SUFFICIENT FENCES AND CATTLE-GUARDS.

SECTION

4319. Common-law liability of railroad companies for injuries to their servants through failure to fence their tracks so as to keep out cattle.

4320. Liability under statute requiring railroad companies to fence their tracks.

4321. Duty as to location of cattle-guards.

SECTION

4322. Duty to make cattle-guards safe for the feet of employes required to cross over them.

4323. Company not liable for injuries from cattle escaping from defective cattle-pen built by a third person near the track.

§ 4319. Common-Law Liability of Railway Companies for Injuries to their Servants through Failure to Fence their Tracks so as

²⁴ *Ante*, § 3772.

²⁵ *Schlaff v. Louisville &c. R. Co.*,

²⁶ *Darling v. New York &c. R. Co.*, 100 Ala. 377; s. c. 14 South. Rep. 105.
17 R. I. 708; s. c. 24 Atl. Rep. 462.

to Keep Out Cattle.—It has been held that a railway company is under no duty to its employes to fence its track,¹ or to construct such cattle-guards as will prevent cattle from getting upon the track at other places than road-crossings.² But unless a railway-track is fenced cattle are liable to stray upon it from adjacent fields and commons; cattle upon a railway-track are liable to get run over by trains notwithstanding the vigilance of the engineer and other trainmen; engines and trains are frequently derailed by running over cattle upon the track; in such derailments trainmen are frequently killed or injured. These propositions of fact, which are abundantly borne out by the judicial reports, argue a duty upon the part of railroad companies toward their own employes of fencing their tracks so as to keep out trespassing animals. That this duty is not absolute under all circumstances may be conceded: circumstances may exist which will excuse the performance of it. But the failure to fence so as to keep out cattle, the consequent straying of cattle upon a railroad-track, the consequent running over them while on the track, the consequent derailment of the train, and the consequent death or injury of trainmen upon the train, form a collection of facts which plainly constitute *evidence of negligence* on the part of the railroad company, making a question for the determination of a jury.³ This conducts us to the better view, which is, that the obligation of a railway company to fence its track, in those States and districts where cattle may lawfully run at large, is an obligation put upon it, whether by the common or statute law, for the purpose of securing the safety of its passengers and its employes, as well as preventing the destruction of cattle belonging to the agricultural proprietors through whose country the road passes.*

¹ Patton v. Central &c. R. Co., 73 Iowa 306; s. c. 35 N. W. Rep. 149; Cowan v. Union Pac. R. Co., 35 Fed. Rep. 43.

² Ward v. Bonner, 80 Tex. 168; s. c. 15 S. W. Rep. 805.

³ Terre Haute &c. R. Co. v. Williams, 172 Ill. 379; aff'g s. c. 69 Ill. App. 392 (engineer not negligent, and not shown to have had notice of absence of fences and cattle-guards; contention overruled that the statute applied only to damages for stock killed through the failure to fence). It has been held that, while it may not be the duty of a railway company to servants operating its trains to enclose its road-bed, yet if the company, after having fenced it, negligently permits the fence enclosing its right

of way to become so out of repair that stock can enter on the track, thereby increasing the danger to its employes in operating its trains, it is liable for an injury occasioned to a locomotive-engineer by the derailment of an engine because of a collision with stock entering on the track through the defective fence: Quill v. Houston &c. R. Co. (Tex. Civ. App.), 46 S. W. Rep. 847; s. c., writ of error dismissed, *sub nom.* Houston &c. R. Co. v. Quill (Tex.), 48 S. W. Rep. 168; 12 Am. & Eng. R. Cas. 736 (no off. rep.). See, as to the liability of a railroad company to its employes for a failure to fence, both where required by statute and in the absence of statute,—note in 25 L. R. A. 320.

* In Missouri it has been held, in

§ 4320. **Liability Under Statute Requiring Railroad Companies to Fence their Tracks.**—A statute imposing an absolute duty upon railroad companies to fence their tracks renders such a company liable for an injury to a *trainman* due to a collision with an animal which has come upon its track through a defective fence;⁵ since it has been well observed that such a statute “was doubtless intended for the benefit of all classes of persons who might need protection, * * * [it being] unreasonable to suppose that the Legislature would provide a law for the protection of property and make no provision whatever for the protection of life.”⁶ In like manner, a railroad company is liable to an employé for failure to *keep its fence in repair*, as required by statute, if he is injured without his fault in consequence thereof by collision of a train on which he is employed with an animal on the track.⁷ But a statute requiring railroad companies to fence their tracks *through enclosed lands* is for the benefit of the owners of stock on such enclosed lands, and cannot be availed of by an employé of the company injured by reason of its failure to fence, in the absence of negligence.⁸

conformity with the above text, that a railroad company is liable to an employé for a failure to keep its fence in repair, as required by statute, if he is injured, without his fault, in consequence thereof, by collision of a train on which he is employed with an animal upon the track: *Dickson v. Omaha & C. R. Co.*, 124 Mo. 140; s. c. 25 L. R. A. 320; 27 S. W. Rep. 476. In Mississippi it has been held that where a railroad company so manages its business as to entice cattle to its track to feed upon waste cottonseed at a place from which they cannot readily escape passing trains, and where they cannot be seen by engineers in time to prevent a collision, it will be liable for the death of a fireman caused by the derailment of his engine in running over a cow at the place: *Illinois Cent. R. Co. v. Seamans*, 79 Miss. 106; s. c. 31 South. Rep. 546.

⁵ *Donnegan v. Erhardt*, 119 N. Y. 468; s. c. 29 N. Y. St. Rep. 589; 23 N. E. Rep. 1051; 7 L. R. A. 527; 42 Am. & Eng. R. Cas. 580; rev'g s. c. 23 Jones & S. (N. Y.) 502; and overruling *Langlois v. Buffalo & C. R. Co.*, 19 Barb. (N. Y.) 364, so far as it holds otherwise.

⁶ *Terre Haute & C. R. Co. v. Wil-*

liams, 172 Ill. 379; s. c. 50 N. E. Rep. 116; aff'g s. c. 69 Ill. App. 392.

⁷ *Dickson v. Omaha & C. R. Co.*, 124 Mo. 140; s. c. 25 L. R. A. 320, and note.

⁸ *Newsom v. Kimball*, 42 U. S. App. 282; s. c. *sub nom.* *Carper v. Receivers*, 78 Fed. Rep. 94; 23 C. C. A. 669; s. c. *sub nom.* *Carper v. Kimball*, 35 L. R. A. 135; s. c. aff'd *sub nom.* *Newsom v. Norfolk & C. R. Co.*, 81 Fed. Rep. 133. Where a fireman was killed by the locomotive colliding with cattle on the track, it was held that his administrator could not recover of the railroad company without proving that the cattle got on the track through the fence at the point where it was defective; it not being sufficient to prove merely that the fence along the road was generally bad: *Wabash R. Co. v. Brown*, 2 Ill. App. 516. Whether an employé can recover against a railway company for its failure to fence as required by statute, was doubted in *Wabash R. Co. v. Brown*, *supra*. The plaintiff's intestate, a railroad fireman, was killed by a collision of the engine with a steer straying on the track. The railway company owned the right of way in fee simple; the owner of the steer owned the land adjoining on both

§ 4321. **Duty as to Location of Cattle-Guards.**—Where the plaintiff, a brakeman, was injured while coupling cars in a yard, by reason of falling into an uncovered cattle-guard near a switch in the yard, where his duties required him to be; and there was testimony that it was dangerous to have such a cattle-guard in such a position; and the defendant's superintendent testified that he always tried to keep cattle-guards outside of yard-limits,—the jury were justified in finding that it was negligence so to locate such a cattle-guard.⁹ But it has been held that a railroad company is not negligent as to a brakeman in constructing a cattle-guard several hundred feet from a street at a point where the ordinary right of way joined the railroad station-grounds, which were crossed by such street, under the Michigan statute requiring railway companies to construct cattle-guards at highway crossings, where the cattle-guard was located at a place where, by common experience, it might well be expected.¹⁰

§ 4322. **Duty to Make Cattle-Guards Safe for the Feet of Employés Required to Cross Over Them.**—If a railroad company is required by law to erect and maintain a cattle-guard at a certain point, or if it does so at its own option, it is under the duty of making it safe as a crossing for its employés, provided it so locates its switch-yards that employés are constantly required to cross the cattle-guard in the discharge of their duties.¹¹

§ 4323. **Company Not Liable for Injuries from Cattle Escaping from Defective Cattle-Pen Built by a Third Person Near the Track.**—There is a doubtful decision to the effect that a railroad company is not liable for injury to an employé, due to the negligent construction

sides; the railway was unfenced, and the owner of the steer was in the habit of turning his cattle loose on his land, and they frequently strayed on and across the track. There was a statutory duty to fence. It was held that there was no cause of action *against the owner of the steer*. There was a statute providing merely that railroad companies should be liable for the value of all stock killed in case they did not fence their land; but not expressly commanding them to fence. As between the landowner and the railway company, this statute cast the duty of fencing exclusively on the railway company: *Sherman v. Anderson*, 27 Kan. 333; s. c. 41 Am. Rep. 414.

⁹ *Galveston &c. R. Co. v. Slinkard*, 17 Tex. Civ. App. 585; s. c. 44 S. W. Rep. 35; s. c. on former appeal (Tex. Civ. App.), 2 Am. Neg. Rep. 654; 39 S. W. Rep. 961 (no off. rep.) (where it was held not negligence so to locate it merely because statute did not require it at such place).

¹⁰ *Fuller v. Lake Shore &c. R. Co.*, 108 Mich. 690; s. c. 2 Det. Leg. N. 986; 3 Am. & Eng. R. Cas. (N. S.) 589; 66 N. W. Rep. 593 (brakeman was injured while coupling cars on account of cattle-guard).

¹¹ *Ford v. Chicago &c. R. Co.*, 91 Iowa 179; s. c. 24 L. R. A. 657; 59 N. W. Rep. 5; *Franklin v. Winona &c. R. Co.*, 37 Minn. 409; s. c. 34 N. W. Rep. 898.

of a cattle-pen built by a third person owning land adjoining the right of way, in consequence of which cattle escaped upon the track and caused the wrecking of a train, although such pen projected a little upon the right of way by the mistake of the person building it, and without his knowledge or that of the company; since the duty of the railway company to provide a safe place for its employes did not require it to see that the cattle-pen was safely constructed.¹²

ARTICLE VI. INJURIES TO RAILWAY EMPLOYES FROM DEFECTS IN RAILWAY-YARDS, SWITCHES, FROGS, AND OTHER SWITCHING-APPLIANCES.

SECTION	SECTION
4325. Liability of railway companies to their employes for defects in switches, frogs, etc.	4333. Absence of a butt-post at the end of a stub-switch.
4326. Whether use of open or unblocked frogs is negligence in the absence of statute.	4334. Switch located too near a cattle-guard.
4327. Statutes prohibiting the use of unblocked frogs or switches.	4335. Care of snow and ice in switch-yards.
4328. Such statutes held to be an affirmance of the common law.	4336. Maintaining switch-target on wrong side of track.
4329. What notice the railway company must have had of the absence of such blocking.	4337. Use of stub-switch instead of split-switch.
4330. Blocking intended only to prevent injuries to the feet.	4338. Use of switches without locks or targets.
4331. Duty of blocking switches, frogs, guard-rails, etc., in process of construction.	4339. Dangerous obstructions in switch-yards.
4332. Leaving unfilled spaces between the ties in switch-yards.	4340. Derailments in consequence of imperfections in switches.
	4341. Derailments in consequence of switches being negligently left open without lights.
	4342. Derailments in consequence of switches being tampered with.
	4343. Breaking of lever of railway turntable.

§ 4325. Liability of Railway Companies to their Employes for Defects in Switches, Frogs, etc.—That a railroad company is liable in damages to its employes, who themselves have been guilty of no fault, for its negligence in having its switches so constructed as not

¹² *Newsom v. Kimball*, 42 U. S. Kimball, 35 L. R. A. 135; s. c. *aff'd* App. 282; s. c. *sub nom.* Carper v. *sub nom.* *Newsom v. Norfolk &c.* Receivers, 78 Fed. Rep. 94; 23 C. R. Co., 81 Fed. Rep. 133.
C. A. 669; s. c. *sub nom.* Carper v.

to be reasonably safe, having reference to the nature of railway-switches and the dangers which necessarily attend them, must be regarded as a truism, following from the general doctrines stated and illustrated in this chapter. The observance of the rule of reasonable care is demanded of the company, to the end that its switches shall be so constructed, without impairing their efficiency as switches, that its employes may pass over them in the discharge of their duties without danger.¹

§ 4326. Whether Use of Open or Unblocked Frogs is Negligence in the Absence of Statute.—The decisions of the courts have been very generally to the effect that for a railway company to fail to block its frogs or switches, in consequence of which failure its employes get their feet caught therein and are killed or maimed,—does not constitute actionable negligence, but that the risk of injury from this source is one of the risks of the service which the employé accepts.²

¹*Hannah v. Connecticut River R. Co.*, 154 Mass. 529; s. c. 28 N. E. Rep. 682. Where the theory of the plaintiff's case, in an action for damages for the death of a trainman, was that the accident was the result of a defective switch, causing the engine to be deflected to a siding, and there were, in the opinion of the court, several possible if not equally probable causes of the accident,—it was held that the plaintiff was not entitled to recover: *Savitz v. Lehigh & C. R. Co.*, 199 Pa. St. 218; s. c. 48 Atl. Rep. 987. The "several possible, if not equally probable, causes shown," were, "a defective truck, defective equipments of the engine, and an obstruction on the track." It will be observed that all of these possible or equally probable causes are causes which impute negligence to the railroad company; since the company was primarily responsible for a defective truck, a defective engine, or an obstruction on the track. The decision therefore rests upon one of those narrow technicalities which lawyers love, because they *are* technicalities and because they result in defeating substantial justice. — — — In an action for injuries to an employé in charge of an engine, caused by a derailment, it was held proper to submit the case to the jury where the evidence tended to show that a switch-rail

at the point at which the engine left the track had been in a battered and unsafe condition for a month before the accident: *Chicago & C. R. Co. v. Hartmann*, 71 Ill. App. 427.

²*Post*, § 4734; *Bivins v. Georgia & C. R. Co.*, 96 Ala. 325; s. c. 11 South. Rep. 68; *McGinnis v. Canadian South. Bridge Co.*, 49 Mich. 466; *Spencer v. New York & C. R. Co.*, 67 Hun (N. Y.) 196; s. c. 51 N. Y. St. Rep. 386; 22 N. Y. Supp. 100; *McNeil v. New York & C. R. Co.*, 71 Hun (N. Y.) 24; s. c. 54 N. Y. St. Rep. 201; 24 N. Y. Supp. 616. The plaintiff, a brakeman in defendant's employ, while uncoupling moving cars on a side-track before daylight, stumbled against the end of the blocking between a guard-rail and the main rail and was injured, and sued defendant for negligence in the construction of the blocking. The evidence showed that guard-rails on defendant's road were ordinarily slightly curved in form, and were placed about 3 inches from the main rail at their nearest points, with their ends 5 or 6 inches distant from the main rail. The ends of the guard-rail in question were about 12 inches from the main rail. The customary way of filling the space between such rails on defendant's road was to drive a wedge-shaped piece of timber 2 inches thick between the rails and

But this is not the universal doctrine, nor is it worthy of the least commendation. The better doctrine is that a railroad company owes its employes the duty of so maintaining the blocking in the space between the guard-rails and the main rail that the heels and soles of their boots will not be caught therein; and where there was evidence tending to show that the defendant was guilty of negligence in that respect, by reason whereof a switchman caught his foot between the guard-rail and the main rail and was run over, and there was no evidence on which it could be held, as matter of law, that the deceased assumed the risk or was guilty of contributory negligence, it was held that the trial court properly refused to take the case from the jury.³

§ 4327. Statutes Prohibiting the Use of Unblocked Frogs or Switches.—The accidents which have proceeded from this species of negligence on the part of railway companies have been so frequent and so dreadful, and the blamelessness of the killed or injured switchman has been, in most cases, so apparent, and the power of the railway company to avert such accidents by a slight expenditure of money has been so obvious, that many of the State legislatures have found it necessary to interpose and to enact statutes requiring railway companies, under penalties, to block their frogs, switches, and guard-rails.⁴ It is not necessary to observe that in order to a recovery of damages grounded on a failure to comply with such a statute, the facts must have been such that the injury would not have happened

between the balls and bases of the rails, driving the wedge in until its wide end was even with the end of the guard-rail, while the narrow end stopped near the middle. The blocking on which plaintiff stumbled was 3 inches thick, 1 foot wide, and projected 1 foot beyond the end of the guard-rail, and the projecting end was not beveled. In thickness it was the best that could have been provided, as it completely filled the space between the bases and the balls of the rails, and the top of it rested 1 inch below the tops of the rails, thus meeting in every way the requirements of the best blocking. It was held that placing the ends of the guard-rail 12 inches, instead of 6 inches, from the main rail, was no evidence of negligence, it being done in the exercise of that reasonable judgment and discretion which must be allowed a railroad company in the construction of its

road-beds, rails, and safety-appliances. Nor was there any evidence to show that the blocking produced any injury that the rail itself would not inevitably have caused. It was 1 inch lower than the top of the guard-rail, and no wider than the space between the rails. Coming toward it from the end as plaintiff did, he would have stumbled had it been 1 foot shorter; or, had it been absent, he must have stumbled on the rail, the end of which was rightfully placed 12 inches from the main rail: *Morris v. Duluth & C. R. Co.*, 108 Fed. Rep. 747; s. c. 47 C. C. A. 661.

³ *Curtis v. Chicago & C. R. Co.*, 95 Wis. 460; s. c. 70 N. W. Rep. 665.

⁴ *Craig v. Lake Erie & C. R. Co.* (U. S.) 35 Ohio Wkly. L. Bul. 15 (no off. rep.) (motion to strike out all evidence in relation to the statute denied).

if the statute had been complied with.⁵ Under a statute requiring railroad companies to block the frogs in their tracks, it is the duty of such a company to make the frogs as nearly safe as practicable; and, hence, evidence that the blocking of a certain frog was old and worn by the flanges of the car-wheels, is sufficient to take the question of the negligence of the defendant to the jury.⁶ Such a statute is not complied with by using a method of blocking that the wear of the road renders ineffectual within two or three days, where a simple, inexpensive, and efficient method is in common use.⁷ A railroad company does not comply with such a statute by employing servants and expressly charging them with the duty of seeing that the frogs are properly blocked; but it is bound to see for itself that the duty has been performed or to answer in damages to a switchman who, without fault, is injured in consequence of his foot being caught in an unblocked frog while in the discharge of his duties.⁸

⁵ *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193; s. c. 23 Ohio L. J. 151.

⁶ *Jones v. Flint & C. R. Co.*, 127 Mich. 198; s. c. 8 Det. Leg. N. 295; 86 N. W. Rep. 888.

⁷ *Eastman v. Lake Shore & C. R. Co.*, 101 Mich. 597; s. c. 60 N. W. Rep. 309 (company used a blocking which the flanges of the car-wheels wore down and split, when there was other blocking in common use which the flanges would not interfere with).

⁸ *Ashman v. Flint & C. R. Co.*, 90 Mich. 567; s. c. 51 N. W. Rep. 645. In an action for an injury resulting from an unblocked frog, under a statute requiring all frogs, switches and guard-rails to be filled, it was error to charge that, as matter of law, the defendant was chargeable with knowledge of a failure to perform this duty; an unblocked frog not coming within the rule of a statute making all defects in cars and locomotives and the attachments and machinery thereof *prima facie* evidence of negligence, and charging the company with knowledge of such defects: *Cleveland & C. R. Co. v. Ullom*, 20 Ohio C. C. 512; s. c. 11 Ohio C. D. 321. The Ontario Railway Act (51 Vict., ch. 29) provides in detail for the filling or "packing" of guard-rails, frogs, switches, etc., by railroad companies (*Ibid.*, § 262), and gives a right of action to "any person" who is injured by the act or

omission of the company in violation of any of the provisions of the act (*Ibid.*, § 289, (D)). It is held that a servant of a railroad company is a "person" within the meaning of the Act, and as such is entitled to recover damages if injured by the failure to pack frogs as required by the Act, although the omission occurs through the negligence of a fellow servant: *Le May v. Canadian Pac. R. Co.*, 17 Ont. App. 293; s. c. 44 Am. & Eng. R. Cas. 627. The power conferred upon the Railway Committee of Canada by § 262, subs. 4, of the above Act, to allow "such fillings to be left out from the month of December to the month of April in each year," refers only to the duty prescribed by subs. 4, of filling the spaces between winged rails and railway-frogs, and between guard and track rails; and does not refer to the duty prescribed by subs. 3, of filling the spaces behind and in front of all railway-frogs and crossings and between the fixed rails of all switches where the spaces are less than five inches wide: *Grand Trunk R. Co. v. Washington*, [1899] A. C. 275; s. c. 68 L. J. P. C. (N. S.) 37; aff'g s. c. *sub nom.* *Washington v. Grand Trunk R. Co.*, 28 Can. S. C. 184; which rev'd s. c. 24 Ont. App. 183, and restored a judgment for plaintiff recovered in the trial court.

§ 4328. **Such Statutes Held to be an Affirmance of the Common Law.**—Some of the courts have held that such statutes are merely an affirmance of the principles of the common law; and this seems to be a sound and enlightened view. From this view the conclusion has followed, that such a statute does not exclude a right of action for damages under the principles of the common law.⁹ This, of course, implies that the principles of the common law give such a right of action, of which it would seem there can be no doubt; and another respectable court has so held.¹⁰

§ 4329. **What Notice the Railway Company must have had of the Absence of such Blocking.**—But, assuming the railroad company to be negligent in not providing such a safeguard, it has been held that the company will not be liable for an injury to its servants caused by the want of this precaution, unless it had actual notice of its absence for a sufficient length of time before the accident to have replaced it, or unless it had been absent for such a length of time as to constitute constructive notice.¹¹ A railroad company owes its yard employes the duty of vigilant and careful inspection in order to discover and remedy defects of this nature. It follows that in an action by a yard employé, grounded upon an injury proceeding from this source, it is not necessary to prove that the railroad company had actual notice that the blocking of the guard-rail, from the condition of which the injury proceeded, had become defective through gradual wear; but it is for the jury to say whether the company was negligent in not inspecting its track and discovering and remedying the defect before the accident; and under such a condition of the evidence it is error to grant a nonsuit.¹²

§ 4330. **Blocking Intended Only to Prevent Injuries to the Feet.**—One court has held that the failure of a railroad company to block a guard-rail in its yard is not ground for recovery by a switchman injured by being thrown from a car, whose arm was caught and held between the guard-rail and the main rail and crushed by the cars,—the court reasoning that blocking is intended only to prevent the feet of the switchmen from being caught.¹³

⁹ New York &c. R. Co. v. Lam-bright, 5 Ohio C. C. 433; s. c. 3 Ohio C. D. 213.

¹⁰ Seley v. Southern Pac. R. Co., 6 Utah 319; s. c. 23 Pac. Rep. 751.

¹¹ Haskins v. New York &c. R. Co., 79 Hun (N. Y.) 159; s. c. 60 N. Y. St. Rep. 817; 29 N. Y. Supp. 274. See also, Ashman v. Flint &c. R. Co.,

90 Mich. 567; s. c. 51 N. W. Rep. 645.

¹² Paine v. Eastern R. Co., 91 Wis. 340; s. c. 64 N. W. Rep. 1005.

¹³ Rutledge v. Missouri Pac. R. Co., 110 Mo. 312; s. c. 19 S. W. Rep. 38. Whether a railroad company is guilty of negligence in maintaining an open frog in a sidewalk crossing

§ 4331. **Duty of Blocking Switches, Frogs, Guard-Rails, etc., in Process of Construction.**—As matter of law, a railroad company which is constructing new switches does not owe the duty to a brakeman of blocking a frog, which is a part of the new construction, during the progress of the work; it being impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected. Giving him such notice and warning as will put him on his guard against the dangers from use of the track while the work is in progress is enough; and notice to him that digging is being done at a certain place between the ties, with warning that he look out for it and avoid injury, is sufficient, although it does not mention the danger from the unblocked frogs, and especially where the work has been for two weeks within his daily view and observation while passing on his train.¹⁴

§ 4332. **Leaving Unfilled Spaces between the Ties in Switch-Yards.**—Negligence has been ascribed to the omission of a railroad company to fill the spaces between the ties in a switch-yard with cinders or some other suitable material, thereby enhancing the danger to switchmen in making couplings, upon evidence that the spaces between such ties were filled in other yards of the same company, in the absence of proof that they could not be filled in the yard in question; and where a brakeman in the discharge of his duties was injured by having his foot caught in such an unfilled space between the ties, a verdict in his behalf for damages was sustained.¹⁵

§ 4333. **Absence of a Butt-Post at the End of a Stub-Switch.**—It has been held, but with questionable propriety, that no recovery can be had against a railroad company for the death of an employé on the ground of its being negligent in failing to have a butt-post at the end of a stub-switch in a switch-yard; the only question proper to submit to the jury being whether the premises are reasonably safe

its track at a *highway*, without blocking it or using other appliances to prevent the catching of the feet of persons passing over it, is for the jury, where there is evidence to show that blocks are in general use or proper for the purpose of preventing injury to persons passing over frogs, and that there are other means in general use or proper which could have been adopted to prevent the accident: *Friess v. New York & C. R. Co.*, 67 Hun (N. Y.) 205; s. c. 51 N.

Y. St. Rep. 391; 22 N. Y. Supp. 104 (injury to a traveller, not a servant).

¹⁴ *Hauss v. Lake Erie & C. R. Co.*, 105 Fed. Rep. 733.

¹⁵ *Railway Co. v. Robbins*, 57 Ark. 377; s. c. 21 S. W. Rep. 886; *Illinois & C. R. Co. v. Cozby*, 174 Ill. 109; s. c. 50 N. E. Rep. 1011; aff'g s. c. 69 Ill. App. 256 (unfilled spaces between ties 6 inches deep tends to prove negligence); *Baltimore & C. R. Co. v. Clifford*, 99 Ill. App. 381.

without such post, as a jury cannot be allowed to prescribe how a railroad shall be conducted.¹⁶

§ 4334. **Switch Located Too Near a Cattle-Guard.**—Upon the question whether a railroad company has been negligent in establishing a switch too near a cattle-guard, it has been held that the mere fact that *another switch* at the same station was farther from the cattle-guard, did not tend to prove that there was any negligence in establishing and maintaining the first switch at a less distance from the cattle-guard at which the accident occurred.¹⁷

4335. **Care of Snow and Ice in Switch-Yards.**—The reasonable care which a railroad company is bound to exercise for the protection of its switchmen does not, unless under very special and peculiar circumstances, require it to remove all the snow from its switch-yards; and if it keeps the surface of the snow practically level, and does not allow it to accumulate above the level of the rails, or in dangerous ridges or hummocks, or to form dangerous holes, it cannot be charged with negligence; nor is it negligent in failing to cover the snow with ashes or cinders.¹⁸

§ 4336. **Maintaining Switch-Target on Wrong Side of Track.**—The fact that the defendant had placed its switch signal-target on the same side of the main track on which its side-track was placed, instead of on the opposite side, did not constitute negligence where the evidence showed that there was no uniform rule as to which side of the track it should be placed upon; and the company was not liable for

¹⁶ Chicago &c. R. Co. v. Driscoll, 176 Ill. 330; s. c. 4 Chic. L. J. Wkly. 130; 12 Am. & Eng. R. Cas. (N. S.) 644; 22 N. E. Rep. 921; rev'g s. c. 70 Ill. App. 91.

¹⁷ Robinson v. Chicago &c. R. Co., 71 Iowa 102; s. c. 32 N. W. Rep. 193. The case was that the plaintiff, while attempting to uncouple cars at night to switch them on to a side-track, stepped into a cattle-guard less than 50 feet from the switch, and was injured. There was very little evidence as to the distance between switches and cattle-guards on defendant's road, and none whatever as to such distance on other roads. All the evidence showed was that at the station where the accident occurred there was, besides the switch in question, another one 81 feet from a cattle-

guard; which plaintiff insisted was some evidence that the distance between the switch and cattle-guard in question was unusually small, and that defendant was therefore guilty of negligence. It was held that evidence showing nothing more than that one of two things is smaller than the other cannot be regarded as any evidence that the smaller is *unusually* small; since a thing which is unusually small is small as compared with the *class* to which it belongs, and not as compared with one thing of the class: Robinson v. Chicago &c. R. Co., *supra*.

¹⁸ Fay v. Chicago &c. R. Co., 72 Minn. 192; s. c. 4 Am. Neg. Rep. 167; 12 Am. & Eng. R. Cas. (N. S.) 641; 75 N. W. Rep. 15.

the injuries resulting from running through an open switch by reason of the target being hidden by freight-cars on the side-track, though, if it had been on the other side, it would have been clearly visible; since, if the signal could not be seen, it was the engineer's duty, under the rules, to stop his train and investigate.¹⁹

§ 4337. **Use of Stub-Switch Instead of Split-Switch.**—It has been held that a railroad company is not negligent in establishing a stub-switch, the same being a kind which is reasonably safe when used in the manner in which it is intended to be used, where an engine is thrown off the track when running through the switch from an opposite direction; though, if a split-switch had been used, the train would probably have remained on the track.²⁰

§ 4338. **Use of Switches without Locks or Targets.**—Railroad companies are bound to provide *locks* for their switches, and to adopt and use such other appliances and safeguards as have been found necessary by other well-regulated railroads; and this obligation rests upon a "dummy" railroad, which is operated for the carriage of freight and passengers, as well as upon steam railroads of the ordinary character.²¹ Evidence showing that the defendant subcontractors, employed in the construction of a railroad of which they were in control for the purpose of construction, failed to provide a lock for a switch not otherwise securely guarded, whereby the switch became misplaced and a construction-train was derailed, killing an employé thereon, and further evidence tending to show that a lock under such circumstances is a usual and necessary thing, is sufficient to support a verdict that the defendants were guilty of actionable negligence.²² It was held by the Appellate Division of the Supreme Court of New York, that a railroad company does not, as matter of law, exercise reasonable care towards an employé who is injured while riding on a caboose before the construction of the road is completed, where it omits to provide a lock and target for a switch,

¹⁹ *Grattis v. Kansas City &c. R. Co.*, 153 Mo. 380; s. c. 55 S. W. Rep. 108; 48 L. R. A. 399.

²⁰ *Grattis v. Kansas City &c. R. Co.*, 153 Mo. 380; s. c. 55 S. W. Rep. 108; 48 L. R. A. 399 (engineer knew it was a stub-switch, and knew the danger of trying to run through it, but failed to stop his train to investigate when he found he could not see the signal-target, the rules of the company providing that an

obscure or hidden signal should be considered a danger-signal; and the fireman could not recover for injuries resulting from the engineer's negligence, they being fellow servants).

²¹ *Birmingham R. &c. Co. v. Baylor*, 101 Ala. 488; s. c. 13 South. Rep. 793.

²² *Rombough v. Balch*, 27 Ont. App. 32.

so that it may be opened by a trespasser to the danger of trains passing along the main track.²³ But, reversing this wholesome decision, the Court of Appeals of that State held that, it being shown by uncontradicted evidence that it was a perfect switch of the standard variety in the work of railway construction, and had performed its work perfectly during several months in which it had been in operation, and that such switches without lock or target were in customary use in railway construction, the plaintiff, an employé, injured by reason of the switch having been opened and allowing the train on which he was riding to enter the siding, so as to render it necessary for him to jump to avoid an impending collision with cars standing on the siding,—had no cause of action.²⁴ It cannot escape attention, that this decision makes a practice of a railroad company, which is obviously negligent and dangerous, as the event in this case showed, the law of the land.

§ 4339. **Dangerous Obstructions in Switch-Yards.**—It need not be said that a railroad company does not discharge its duties towards its employés engaged in its switch-yards, where it leaves dangerous obstructions in such yards, and fails to maintain a reasonable inspection to the end of discovering and removing them.²⁵ Thus, negligence has been imputed to a railway company where it left for a long time a pile of sleepers, three or four feet wide, within eighteen inches of the rails in a freight-yard, which was in constant use;²⁶ where it allowed an oil-box in its yard to stand so near a track as to catch the foot of a switchman, casually allowed to protrude slightly beyond the end of the foot-board of an engine on which he was riding in the

²³ *Bennett v. Long Island R. Co.*, 21 App. Div. (N. Y.) 25; s. c. 47 N. Y. Supp. 258.

²⁴ *Bennett v. Long Island R. Co.*, 163 N. Y. 1; s. c. 57 N. E. Rep. 79; rev'g s. c. 21 App. Div. (N. Y.) 25; 47 N. Y. Supp. 258.

²⁵ *Railroad Co. v. Jackson*, 106 Tenn. 438; s. c. 61 S. W. Rep. 771. In this case it appeared that plaintiff was a conductor on the defendant's freight-train, and while coupling cars in a switch-yard slipped on an iron bar lying between the rails and had his foot crushed by the wheels. It was a rule of the company that this bar should not be left on the track, and it was the station-agent's duty to see that the switches and tracks were kept in safe condition. The bar was used

to move cars when they were being loaded while there was no engine at the station, and had been used for that purpose by some shippers, to the agent's knowledge, before the arrival of the train, and since he had inspected the tracks. It was held sufficient to support a verdict for the plaintiff on the ground that the station-agent was negligent in not looking for the bar after he knew the shippers who were using it were through with it, as it was not shown that he had warned them about leaving it, and he might reasonably presume they would leave it where they used it: *Railroad Co. v. Jackson*, *supra*.

²⁶ *Babcock v. Old Colony R. Co.*, 150 Mass. 467; s. c. 23 N. E. Rep. 325.

discharge of his duties;²⁷ where it permitted for several months a ditch from four to six inches deep to extend across a track, in consequence of which an employé was injured in going between the cars for the purpose of coupling them when they were moving at a safe rate of speed;²⁸ where it suffered a pile of gravel used in ballasting to remain between its tracks in its yard for the space of two weeks, this being deemed such an unreasonable length of time as to raise an inference of negligence sufficient to justify a verdict in favor of an employé thereby injured.²⁹ The duty of a railroad company towards its own employés or those of a lessee of the road, to keep the track in a switch-yard free from defects, has been held to extend to the wood-work of a platform which is part of a contrivance for weighing cars, but which, when not in use for that purpose, constitutes a part of a switch-track.³⁰

§ 4340. Derailments in Consequence of Imperfections in Switches.

—Negligent imperfections in railway-switches, which result in the derailment of trains, and in the killing of train employés, furnish, of course, a cause of action against the railroad company.³¹

²⁷ *Louisville &c. R. Co. v. Bouldin*, 121 Ala. 197; s. c. 25 South. Rep. 903; s. c. on former appeal, 110 Ala. 185 (held under a statute to be the negligence of the yardmaster, whose duty it was to keep the tracks in the yard free from obstructions, and who acted in the exercise of superintendence).

²⁸ *Hollenbeck v. Missouri Pac. R. Co.*, 141 Mo. 97; s. c. 8 Am. & Eng. R. Cas. (N. S.) 277; 38 S. W. Rep. 723; substituted for opinion in 3 Am. & Eng. R. Cas. (N. S.) 350; 34 S. W. Rep. 494; s. c. *aff'd in banc*, 41 S. W. Rep. 887.

²⁹ *Hurst v. Kansas City &c. R. Co.*, 163 Mo. 309; s. c. 63 S. W. Rep. 695.

³⁰ *Rome R. Co. v. Thompson*, 101 Ga. 26; s. c. 28 S. E. Rep. 429. Ignoring the principle of the text, it has been held that a railroad company is not liable to an employé for an injury resulting from a small piece of decayed sapwood breaking from the edge of a tie in a trestle over which he was passing in pursuance of his duty, where the tie was otherwise sufficiently safe for the use for which it was intended; the purpose of having ties not being to make a way for employés to walk upon, but to make a safe road-bed for the running of trains: *East*

Tennessee &c. R. Co. v. Reynolds, 93 Ga. 570; s. c. 20 S. E. Rep. 70 (injury was a mere casualty incident to the business).

³¹ Of which perhaps a good illustration is found in the case of *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772. In another case the evidence tended to show that the handle-bar with which a switch was held in place was insecurely fixed, and that by reason of the rapid approach of a switch-engine the bar, and consequently the switch-points, became displaced and the tender was derailed, and plaintiff, a switchman, was injured. It was the special duty of the foreman of the switch-crew to see that the switch was in position, and this was also the duty of plaintiff and that of the fireman, who was absent from the engine. The switch-target indicated safety, but, on account of the excessive speed of the engine, and his position thereon, the plaintiff could not determine whether the bar was securely fastened or not. The foreman testified that he passed along the track within 40 feet of the switch in question for the purpose of seeing that it was in position, and that the target indi-

§ 4341. **Derailments in Consequence of Switches being Negligently Left Open without Lights.**—It has been held that an engineer, injured by the derailing of his train, caused by a partly-open switch, may recover, notwithstanding the switch was unlocked either by a trespasser or by a fellow servant, where the negligence of the company in opening the switch for use after it had been abandoned for a long time, without any lights to warn the engineer of its presence or danger, was a concurrent cause of the accident.³² But another court has held, with doubtful propriety, that the failure to have lights upon switches in a yard cannot be regarded as negligence towards employes as a matter of law, where it is not the custom to have such lights;³³ in other words, that if it is *customary* to be negligent in omitting an obvious means of safety, the negligence is excused, notwithstanding the rule that the law will not recognize and apply a bad custom. But it seems to be well held that a railroad company is not bound, for the protection of its employes in moving cars in its freight-yards in the night-time, to have *lights* upon such cars and men to handle the lights, or to require a man to precede each car to announce its approach.³⁴

§ 4342. **Derailments in Consequence of Switches being Tampered with.**—It has been reasoned that railroad companies are not entitled to presume that there will be no unlawful interference with their tracks and switches by trespassers, and the degree of vigilance which they are required to exercise to guard against injuries to employes resulting therefrom must be determined and regulated by the possibility and probability of such interference, and the harm likely to result therefrom. Therefore, where a railroad company failed for six hours to inspect a switch near the capital city of the State, and defended a suit on the ground that the switch had been unlawfully tampered with, causing a derailment, a verdict finding the company guilty of negligence will not be set aside.³⁵

§ 4343. **Breaking of Lever of Railway Turntable.**—Where, while plaintiff was pressing against a lever extending from the side of a turn-

cated that the switch was secure. It was held sufficient to warrant a verdict that the foreman was guilty of negligence which was the proximate cause of the accident in failing to discover the condition of the switch; and a judgment for plaintiff was affirmed: *Gulf &c. R. Co. v. Powell*, 25 Tex. Civ. App. 91; s. c. 60 S. W. Rep. 979.

³² *Town v. Michigan &c. R. Co.*, 84 Mich. 214; s. c. 47 N. W. Rep. 665.

³³ *Grant v. Union Pac. R. Co.*, 45 Fed. Rep. 673.

³⁴ *Crowe v. New York &c. R. Co.*, 70 Hun (N. Y.) 37; s. c. 53 N. Y. St. Rep. 558; 23 N. Y. Supp. 1100.

³⁵ *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772.

table in an endeavor to move the table, the lever broke, and plaintiff was injured, he could not recover, the lever being open to view, and there having been no visible defect therein, or any showing that defendant could have discovered the defect by diligence.³⁸

ARTICLE VII. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTS IN LOCOMOTIVE-ENGINES AND THEIR APPLIANCES.

SECTION

4346. Liability of railway companies to their employés for furnishing defective locomotive-engines, etc.

4347. Bound to what inspection of their engines, etc.

4348. Allowing locomotive-boilers to become defective and unsafe.

4349. Defective step on locomotive.

4350. Defective hand-rails and grab-irons.

4351. Grease on top of steam-chest.

SECTION

4352. No sand in dome.

4353. Engine without sufficient power.

4354. Steel sliver on drive-wheel.

4355. Valve-stem of tender out of order.

4356. Number-plate on engine not securely fastened.

4357. Various other defects in engines, etc., for which railway companies have been held liable to their servants.

§ 4346. Liability of Railway Companies to their Employés for Furnishing Defective Locomotive-Engines, etc.—Railway companies also stand under the legal duty of exercising reasonable care to the end of providing safe and adequate locomotives, tenders, and other appliances which are put into the hands of their engineers and firemen.¹ But here, as in other cases, the railway company is *not an absolute insurer* of the adequacy or safety of the engines which it furnishes. It is not absolutely bound, it has been held by a divided court, to furnish engines adequate in power for every emergency; but it is for it to determine how powerful an engine shall be at any place and for any purpose; so that if an accident happens to an employé from the *want of adequate power in an engine* furnished, the company will not be liable.²

³⁸ Pippin v. Sherman &c. R. Co. (Tex. Civ. App.), 58 S. W. Rep. 961 (no off. rep.) (was subjected to an extraordinary strain at time of accident because turntable had frozen fast).

¹ Hewitt v. Flint &c. R. Co., 67 Mich. 61; s. c. 11 West. Rep. 148; 34 N. W. Rep. 659; Krueger v. Louisville &c. R. Co., 111 Ind. 51; s. c. 11 N. E. Rep. 957; 9 West. Rep. 247; Sabine &c. R. Co. v. Ewing, 7 Tex.

Civ. App. 8; s. c. 26 S. W. Rep. 638; Texas &c. R. Co. v. Whitmore, 58 Tex. 276.

² Bajus v. Syracuse &c. R. Co., 103 N. Y. 312; s. c. 8 N. E. Rep. 529; 57 Am. Rep. 723; rev'g s. c. 34 Hun (N. Y.) 153. It has been held that it is negligence on the part of a railway company toward its employé not to provide for his use and safety such appliances upon the locomotives on which he serves, as it is usual and

§ 4347. **Bound to what Inspection of their Engines, etc.**—But it is bound to a reasonable and continuous inspection, and it will be liable for an injury caused by a locomotive being tampered with by *trespassers*, where such an inspection would have prevented it from being taken out of the yard in a damaged condition.³ Here, again, the railroad company is under the absolute duty of exercising a reasonable inspection to the end that such machines are kept in a reasonable state of safety and repair, and it is immaterial to what servant this duty is delegated: the company will be liable for his negligence.⁴ It was so held where an injury happened to another employé, through the defective condition of an engine, by reason of the failure of the engineer to report such defect.⁵ In the application of the principle under consideration, railway companies have been held liable for failing suitably to inspect the coupling-pin of an engine after it has been subjected by a collision to a strain which is likely to injure it;⁶ where, owing to a defect, which the engineer had previously reported to the company as making it dangerous, the engine suddenly started, injuring a switchman;⁷ where an engineer was killed by the derailling of his locomotive, either through a defective flange of one of its wheels, caused by an undiscoverable fracture, or else by the defective condition of the track,—the case having been submitted to the jury upon the theory that if the accident was caused by the breaking of the wheel, there could be no recovery, but that the company would be liable for a careless inspection of the track, though by a competent inspector.⁸

§ 4348. **Allowing Locomotive-Boilers to Become Defective and Unsafe.**—A railroad company owes to its employés, in respect to a locomotive charged with steam, the duty of using due care in seeing that the engine is kept and maintained in a safe and proper condi-

customary for railway companies generally to provide for work of the same character: *Crumley v. Cincinnati & C. R. Co.*, 12 Ohio C. C. 164; s. c. 1 Ohio C. D. 353 (failure to provide pole for switching; employé injured while making flying switch).

Cases where the Company was Exonerated.—Brakeman killed by a pusher-engine parting from its tender by running into another engine: *Morse v. New York & C. R. Co.*, 39 Hun (N. Y.) 414. Foreman killed by being thrown between engine and tender, and thereby breaking king-bolt by which they were

coupled, in consequence of latent defect: *Powers v. New York & C. R. Co.*, 38 N. Y. St. Rep. 558.

³ *Southern Pac. Co. v. Lafferty*, 57 Fed. Rép. 536; s. c. 6 C. C. A. 474.

⁴ *Ante*, §§ 3791, 3792.

⁵ *Texas & C. R. Co. v. Wynne* (Tex. Civ. App.), 22 S. W. Rep. 1064 (no off. rep.).

⁶ *Norfolk & C. R. Co. v. Nunnally*, 88 Va. 546; s. c. 16 Va. L. J. 731; 14 S. E. Rep. 367.

⁷ *Chicago & C. R. Co. v. Rung*, 104 Ill. 461.

⁸ *Durkin v. Sharp*, 88 N. Y. 225; *ante*, § 3793.

tion, which is a care in proportion to the consequences liable to follow from the want of such care and skill.⁹

§ 4349. **Defective Step on Locomotive.**—Negligence has been imputed to a railway company for suffering the step upon an engine used in lighting the head-light to get and remain out of repair after the attention of the engineer had been called to the defect and after a lapse of sufficient time for its reparation, in consequence of which a fireman was injured. Nor was the injured fireman guilty of contributory negligence in using the step in the discharge of his duty, as a matter of law, but at most the question of his negligence was a question of fact for the jury, since in the absence of knowledge or of some plain admonition to the contrary he might rightfully assume that the company had done its duty in this respect.¹⁰ A railway company was held not to be liable for injuries to a fireman, caused by the step of the locomotive turning and throwing him to the ground while descending from it, where the engine had just come in from a run during which the step had been safely used several times, and the fireman himself had aided in properly securing it two days before, and there was nothing to show that any one had tampered with it, or that it had been accidentally injured or displaced, though immediately after the accident its fastenings were found to be loose.¹¹ Such a company has been exonerated from liability for injuries to a brakeman, caused by the turning of a loose step upon the engine, where

⁹ *Texas & C. R. Co. v. Barrett*, 67 Fed. Rep. 214 (explosion of locomotive-boiler, due to broken and rusted stay-bolts, the condition of which could have been discovered by proper inspection).

¹⁰ *Kerrigan v. Chicago & C. R. Co.*, 86 Minn. 407; s. c. 90 N. W. Rep. 976. But it was held that the court properly directed a verdict for defendant, and refused to leave the question of negligence to the jury, in an action by a locomotive-fireman for injuries sustained by the turning of a loose step on a locomotive while he was cleaning the engine at the end of his trip, where it was admitted that the step, the rod, and the nut were suitable and in good condition, that the inspectors at both ends of the trip were competent, and that the step was securely fastened at the beginning of the trip, while the fireman undertook, for his own convenience, to clean the engine without waiting for the

regular inspection, which would doubtless have led to the discovery and repair of the defect: *Patton v. Texas & C. R. Co.*, 179 U. S. 658; s. c. 21 Sup. Ct. Rep. 275; 45 L. ed. 361; aff'g s. c. 95 Fed. Rep. 244; 37 C. C. A. 56. For a condition of evidence where the plaintiff, who was head brakeman of a train, stepped upon the stirrup or step on the front of the engine-pilot as the train was moving slowly along a switch-track in the yards at night, and where, by the giving way of the step, his foot went between the ties, where it was caught and crushed, and it was held that the court did not err in refusing to decide the questions of negligence and contributory negligence as matter of law, but properly submitted them to the jury,—see *Choctaw & C. R. Co. v. Tennessee*, 116 Fed. Rep. 23.

¹¹ *Texas & C. R. Co. v. Patton*, 61 Fed. Rep. 259.

there was no evidence that the engineer, whose duty it was to fix it, was incompetent, or was not furnished with the proper tools for its repair, or that the company had knowledge, actual or constructive, of its condition, and no evidence as to how long it had been in that condition, and where the accident would not have happened had the brakeman not ordered the engineer to proceed before getting upon the engine.¹²

§ 4350. Defective Hand-Rails and Grab-Irons.—It has been held that the receivers appointed by a Federal court to operate a railway are not guilty of negligence as matter of law in hauling in one of their trains a switch-engine which is not equipped with a continuous hand-rail across the rear end, although such rails are in use upon other switch-engines,—the reason being that a railway company rests under no duty to its employes to provide cars or engines of but one pattern or of any particular pattern, so that those which it provides are reasonably safe for the service.¹³

§ 4351. Grease on Top of Steam-Chest.—The mere fact that a little dust and grease appeared on the top of the steam-chest of an engine after a run of thirty miles, causing the defendant's brakeman's foot to slip, was not sufficient evidence of negligence to warrant the submission to a jury of the defendant's liability for injuries sustained by the brakeman.¹⁴

§ 4352. No Sand in Dome.—It has been held that a railway employé cannot recover damages from the company for injuries caused by the neglect of the engineer or fireman to have sand in the dome of the engine, on the ground that such neglect involves a failure on the

¹² *Miller v. Chicago & C. R. Co.*, 90 Mich. 230; s. c. 51 N. W. Rep. 370.

¹³ *Peirce v. Bane*, 80 Fed. Rep. 988; s. c. 53 U. S. App. 297. But where, in the proper discharge of his duties as yard conductor, the plaintiff was required to get to a place above the platform of the tender, where he could look over the tender, and see and also signal to the engineer and to get up there he had either to catch hold of the top of the tender or use a drainpipe, there being no grab-irons, and the safer and convenient way of doing so was by using the drainpipe, which, if properly constructed and fastened, would sustain a weight of 1,000

pounds,—it was held to be negligence for the railroad company to furnish a tender with a drainpipe which gave way while he was so using it: *Coley v. North Carolina R. Co.*, 128 N. C. 534; s. c. 39 S. E. Rep. 43; rehearing denied, 129 N. C. 407; s. c. 40 S. E. Rep. 195.

¹⁴ *Hall v. Iowa & C. R. Co.*, 111 Iowa 523; s. c. 82 N. W. Rep. 999. In this case the plaintiff charged negligence in furnishing a "place to work." He went through the cab-window and along the running-board, and slipped in stepping on the steam-chest, in order to get down and throw a switch, when he might have got off at the side of the engine.

part of the company to provide safe ways and appliances,—the court taking the view that such neglect was that of a fellow servant.¹⁵

§ 4353. **Engine Without Sufficient Power.**—In a case illustrating this phase of the duty of a railway company it appeared that the plaintiff, a trainman employed by a railway company, had his foot caught by a brake-beam while uncoupling moving cars, whereby he was dragged about forty-five feet and then run over. His contention was that if the flues of the engine had not been foul, and if the main valve in the steam-chest had not been leaky (two defects which would merely diminish the power of the engine), the train could have been stopped more quickly. There was also a leaky throttle-valve, which might make the engine hard to reverse; but the undisputed evidence showed that, after the engineer heard the plaintiff's signal, he reversed the engine easily and at once, after which the train moved only five feet. It was held that there could be no recovery. The court proceeded upon the view that a railroad company is not bound to have in its service engines of sufficient power to avert the consequences of accidents which it has no reason to anticipate, but that it is sufficient, as to its own servants, if its engines are reasonably safe and proper. The court also reasoned that where the only result of defects in the locomotive-engine is to diminish its power, the responsibility of the railroad company for such defects, to its own servants, is no greater than it would be in the case of a new engine having the same power as the defective engine had at the time of the accident.¹⁶

§ 4354. **Steel Sliver on Drive-Wheel.**—It has been held that a railroad company is not bound to anticipate that an engine-wiper will, in the daytime, place his bare hand upon a steel sliver attached to the driving-wheel of an engine, six inches long and projecting from one-half inch to one inch beyond the tire, for the purpose of supporting himself in cleaning the engine, whereby he injures his hand on splinters of the sliver, when the smooth surfaces of all the other parts of the engine are open to his use for the purpose.¹⁷

§ 4355. **Valve-Stem of Tender Out of Order.**—The plaintiff was in the service of a railroad company as a locomotive-fireman. On a cold winter morning he was assigned to duty on a certain engine on which

¹⁵ *Illinois &c. R. Co. v. Jones* (Miss.), 16 South. Rep. 300 (no off. rep.). See *ante*, § 3760.

¹⁶ *Bajus v. Syracuse &c. R. Co.*, 103 N. Y. 312; s. c. 4 Cent. Rep. 518; 8 N. E. Rep. 529; 57 Am. Rep. 723; rev'g s. c. 34 Hun (N. Y.) 153.

¹⁷ *McCain v. Chicago &c. R. Co.*, 76 Fed. Rep. 125; s. c. 40 U. S. App. 181; 22 C. C. A. 99.

he had not fired since the preceding summer. The tender was defective in that its valve-stem was out of place, and an imperfectly-fitting wooden plug had been substituted, permitting a spray of water to escape with the jolting of the engine over the rough road-bed, and fall on to the iron apron connecting the engine and the tender, where it froze, creating an icy surface. The plaintiff slipped on this surface, and fell from the cab, receiving serious injury. He was ignorant, at the time of going on the engine, of the substitution of the plug for the valve-stem, and had not been warned of the fact. It was held that the question of the defendant's negligence was properly submitted to the jury.¹⁸

§ 4356. **Number-Plate on Engine Not Securely Fastened.**—It has been held that negligence is not imputable to a railroad company from the fact that a number-plate on one of its locomotives, designed merely to identify the engine, is not so securely fastened as to serve as a hand-hold for an employé as he passes over the pilot of the engine, where the company does not know of any habit of so passing, and has not given its consent, expressed or implied, that the pilot shall be used for such a purpose.¹⁹

§ 4357. **Various Other Defects in Engines, etc., for which Railway Companies have been held Liable to their Servants.**—Railway companies have also been held liable to their injured servants:— Where the train was derailed in consequence of the engine having *no cow-catcher*;²⁰ where an injury was sustained by a conductor on an engine used to push trains over a hill, by the *breaking of a wheel of the tender*, which threw it and the engine down an embankment, where the wheel was defective and unsafe and the defect might have been discovered by ordinary care and diligence;²¹ where the engine was defective in such a sense that the engineer *could not control it*, and had been so for some time, in consequence of which the hand of a switchman was caught between two deadwoods while making a coupling;²² where a switch-engine was so badly constructed that, while *making a coupling with it in the night-time*, the switchman was obliged to stand on one foot with his lantern on his arm and both

¹⁸ Mason &c. R. Co. v. Yockey, 103 Ala. 1; s. c. 12 L. R. A. 103; 8 South. Fed. Rep. 265; s. c. 43 C. C. A. 228. Rep. 764.

¹⁹ McCauley v. Southern R. Co., 10 App. (D. C.) 560; s. c. 25 Wash. L. 121 Mo. 652; s. c. 26 S. W. Rep. 661. Rep. 331.

²⁰ Tennessee &c. Co. v. Kyle, 93 ²¹Coontz v. Missouri &c. R. Co., 22 Lake Erie &c. R. Co. v. McHenry, 10 Ind. App. 525; s. c. 37 N. E. Rep. 186.

hands engaged;²³ where an injury happened to an employé who was himself negligent in undertaking to make repairs upon a car without displaying certain signals, it appearing that the accident was due to a *defect in an engine*, which would have caused the accident in the same manner if the signals had been displayed;²⁴ where a locomotive was so defective that water leaking from it formed *ice*, upon which a brakeman was injured in *coupling* moving cars;²⁵ where an injury happened to a fireman by the *breaking of a drawbar* of the engine and tender while he was making a coupling, owing to a defect in the casting of which the company ought to have known by the use of ordinary care, and by which the injury was proximately caused, where he did not know of the defect and was not guilty of any contributory negligence;²⁶ where the *tender* belonging to another engine was attached to the engine upon which a fireman was employed, and was three or four inches higher than the deck of the engine, which *difference in height* made the use of the locomotive as thus constituted dangerous, by reason of the lost motion and the liability of the tender to become detached, of which the master mechanic had been notified by the engineer.²⁷

²³ *Smith v. Buffalo & C. R. Co.*, 72 Hun (N. Y.) 545; s. c. 55 N. Y. St. Rep. 223; 25 N. Y. Supp. 638.

²⁴ *Texas & C. R. Co. v. Wynne* (Tex. Civ. App.), 22 S. W. Rep. 1064 (no off. rep.).

²⁵ *Flynn v. Wabash & C. R. Co.*, 18 Ill. App. 235.

²⁶ *Sabine & C. R. Co. v. Ewing*, 7 Tex. Civ. App. 8; s. c. 26 S. W. Rep. 638.

²⁷ *Krueger v. Louisville & C. R. Co.*, 111 Ind. 51; s. c. 9 West. Rep. 247; 11 N. E. Rep. 957. It has also been held that a railroad company is liable for personal injuries to a fireman in its service, ordered to work upon an engine furnished by it to a contractor engaged in constructing an extension of its road, occasioned by defects in the engine attributable to its negligence, although the track of the extension is in possession of the contractor, and the operation and movements of the train are in the latter's ex-

clusive control: *Savannah & C. R. Co. v. Phillips*, 90 Ga. 829; s. c. 17 S. E. Rep. 82. In balancing the correlative care required of the railway company and the employé, it has been held, in an action against a railroad company for the death of an engineer, that an *instruction* that if the jury find that such injuries and death were the result of a defect or defects in the engine operated by the deceased; that the company operating the road knew of such defects, or might have known of them by the use of such care as a person of ordinary prudence would have used under similar circumstances; and that deceased did not know of such defects, and could not have known of them by the use of ordinary care and prudence, the plaintiff is entitled to recover,—is substantially correct: *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220; s. c. 12 S. W. Rep. 828.

ARTICLE VIII. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTS IN CARS, OTHER THAN "FOREIGN" CARS.

SECTION	SECTION
4360. General nature of the liability of railway companies to their employes for furnishing defective cars.	4366. Defects in cars on repair-tracks.
4361. This duty an absolute and unassignable one.	4367. Bolt projecting too far from the bottom of a car.
4362. What the plaintiff must show in order to a recovery on this ground.	4368. Evidence of negligence, proximate cause, instructions, and other questions relating to the use of defective cars.
4363. Facts upon which negligence has been ascribed in operating defective cars.	4369. Federal statute requiring hand-holds on freight cars.
4364. Defects in cars brought into railway-yards and not properly inspected.	4370. Ohio statute prohibiting use of defective cars, etc., and charging company with knowledge of defects.
4365. Facts upon which negligence not ascribed.	

§ 4360. General Nature of the Liability of Railway Companies to their Employes for Furnishing Defective Cars.—The duty rests upon railway companies, in favor of their employes, of exercising reasonable care and maintaining a reasonable inspection, to the end that the cars committed to such employes are constructed and maintained in a reasonably safe condition.¹ Here, as in other cases, the degree of care which the law puts upon the railway company is measured by the circumstances, and is involved in such considerations as the kind of machinery necessary in the particular service, the nature of the business, the incidental hazards, etc.² If any certain and satisfactory test of the machinery used by a railroad company in transportation is known, which is within the reach of the company, it should be applied, and it is negligence in the company to rely upon a test which is clearly insufficient.³ It has been held that a railroad company fully discharges its duty toward its employes as to appliances on its own cars or those received from other companies, if they are such as are *in ordinary use*, though they are not the best or safest

¹ St. Louis & C. R. Co. v. Higgins, 53 Ark. 458; s. c. 44 Am. & Eng. R. Cas. 541; 14 S. W. Rep. 653; King v. Ohio & C. R. Co., 14 Fed. Rep. 277; Daniels v. Union Pac. R. Co., 6 Utah 357; s. c. 23 Pac. Rep. 762; Goodman v. Richmond & C. R. Co., 81 Va. 576.

² Jones v. New York & C. R. Co., 22 Hun (N. Y.) 284; *ante*, § 3772.

³ Texas & C. R. Co. v. Hamilton, 66 Tex. 92 (defective wheel under car; company relied on a careful observation of the wheel; but the hammer test, applied while the wheel was raised from the track, would

for the purpose.⁴ It cannot escape attention that this holding substitutes the ordinary use of railroad companies in the place of the law of the land, and makes such ordinary use the standard of care although it may be prompted by greed and founded in gross and criminal negligence.

§ 4361. This Duty an Absolute and Unassignable One.—This duty, it is needless to say, is one of those *absolute and unassignable duties* for the performance of which the railroad company is responsible, no matter to whom or to what grade of servant it commits its performance; the duty cannot be delegated so as to exonerate the company from liability for its non-performance.⁵ It follows that, if the duty is delegated to a fellow servant, he becomes, with respect to it, a vice-principal of the master; his negligence in discharging it is the negligence of the master; the fellow-servant rule does not obtain so as to exonerate the master; but in case of an injury to a servant through the negligent performance of the duty, the master will be responsible.⁶

§ 4362. What the Plaintiff must Show in Order to a Recovery on this Ground.—In order to a recovery the plaintiff must either

have disclosed with certainty any flaws in the wheel; and it was not shown that there were no adequate means for applying such test).

⁴*Dooner v. Delaware & Canal Co.*, 171 Pa. St. 581; s. c. 26 Pitts. L. J. (N. S.) 227; 33 Atl. Rep. 415 (car with two iron steps, a brake, and a wheel, upon the middle of the end of the car, but no handholds of any kind at or near the corners of the car).

⁵*Union Pac. R. Co. v. Daniels*, 152 U. S. 684; s. c. *sub nom.* *Union Pac. R. Co. v. Snyder*, 38 L. ed. 597; 14 Sup. Ct. Rep. 756.

⁶For example, the *standards used to keep a load of lumber on a low-sided car in place*, whether for constant use and permanently attached to the car, or unattached and intended for use on a single occasion, are appliances necessary for the proper equipment of the car, and it is the duty of the master to furnish proper standards for the purpose, which cannot be delegated to a fellow servant, nor performed by furnishing such fellow servant with proper standards, with which he fails to equip the cars. The company's whole duty is not fulfilled short of the actual proper equip-

ment of the car: *Pennsylvania R. Co. v. La Rue*, 81 Fed. Rep. 148; s. c. 55 U. S. App. 20; 27 C. C. A. 363 (foreman of car-repairers, whose duty it was, failed to substitute oak standards in place of every hemlock standard—hemlock standard broke and allowed lumber to project from side of car and strike fireman on passing train—recovery) [citing *Bushby v. New York & C. R. Co.*, 107 N. Y. 374; s. c. 14 N. E. Rep. 407 (where it was held that side-standards are necessary appliances forming part of a car for hauling lumber, and a railroad company cannot, as to its employé, delegate to a shipper the duty of furnishing such standards; and the company was held liable to an employé for an injury caused by the giving way of a poor stake furnished by a shipper while the train was going round a curve, the company not having furnished any stakes, but relying on the shipper)]. See also, *McIntyre v. Boston & C. R. Co.*, 163 Mass. 189; s. c. 39 N. E. Rep. 1012 (similar to principal case—standards furnished for holding load of ties on platform-car—master's duty to see that they are used).

bring home to the defendant a knowledge of the defect, or prove that it was ignorant of it in consequence of its negligence in failing to maintain the proper inspection.⁷ The proposition is extracted from another case that a railroad company which has performed its duty of inspecting a car with *ordinary care* is not liable for an injury to an employé caused by a defect which existed, but was not discovered, at the time of the inspection, unless it had knowledge of such defect.⁸ But the value of this statement of doctrine depends upon its application in any given case. The "ordinary care" which railroad companies often bestow upon their machinery and appliances might well be characterized as habitual negligence. It seems to have been so in the case under consideration. An inspector spent about five minutes in examining the car, without tools; whereas it was alleged that a reasonable and efficient inspection would have required the use of tools and taken fifteen minutes, and would have disclosed the defect. It was held that if the inspector followed the usual and ordinary manner of doing the work, he was in the exercise of ordinary care, and the company was not liable.⁹

§ 4363. **Facts upon which Negligence has been Ascribed in Operating Defective Cars.**—Negligence has been ascribed to railway companies for failure to perform this duty in the following particulars:—Permitting a coupling-pin to be upon the outside of the car while in motion, without being secured in its place, so that the pin falls under the wheels, throwing the train from the track and injuring an employé standing near by;¹⁰ leaving the rear end of a car unprotected, so that the train-conductor, in the discharge of his duty, steps off the car in a moment of forgetfulness in a dark tunnel;¹¹ permitting a car to be used on which the reach-rod is absent from the brake-beam in front of the wheels, causing the beam to hang lower and farther forward than it otherwise would have done, making it dangerous to a brakeman to go between the cars to uncouple them, where this defect is known to the company, or might be known by the exercise of reasonable care;¹² maintaining a car-platform in a rotten and defective condition, so that it gives way, precipitating an employé between the

⁷ Chicago &c. R. Co. v. Platt, 89 Ill. 141. Compare East St. Louis Packing &c. Co. v. Hightower, 92 Ill. 139.

⁸ Louisville &c. R. Co. v. Bates, 146 Ind. 564; s. c. 45 N. E. Rep. 108.

⁹ Louisville &c. R. Co. v. Bates, *supra*.

¹⁰ Doyle v. Chicago &c. R. Co., 77

Iowa 607; s. c. 4 L. R. A. 420; 42 N. W. Rep. 555.

¹¹ Fiero v. New York &c. R. Co., 71 Hun (N. Y.) 213; s. c. 54 N. Y. St. Rep. 373; 24 N. Y. Supp. 805.

¹² Louisville &c. R. Co. v. Buck, 116 Ind. 566; s. c. 2 L. R. A. 520; 28 Am. L. Reg. 148; 19 N. E. Rep. 453.

cars;¹³ maintaining in service a caboose which has been repeatedly condemned and marked as out of repair;¹⁴ maintaining a defective appliance for holding a water-supply pipe in position when not in use, whereby it swung around over the train, precipitating a brakeman therefrom;¹⁵ maintaining in its service "push-cars" without brakes, in consequence of which defect an employé is injured while riding thereon, according to custom, although such cars are employed for the carriage of materials only;¹⁶ allowing a freight-car to remain in service some time after a handle of the ladder has been broken off, in consequence of which a brakeman, in attempting to descend from it in the night, grasps at the supposed handle, misses it, and is killed;¹⁷ maintaining a defective stake used to support lumber on a platform-car, although the stake may have been furnished by a shipper,¹⁸—the liability not being avoided by the fact that the defect was not apparent on a previous inspection of the car, where it had no rules requiring the inspection of stakes, and the inspection given was casual;¹⁹ maintaining in service a car built of defective timbers, which are broken apart in a collision not of sufficient force to have produced this result if the timbers had been sound.²⁰

¹³ Bonner v. Glenn, 79 Tex. 531; s. c. 15 S. W. Rep. 572.

¹⁴ St. Louis & C. R. Co. v. Higgins, 53 Ark. 458; s. c. 44 Am. & Eng. R. Cas. 541; 14 S. W. Rep. 653.

¹⁵ Ohio & C. R. Co. v. Johnson, 31 Ill. App. 183.

¹⁶ Miller v. Union Pac. R. Co., 17 Fed. Rep. 67. *Contra*, York v. Kansas City R. Co., 117 Mo. 405; s. c. 22 S. W. Rep. 1081.

¹⁷ Richmond & C. R. Co. v. Moore, 78 Va. 93.

¹⁸ Bushby v. New York & C. R. Co., 107 N. Y. 374; s. c. 14 N. E. Rep. 407; aff'g s. c. 37 Hun (N. Y.) 104.

¹⁹ Bushby v. New York & C. R. Co., 107 N. Y. 374; s. c. 14 N. E. Rep. 407; aff'g s. c. 37 Hun (N. Y.) 104.

²⁰ Parsons v. Missouri Pac. R. Co., 94 Mo. 286; s. c. 12 West. Rep. 615; 6 S. W. Rep. 464.

Further Particulars in which Negligence has been Ascribed to Railway Companies:—For an electric-railway company to maintain in use a car which, by reason of the worn-out condition of electrical fields, has frequently stopped suddenly and as suddenly started up, where no proper care has been exercised in renewing the fields or proper tests applied to ascertain their condition; since it is bound

to know that, with a low dasher in front, the inevitable result of such action of the car will be to suddenly hurl the motorman upon the ground in front of the car and greatly imperil his life: *Beardsley v. Minneapolis St. R. Co.*, 54 Minn. 504; s. c. 56 N. W. Rep. 176. For a railroad company to leave a *bolt protruding* from the top of a box-car so that a train-hand, while on top of the car in the night-time, strikes his foot against it, causing him to fall and suffer injuries,—with the conclusion that the condition of the bolt was evidence of negligence on the part of the railroad company in failing to discover and remove the same: *International & C. R. Co. v. Bayne*, 28 Tex. Civ. App. 392; s. c. 67 S. W. Rep. 443. For a railroad company to require its employés to handle and ship cars from one place to another on the tracks in the yard of a refining company, the owner of the cars, one of which cars has a *defective stirrup*, a giving way of which injures a servant of the railway company; the court reasoning that it is not the ownership of the cars or the line on which they are operated that imposes the liability, but it is the shifting or handling

§ 4364. **Defects in Cars Brought Into Railway-Yards and Not Properly Inspected.**—A railway company was held liable for the death of a switchman while making a coupling, caused by a defective car which had been brought from a distant point into the railroad-yard two or three hours before the accident, where it had not been inspected, or the inspection had been negligently performed.²¹

§ 4365. **Facts upon which Negligence Not Ascribed.**—But such a company has been held to be not guilty of actionable negligence in the following particulars:—For not having adopted and provided in its cars a resistance-coil for the purpose of making the starting of the

of them by the orders of the railroad company without adequate inspection to discover their condition: *Elkins v. Pennsylvania R. Co.*, 171 Pa. St. 121; s. c. 33 Atl. Rep. 74; 26 Pitts. L. J. (N. S.) 205. For a railroad company to operate in its train a sleeping-car, the *steps* leading from which have been *removed*, without fastening the gate between the platform and the steps, where such gate might easily have been secured, whereby the conductor of its train is injured: *Cameron v. Great Northern R. Co.*, 8 N. D. 124; s. c. 5 Am. Neg. Rep. 454; 12 Am. & Eng. R. Cas. (N. S.) 520; 77 N. W. Rep. 1016. For a railroad company to send out a car with a *handhold* necessary for the safe and prompt performance of the duties of a brakeman in coupling and uncoupling, in an obviously *defective* condition: *Settle v. St. Louis & C. R. Co.*, 127 Mo. 336; s. c. 30 S. W. Rep. 125 (handhold bent in at the center so that it could be grasped only near the ends). For a railroad company whose ordinary cars are low enough to enable its brakemen standing on the top of them to pass under an overhead bridge in safety, to place in its train without notice to its brakemen a car which is so *high* that a brakeman could not safely stand upon it while passing under the bridge in the discharge of his duties: *Southern R. Co. v. Duvall*, 22 Ky. L. Rep. 56; s. c. 56 S. W. Rep. 988; denying rehearing of s. c. 21 Ky. L. Rep. 1153; 54 S. W. Rep. 741; the opinion in which was substituted for that in s. c. 20 Ky. L. Rep. 1915; 50 S. W. Rep. 535, where

the facts are stated (no off. rep.). For a railroad company to use an engine in its switch-yard with its *draw-bar broken* and lying on the track for a space of six and one-half hours, in consequence of which an employé riding on the pilot of an engine in the discharge of his duties receives an injury: *Chicago & C. R. Co. v. Delaney*, 169 Ill. 581; s. c. 48 N. E. Rep. 476; aff'g s. c. 68 Ill. App. 307. For a railroad company to place a brakeman after dark on a car which has just been inspected and passed as in good condition, one of the *rungs of the ladder* of which is so bent down that he cannot get hold of it in getting off the car: *Lake Shore & C. R. Co. v. Ryan*, 70 Ill. App. 45. A brakeman has a right to have *ladders on freight-cars* maintained in good condition, so far as can be done with reasonable care; and where, at the place where a brakeman was killed, the snow was found all trampled, and on top of the snow a broken rung was found, such as is used in the ladders on freight-cars, which was bent or dented, and a portion of the break was rusty and seemed to be old, and a portion was bright as though recently broken, such evidence justified a verdict that defendant was guilty of, and deceased free from negligence, though no one had seen the accident: *Jones v. New York Cent. & C. R. Co.*, 28 Hun (N. Y.) 364; s. c. aff'd, 92 N. Y. 628 (*mem.*).

²¹ *Missouri & C. R. Co. v. Murphy*, 59 Kan. 774 (*mem.*); s. c. in full, 52 Pac. Rep. 863.

car more gradual, at a time when such coils have not become known, approved, and recognized as a useful appliance for that purpose;²² for operating freight-cars with *hand-holds running lengthwise* of the cars, although most of the other owners of cars have them running crosswise, where it appears that many freight-cars have them running lengthwise, and it is not shown that such an arrangement has ever been condemned, or abandoned by prudent railroad companies, or that it has been found more dangerous than any other method;²³ for failing to provide a sufficient *platform* on a car for a man employed thereon to stand upon where the evidence failed to show that the insufficient width of the platform aided in producing the injury which he received;²⁴ for failing to have the *brake-beams* on its cars hung high enough to pass over a brakeman lying on the track between the rails;²⁵ for furnishing a *brake-staff* on a car which gives way when the brakeman attempts to use it as a hand-hold in climbing upon the car while it is in motion, it being sufficient for the purpose for which it is intended;²⁶ for failing to have the *end-gate* of a gondola-car, properly constructed for the purpose for which it was intended, securely fastened so as to allow a brakeman to use it as a hand-hold in attempting to alight from the car while it is in motion.²⁷

²² *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391; s. c. 51 N. W. Rep. 125.

²³ *Chicago & C. R. Co. v. Armstrong*, 62 Ill. App. 228, per Waterman, J., holding that it is not for a jury to say how handholds shall be placed on a car, but that a jury may say whether the handhold as it is placed is reasonably safe for the purpose intended; the burden being on plaintiff to prove that it is not.

²⁴ *Youngbluth v. Stephens*, 104 Wis. 343; s. c. 80 N. W. Rep. 443. The plaintiff was knocked from the front platform of car which he was operating and which was used to take clay out of a pit. The car was drawn out of the pit by a wire rope wound around a drum. Plaintiff was riding with his back to the rope. The rope caught under a plank in the walk between the tracks, raising it up so that as the car advanced it struck and broke plaintiff's leg.

²⁵ *Texas Cent. R. Co. v. Waller*, 28 Tex. Civ. App. 4; s. c. 66 S. W. Rep. 466.

²⁶ *Elgin & C. R. Co. v. Docherty*, 66 Ill. App. 17.

²⁷ *Graham v. Chicago & C. R. Co.*, 62 Fed. Rep. 896.

Other cases where the Company was Exonerated.—Freight-car found on track in a crippled condition, exposing brakeman to unusual risks in managing it: *Judkins v. Maine Cent. R. Co.*, 80 Me. 417; s. c. 6 N. Eng. Rep. 715; 14 Atl. Rep. 735. Injury through defect in car, where the company had exercised reasonable and proper care in respect of it: *Galveston & C. R. Co. v. Davis*, 4 Tex. Civ. App. 468; s. c. 23 S. W. Rep. 301; s. c. aff'd on rehearing, 23 S. W. Rep. 1019. Company using dump-car, such as ordinarily in use, and operating it by usual methods: *Cordelia v. Dwyer*, 9 Misc. (N. Y.) 399; s. c. 61 N. Y. St. Rep. 690; 29 N. Y. Supp. 1073. Derailment, where no defect found in the car upon inspection, either before or after the accident: *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa 105; s. c. 48 N. W. Rep. 1002. The plaintiff was a brakeman in defendant's employ on a train in which were several flat-cars loaded with cord-wood, piled in two rows, lengthwise, on each car. At each end of a row of

§ 4366. **Defects in Cars on Repair-Tracks.**—The rule that a railroad company owes the duty towards its employes of keeping its cars in a reasonably safe condition, does not apply in the case of a car which has been placed upon a repair-track for the purpose of being repaired, because the placing of the car on such a track is of itself notice to employes that it is defective.²⁸

§ 4367. **Bolt Projecting Too Far from the Bottom of a Car.**—A court refused to impute negligence to a railroad company because the foreman of its repair-shop selected a bolt to be driven through the floor of a car, which was one inch longer than was needed, where bolts were frequently used somewhat longer than were required, and where a bolt of a proper length would project an inch and a half below the bottom of the car.²⁹

§ 4368. **Evidence of Negligence, Proximate Cause, Instructions, and Other Questions Relating to the Use of Defective Cars.**—Evidence merely that a *train parted* while going down grade because of the loss or absence of the key to a bolt holding the drawhead of a car in position, is not sufficient to justify a recovery for the death of a railroad brakeman on the ground of defective appliances, where there is also evidence that the train had gone up grade at many places, and, if the key to the bolt had been out of place, would necessarily have parted while going up grade, and that keys of such bolts are frequently lost on all railroads, though not defective, and there is no evidence when or where it was lost; the inference being that it got out of place

wood were two upright stakes, serving to keep the wood in place. The lower ends of the stakes rested in iron sockets. It was the usual custom of brakemen, when ascending or descending from the top of these piles, to seize and rely on these stakes, which were always put in place by the shippers, but which at once became car appliances. The plaintiff walked along on the top of the wood, attempted to descend to the car floor, seized one of these stakes, and it broke and he was thrown down, receiving injuries. The stake was somewhat rotten at its core, but was not shown to be rotten or defective at any other point. There was no evidence that the defendant had notice of the defect, or in the exercise of ordinary care should have discovered it. It

was held there was not sufficient evidence to sustain a verdict in favor of the plaintiff: *Jones v. Chicago &c. R. Co.*, 80 Minn. 488; s. c. 83 N. W. Rep. 446; 49 L. R. A. 640 (stakes were live maple covered with bark, 5 or 6 inches in diameter originally, and trimmed down to 4x5 inches to fit socket).

²⁸ *Brown v. Chicago &c. R. Co.*, 59 Kan. 70; s. c. 52 Pac. Rep. 65; 11 Am. & Eng. R. Cas. (N. S.) 408 (brakeman injured on account of its defective coupling-apparatus while trying to uncouple it from another car).

²⁹ *Holtz v. Great Northern R. Co.*, 69 Minn. 524; s. c. 72 N. W. Rep. 805 (employe on duty under the car came in contact with the bolt, which was too long, and was injured).

just before the train parted.³⁰ The failure to equip a car with an *automatic coupling-device*, by reason of which a car-coupler was obliged to go between the cars, where he was crushed, is a proximate cause of the accident, though the cars were forced together by the negligent kicking of other cars against them.³¹ Evidence of negligence has been discovered in the fact that freight-cars are operated in a railway-train having an oval or rounded top, without any runway upon them, and higher than other cars in the train, where the train is not equipped with air-brakes, so that the brakemen will have to move about over the top of the cars in the discharge of their duties.³²

§ 4369. Federal Statute Requiring Hand-holds on Freight-Cars.—

The Federal statute regulating interstate commerce³³ requires every car engaged in such business to be furnished with hand-holds. It has been held that a train operated by a railroad company engaged in the transportation of freight across an entire State, and for a considerable distance within another, is a "through train," within the meaning of the statute, and is, with every car composing it, required to be furnished with hand-holds; and the failure of the company to maintain such hand-holds is negligence *per se*.³⁴

³⁰ Tuck v. Louisville & C. R. Co., 98 Ala. 150; s. c. 12 South. Rep. 168.

³¹ Voelker v. Chicago & C. R. Co., 116 Fed. Rep. 867. Evidence that a certain car was brought to the station from a station where there were repair-shops at which all cars arriving at that station were inspected, and, if necessary, repaired, is sufficient to show due precaution by a railroad company to repair the car through alleged defects in which an employé was injured in attempting to couple it to a locomotive at the former station, in the absence of sufficient proof of the identity of the two cars: Van Tassel v. New York & C. R. Co., 1 Misc. (N. Y.) 299; s. c. 48 N. Y. St. Rep. 767; 20 N. Y. Supp. 708. Circumstantial evidence held sufficient to sustain a finding that the railroad company was negligent in failing to provide a safe fastening to the key holding a drawhead-stem: Missouri & C. R. Co. v. Cox (Tex. Civ. App.), 55 S. W. Rep. 354; rehearing denied, 56 S. W. Rep. 97 (no off. rep.). Circumstances under which the refusal to charge that the mere

absence of a nut from a bolt used in fastening a stirrup to a car, and the mere giving way of the stirrup on the brakeman attempting to mount the car, would not establish negligence, was proper: Missouri & C. R. Co. v. Bailey, 28 Tex. Civ. App. 609; s. c. 68 S. W. Rep. 803. The act of a car-inspector in moving a defective car into a position where an employé upon a train is likely to be injured is not a mere act of omission or nonfeasance, for which the company alone would be liable, but is one of misfeasance, which will render the car-inspector liable to the injured employé: Hukill v. Maysville & C. R. Co., 72 Fed. Rep. 745.

³² Rogers v. Louisville & C. R. Co., 88 Fed. Rep. 462 (but as there was no proof at all that deceased fell from this particular car, or why he fell, the court directed a verdict for defendant).

³³ U. S. Comp. Stat. 1901, p. 3174, § 4; 27 U. S. Stat. at Large, ch. 196, § 4; Act Cong. March 2, 1893.

³⁴ Malott v. Hood, 99 Ill. App. 360.

§ 4370. **Ohio Statute Prohibiting Use of Defective Cars, etc., and Charging Company with Knowledge of Defects.**—A statute of Ohio prohibits every railroad company from knowingly or negligently using or operating any defective car or locomotive, or any car or locomotive with defective machinery or attachments; and charges it with knowledge, before and at the time of an injury to an employé, of such defects; and makes proof of the fact of a defect *prima facie* evidence of negligence.³⁵ In an action brought under this statute it appeared that one car in a freight-train was a flat-car, loaded with heavy stone, which car was without side or end boards or standards. One of the stones fell off, whereby the train was wrecked, and a brakeman, the plaintiff's intestate, was killed. The administrator of the deceased brought suit against the railroad company for damages for negligently causing the intestate's death, averring negligence of the railroad company in furnishing a defective and unsafe car. It was held that the use of such flat-car was not the use of a defective car or one with defective appliances within the meaning of the statute.³⁶ Another case holds that, in an action for personal injuries by a brakeman, a railroad company, in order to overcome this statutory presumption that it knew of the defects causing the injury and was guilty of negligence, must show that in fact it did not have such knowledge, and that it used due diligence to ascertain and remedy such defects.³⁷

ARTICLE IX. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTS IN "FOREIGN" CARS.

SECTION

4373. Duty of a railway company in respect of cars received from another company.

4374. This duty of inspecting "foreign" cars a positive and unassignable duty.

4375. Theoretical measure of this duty—Degree of care required in its performance.

4376. This duty gauged by the standard of "ordinary care."

SECTION

4377. Duty of a railway company to inspect "foreign" cars the same as its own.

4378. Nature and extent of the inspection required.

4379. Duty exists although compelled by constitutional mandate to receive and transport such cars.

4380. Receiving company may break seals of "foreign" cars if necessary to a suitable inspection.

³⁵ Bates' Ann. Ohio Stat. (2d ed.), § 3365-21; 87 Ohio Laws, 149; Act April 2, 1890.

³⁶ Toledo &c. R. Co. v. Beard, 20

Ohio C. C. 681; s. c. 11 Ohio C. D. 406.

³⁷ Railway Co. v. Erick, 51 Ohio St. 146; s. c. 31 Ohio L. J. 260; 37 N. E. Rep. 128.

SECTION

4381. Duty of railroad company to inspect the coupling-devices of "foreign" cars.
4382. But not negligence to receive and use on its own road "foreign" cars having different coupling-devices from its own.
4383. Railroad company not liable for defects which a reasonable inspection would not disclose.
4384. Both the sending and the receiving company may be liable.
4385. Rule of proximate cause operates to charge sending company for an injury to servant of receiving company.

SECTION

4386. Railroad company not liable for defects which are plainly marked and indicated so as to put the risk upon the employé.
4387. Railroad company liable to its employés for care of defective "foreign" cars while on its repair-tracks.
4388. Duty of inspection of "foreign" cars extends to the manner in which such cars are loaded.
4389. No duty of inspecting "foreign" cars received for the mere purpose of unloading.
4390. Injuries received in shifting standard-gauge car-bodies upon narrow-gauge trucks.

§ 4373. **Duty of a Railway Company in Respect of Cars Received from Another Company.**—It is the duty of a railroad company, after receiving cars from another company to be transported over its line, to subject them to a reasonable inspection before attaching them to its train or permitting them to be hauled therein, for the purpose of ascertaining whether they are fit for service, and to reject them, if they are found to be unfit, until they are suitably repaired; and it is liable to one of its own employés, injured by reason of its failure to perform this duty.¹

¹ Louisville &c. R. Co. v. Davis, 91 Ala. 487; Denver &c. R. Co. v. Smock, 23 Colo. 456; s. c. 48 Pac. Rep. 681 (owes to its employés the duty of exercising reasonable precautions to see that a foreign car is in proper repair); Sack v. Dolese, 137 Ill. 129 [but see Ohio &c. R. Co. v. Wangelin, 43 Ill. App. 324]; Chicago &c. R. Co. v. Gillison, 72 Ill. App. 207; s. c. aff'd, 173 Ill. 264; 50 N. E. Rep. 657; Chicago &c. R. Co. v. Armstrong, 62 Ill. App. 228; Illinois &c. R. Co. v. Barslow, 94 Ill. App. 206; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; s. c. 20 N. E. Rep. 287; Louisville &c. R. Co. v. Bates, 146 Ind. 564; s. c. 45 N. E. Rep. 108; Missouri Pac. R. Co. v. Barber, 44 Kan. 612; s. c. 44 Am. & Eng. R. Cas. 523; 24 Pac. Rep. 969;

Atchison &c. R. Co. v. Penfold, 57 Kan. 148; s. c. 45 Pac. Rep. 574 (where there is time and opportunities for such inspection); Atchison &c. R. Co. v. Seeley, 54 Kan. 21; Louisville &c. R. Co. v. Williams, 95 Ky. 199; s. c. 15 Ky. L. Rep. 548; 24 S. W. Rep. 1; Budge v. Morgan's Louisiana &c. R. &c. Co., 108 La. 349; s. c. 32 South. Rep. 535; Bomar v. Louisiana &c. R. Co., 42 La. An. 983; s. c. 8 South. Rep. 478; rehearing denied, 42 La. An. 1206; s. c. 9 South. Rep. 244; Chandler v. New York &c. R. Co., 159 Mass. 589; Coffee v. New York &c. R. Co., 155 Mass. 21; Dewey v. Detroit &c. R. Co., 97 Mich. 343; s. c. 16 L. R. A. 342; Sheedy v. Chicago &c. R. Co., 55 Minn. 357; s. c. 57 N. W. Rep. 60; Mateer v. Missouri &c. R. Co., 105

§ 4374. **This Duty of Inspecting "Foreign" Cars a Positive and Unassignable Duty.**—But this duty of a railroad company to make a reasonable inspection of cars which it receives from another company and which its own employes are required to handle, is a positive duty

Mo. 320; *Chicago &c. R. Co. v. Curtis*, 51 Neb. 442; s. c. 71 N. W. Rep. 42 (not negligence to receive and draw cars of another company equipped with double buffers while its own are equipped with single buffers); *Hayden v. Platt*, 84 Hun (N. Y.) 487; s. c. 32 N. Y. Supp. 1144; 65 N. Y. St. Rep. 875 (company responsible for an injury to a brakeman caused by the absence of a nut from the top of a brake-staff which held the lever fast to it, notwithstanding an imperfect inspection made a short time before the injury); *Gottlieb v. New York &c. R. Co.*, 100 N. Y. 462; s. c. 1 Cent. Rep. 728 (injury resulted from a drawhead or bumper which was defective in construction, which defect could have been easily observed); *Goodrich v. New York &c. R. Co.*, 116 N. Y. 398; s. c. 26 N. Y. St. Rep. 767; 5 L. R. A. 750; 41 Am. & Eng. R. Cas. 259; 22 N. E. Rep. 397; *McDonald v. Fitchburg R. Co.*, 19 App. Div. (N. Y.) 577; s. c. 46 N. Y. Supp. 600; 80 N. Y. St. Rep. 600; *Dolan v. Burden Iron Co.*, 62 App. Div. (N. Y.) 545; s. c. 71 N. Y. St. Rep. 145 (cars of different roads coming to the different yards, some having drawbars higher than others, making coupling more dangerous, excused where the injured brakeman is aware of the fact); *Mason v. Richmond &c. R. Co.*, 111 N. C. 482; s. c. 18 L. R. A. 845; *Leak v. Carolina &c. R. Co.*, 124 N. C. 455; s. c. 32 S. E. Rep. 884; *Hunt v. Caldwell*, 22 Ohio C. C. 283; s. c. 11 Ohio C. D. 562 (defective eyebolt excused); *Dooner v. Delaware &c. Canal Co.*, 164 Pa. St. 17; s. c. 10 Am. Rail. & Corp. Rep. 264; 30 Atl. Rep. 269 (must use ordinary or reasonable care to see that it is furnished with such car-handles, ladders, or safeguards as are in common use); *Jones v. New York &c. R. Co.*, 20 R. I. 210; s. c. 37 Atl. Rep. 1033 [quoting with approval *Gottlieb v. New York &c. R. Co.*, 100 N. Y. 462; aff'g s. c. 29 Hun (N. Y.) 637]; *Wallingford v. Columbia &c. R. Co.*, 26 S. C. 258; *Louisville &c.*

R. Co. v. Reagan, 96 Tenn. 128; s. c. 33 S. W. Rep. 1050; *St. Louis &c. R. Co. v. Putnam*, 1 Tex. Civ. App. 142; *Eddy v. Prentice*, 8 Tex. Civ. App. 58; s. c. 27 S. W. Rep. 1063; *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487; s. c. 3 Chic. L. J. Wkly. 99; 43 S. W. Rep. 1090 (when bound to make an inspection of the inside of a foreign car although sealed); *Galveston &c. R. Co. v. Nass* (Tex. Civ. App.), 57 S. W. Rep. 910 (no off. rep.); *Missouri &c. R. Co. v. Baker* (Tex. Civ. App.), 68 S. W. Rep. 556 (no off. rep.); *Houston &c. R. Co. v. Milam* (Tex. Civ. App.), 58 S. W. Rep. 735 (no off. rep.); s. c. rev'd on rehearing, on other grounds' (Tex. Civ. App.), 60 S. W. Rep. 591 (no off. rep.) (company permitting locomotive of another company to be used in its own yard); *International &c. R. Co. v. Kernan*, 78 Tex. 294; s. c. 9 L. R. A. 703; 44 Am. & Eng. R. Cas. 607; 14 S. W. Rep. 668; *Southern Pac. Co. v. Winton*, 27 Tex. Civ. App. 503; s. c. 66 S. W. Rep. 477; *Texas &c. R. Co. v. Archibald*, 75 Fed. Rep. 802; s. c. 41 U. S. App. 567; *Texas &c. R. Co. v. Archibald*, 170 U. S. 665; s. c. 42 L. ed. 1188; *Baltimore &c. R. Co. v. Mackey*, 157 U. S. 72; s. c. 39 L. ed. 624; 15 Sup. Ct. Rep. 491; *Mackey v. Baltimore &c. R. Co.*, 19 D. C. 282; s. c. 18 Wash. L. Rep. 767; *Comb v. London &c. R. Co.*, 31 L. T. (N. S.) 613. *Loaded cars* received from other railroads form a part of the "*works and machinery*" of the company receiving them, within the meaning of Mass. St. 1887, ch. 270, so that the company is not bound to use them in its own train, if, on inspection, they are found to be unsafe: *Bowers v. Connecticut River R. Co.*, 162 Mass. 312; s. c. 38 N. E. Rep. 508; *Peirce v. Bane*, 80 Fed. Rep. 988; s. c. 53 U. S. App. 297. When the foreign car may be returned to the sending company as defective: *Atchison &c. R. Co. v. Mayers*, 76 Fed. Rep. 443; s. c. 46 U. S. App. 226; 22 C. C. A. 267.

which it owes to its employes, and is an unassignable duty in the sense which makes it responsible for the negligence of its inspector whom it employs to discharge it.²

§ 4375. Theoretical Measure of this Duty—Degree of Care Required in its Performance.—The railway company using such “foreign” cars is under the plain duty of subjecting them to such an inspection as will discover latent defects or dangers, which would not be apparent to its employes required to use them.³ This duty extends to all defects which would be disclosed by a reasonably careful inspection.⁴ For example, the fact that a car is received from another road for transportation does not relieve the company from the duty towards its own employe of using ordinary and reasonable care to see that it is furnished with such *car-handles, ladders*, or other safeguards as are in common use.⁵

§ 4376. This Duty Gauged by the Standard of “Ordinary Care.”—The duty of a railroad company as to “foreign” cars received in regular course of business for transportation over its lines is that of exercising ordinary care in inspecting them to see if they are in reasonably safe condition of repair, and if found to be out of repair, to put them in a reasonably safe condition of repair, or notify its employes of their condition. The ordinary care required is such care as the time, place, means and opportunity, and the requirements and exigencies of commerce, will permit. The company is not required to resort to tests that are impracticable, or unreasonable and oppressive, or which would be incompatible with the proper furtherance of the business, and which are only required to insure absolute safety.⁶

§ 4377. Duty of a Railway Company to Inspect “Foreign” Cars the Same as its Own.—In some of the cases, the rule is broadly stated that a railroad company which accepts and puts into one of its trains a car belonging to another company, is under the same duty to its

² New Orleans &c. R. Co. v. Clements, 40 C. C. A. 465; s. c. 100 Fed. Rep. 415; *ante*, § 3791.

³ *Ante*, § 3801; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; s. c. 39 L. ed. 624; 15 Sup. Ct. Rep. 491.

⁴ Felton v. Bullard, 94 Fed. Rep. 781; s. c. 42 Ohio L. J. 218; 14 Am. & Eng. R. Cas. (N. S.) 547; 37 C. C. A. 1; McDonald v. Fitchburg R. Co., 19 App. Div. (N. Y.) 577; s. c. 46 N. Y. Supp. 600.

⁵ Dooner v. Delaware &c. Canal Co., 164 Pa. St. 17; s. c. 10 Am. Rail. & Corp. Rep. 264; 30 Atl. Rep. 269.

⁶ Louisville &c. R. Co. v. Bates, 146 Ind. 564 (inspection need only be made in the usual and ordinary way, the way commonly adopted by those in like business). See also, McDonald v. Fitchburg R. Co., 19 App. Div. (N. Y.) 577; s. c. 46 N. Y. Supp. 600; 80 N. Y. St. Rep. 600.

employés, in respect to defects therein, as if it were its own.⁷ The sound view is that a railroad company must inspect "foreign" cars running over its road just as it is required to inspect its own after they have been in use.⁸ With respect to the cars of other companies which it allows to come into its yard, and which, while there, are to be moved and handled by its employés, a railroad company is bound to use due diligence and care in seeing that the cars are safe to be so handled by its servants; and such company cannot divest itself of this duty to its servants by a contract with such other companies whose cars are used that the latter shall keep them in repair. The general rule is that the employer is bound to use due diligence in providing and maintaining safe machinery and instrumentalities to be handled and used by his employés, without regard to the ownership of the same.⁹

§ 4378. Nature and Extent of the Inspection Required.—It is said that it does not follow from the foregoing rule that what may be reasonable inspection for one of its own cars shall be demanded as

⁷Louisville &c. R. Co. v. Davis, 91 Ala. 487; s. c. 8 South. Rep. 552; Sack v. Dolese, 35 Ill. App. 636; s. c. aff'd, on other grounds, 137 Ill. 129; 27 N. E. Rep. 62; Chicago &c. R. Co. v. Avery, 109 Ill. 314; Bender v. St. Louis &c. R. Co., 137 Mo. 240; s. c. 37 S. W. Rep. 132; Mateer v. Missouri Pac. R. Co. (Mo.), 15 S. W. Rep. 970 (no off. rep.); Union Stock Yards Co. v. Goodwin, 57 Neb. 138; s. c. 77 N. W. Rep. 357; 12 Am. & Eng. R. Cas. (N. S.) 502; Eaton v. New York &c. R. Co., 163 N. Y. 391; s. c. 57 N. E. Rep. 609; rev'g s. c. 43 N. Y. Supp. 666; 14 App. Div. (N. Y.) 20; Dooner v. Delaware &c. Canal Co., 171 Pa. St. 581; s. c. 26 Pitts. L. J. (N. S.) 227; 33 Atl. Rep. 415 (duty in respect to appliances on cars received from other roads not higher than that in respect to appliances on its own cars); Jones v. New York &c. R. Co., 20 R. I. 210; s. c. 3 Am. Neg. Rep. 496; 11 Am. & Eng. R. Cas. (N. S.) 414; 37 Atl. Rep. 1033 (grab-iron on top of car loose); St. Louis &c. R. Co. v. Putnam, 1 Tex. Civ. App. 142; s. c. 20 S. W. Rep. 1002; Jones v. Shaw, 16 Tex. Civ. App. 290; s. c. 41 S. W. Rep. 690; Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503; s. c. 66 S. W. Rep. 477; Texas &c. R. Co. v.

Archibald, 75 Fed. Rep. 802; s. c. 41 U. S. App. 567 (degree of care required of a railroad company to inspect cars coming from other roads to be merely loaded and returned, is not less than that as to cars to be sent out upon its own road); New Orleans &c. R. Co. v. Clements, 40 C. C. A. 465; s. c. 100 Fed. Rep. 415. It has been reasoned that the negligence of the connecting line with respect to the condition of the cars before they were delivered to the receiving company cannot be imputed to the latter; but its duty to its own employés will be measured by what it ought to have done while the cars were in its possession: Illinois &c. R. Co. v. Barslow, 94 Ill. App. 206. That the owner of a quarry, using a car furnished by a railroad company to convey stone from its quarry to the railroad, owes the same duty to its employés in respect to such car as though the car were owned by it,—is held in Spaulding v. W. N. Flynt Granite Co., 159 Mass. 587; s. c. 34 N. E. Rep. 1134.

⁸Gutridge v. Missouri Pac. R. Co., 94 Mo. 468; s. c. 13 West. Rep. 644; 7 S. W. Rep. 476.

⁹Chicago &c. R. Co. v. Avery, 109 Ill. 314; aff'g s. c. 10 Ill. App. 210; s. c. on prior appeal, 8 Ill. App. 133.

alone reasonable for a "foreign" car, received for through transit. The time, place, and general opportunity for inspection, and the fact that the "foreign" car comes to hand as one actually on trial, showing its fitness, all should be considered.¹⁰ In another case a statement of the duty has been qualified by adding, where there is time and opportunity to do so.¹¹ Another court makes a similar qualification by stating the proposition with the additional clause that the receiving company has had an opportunity to inspect the "foreign" car.¹² But it should seem that if there has not been time and opportunity, the receiving company should make one. Another court reasons that the railroad company performs its duty in respect to "foreign" cars received for through transit, by employing sufficient competent and suitable inspectors, acting under proper superintendence, rules and instructions; and *in such case* the inspectors are fellow servants with brakemen while such cars are in transit, and until ready to be inspected for a new service,—as, their return.¹³ But this holding necessarily repudiates the doctrine, so essential to the safety of the servants of the railway company and of the public, that this duty of inspection is a positive and unassignable duty,¹⁴ and denies the operation of the rule of *respondeat superior* with respect to it, and does not represent the American law. The diametrical reverse of the Massachusetts case was held by a United States Circuit Court of Appeals in laying down the proposition that this duty of inspection is not discharged by the employment of a competent inspector for that purpose, but the railroad company is answerable for the negligence of its inspector under the rule of *respondeat superior*.¹⁵ Another decision, rendered by a divided court, holds that one railroad company, receiving a loaded car from another railroad company and running it upon its own road, is *not bound to repeat the tests* which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact.¹⁶ Repeating this language, it has been held by another court that this duty of inspection does not render the receiving company liable to its own servants for an injury caused by a

¹⁰ Alabama &c. R. Co. v. Carroll, 84 Fed. Rep. 772; s. c. 52 U. S. App. 442; 28 C. C. A. 207 (an inspection by train employés about the only inspection practicable).

¹¹ Atchison &c. R. Co. v. Penfold, 57 Kan. 148.

¹² Bender v. St. Louis &c. R. Co., 137 Mo. 240; s. c. 37 S. W. Rep. 132.

¹³ Mackin v. Boston &c. R. Co., 135 Mass. 201; s. c. 46 Am. Rep. 456.

¹⁴ *Ante*, §§ 3791, 4374.

¹⁵ Felton v. Bullard, 94 Fed. Rep. 781; s. c. 42 Ohio L. J. 218; 14 Am. & Eng. R. Cas. (N. S.) 547; 37 C. C. A. 1.

¹⁶ Ballou v. Chicago &c. R. Co., 54 Wis. 257; s. c. 41 Am. St. Rep. 31; 11 N. W. Rep. 559.

hidden defect in the "foreign" car which would not be discovered by such an inspection as the exigency of the traffic permits. The receiving company is not required to repeat the tests which are proper to be used in the original construction of such car, but it may assume that all parts of the car which appear, upon ordinary examination, to be in good condition, are in fact so; but the duty of exercising reasonable or ordinary care requires a more careful inspection of an old, dilapidated car than of one which presents a good appearance to casual observation.¹⁷ It has been held that where the "foreign" car is received for a long journey,—for example, six hundred miles,—a single inspection at the receiving-station is not, as matter of law, sufficient; but it may become the duty of the receiving company, in the exercise of ordinary or reasonable care, to cause it to be inspected at other inspection-stations during its journey.¹⁸ It has also been held that the fact that the cars received from the other road will be only used for a short time or carried for a short distance will not relieve the company receiving them from the duty toward its own employés to make such reasonable inspection.¹⁹

§ 4379. Duty Exists Although Compelled by Constitutional Mandate to Receive and Transport such Cars.—A railroad company is not exonerated from the performance of this duty by a constitutional mandate compelling them to receive the cars of other companies and take them over its line; since such a mandate must be construed reasonably, and it will not be so construed as to make it the duty of a railway company to receive cars which are in an unsafe condition, and so defective in construction as to render them unsafe for those who are required to handle them.²⁰ But, on the other hand, a railway company will not be imputable with negligence where, in obedience to constitutional or statutory mandates of this kind, it receives and transports the cars of other companies, which cars are in sound condition, although *differing in their coupling-apparatus* from those of the receiving company.²¹

¹⁷ *Louisville &c. R. Co. v. Bates*, 146 Ind. 564; s. c. 45 N. E. Rep. 108. Case where the action failed because of the failure to identify the car-repairer whose duty it was to make the inspection, and to whom it was claimed notice was given of the defect: *Illinois &c. R. Co. v. Barslow*, 94 Ill. App. 206.

¹⁸ *Missouri &c. R. Co. v. Baker* (Tex. Civ. App.), 68 S. W. Rep. 556 (no off. rep.).

¹⁹ *Atchison &c. R. Co. v. Penfold*, 57 Kan. 148; s. c. 45 Pac. Rep. 574.

²⁰ *Louisville &c. R. Co. v. Williams*, 95 Ky. 199; s. c. 15 Ky. L. Rep. 548; 24 S. W. Rep. 1. To the same effect under Miss. Const., § 184,—see *Illinois &c. R. Co. v. Price*, 72 Miss. 862; s. c. 18 South. Rep. 415.

²¹ *Thomas v. Missouri &c. R. Co.*, 109 Mo. 187; s. c. 18 S. W. Rep. 980.

§ 4380. **Receiving Company may Break Seals of "Foreign" Cars if Necessary to a Suitable Inspection.**—Negligence may be imputed to a railroad company because of its failure to inspect on the inside a car received from another company, although such car was sealed, where a reasonable inspection of the car from the outside would have shown signs of a defect in the ladder on the side of the car, and an inspection from the inside was required to see whether or not it was actually safe. If an inspection from the outside should indicate the necessity of an inside inspection, it would be the duty of the company to inspect from the inside though it had to break a dozen seals and unload the entire car; or else it should decline to haul the car.²²

§ 4381. **Duty of Railroad Company to Inspect the Coupling-Devices of "Foreign" Cars.**—It need not be said that a railroad company is under the duty of inspecting and of repairing when necessary the coupling-apparatus upon cars received from other companies to be transported over its own road.²³ Negligence has been ascribed to railroad companies where they have received from other companies, and placed in charge of their own servants, cars having *defective bumpers*,²⁴ and cars having *no bumpers* at all,²⁵ and freight-cars with *defective beams*,²⁶ and cars having *draw-bars* so constructed that they will slide past the cars of the company receiving them.²⁷

§ 4382. **But Not Negligence to Receive and Use on Its Own Road "Foreign" Cars having Different Coupling-Devices from Its Own.**—

²² *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487.

²³ *Post*, § 4406, *et seq.*; *Chicago &c. R. Co. v. Gillison*, 72 Ill. App. 207; s. c. *aff'd*, 173 Ill. 264; 50 N. E. Rep. 657; *Bender v. St. Louis &c. R. Co.*, 137 Mo. 240; *Goodrich v. New York Cent. &c. R. Co.*, 116 N. Y. 398; s. c. 26 N. Y. St. Rep. 767; 22 N. E. Rep. 397; *rev'g* s. c. 3 N. Y. St. Rep. 774 (following *Gottlieb v. New York &c. R. Co.*, *infra*). A railroad company was transporting over its own road two cars of different gauge belonging to other companies. When a brakeman attempted to couple them in the night-time the drawheads slipped past each other, and, the bumpers projecting only three inches on each car, he was crushed. The defect was held to be an obvious one, and easily remedied, and the company was guilty of negligence in not

doing so; and the fact that the cars belonged to other companies did not exonerate the defendant, since it was bound to inspect such cars the same as its own, and was responsible for the consequences of such defects as ordinary inspection would disclose. It must either remedy the defects or refuse to take the cars: *Gottlieb v. New York &c. R. Co.*, 100 N. Y. 462; *aff'g* s. c. 29 Hun (N. Y.) 637.

²⁴ *Gottlieb v. New York &c. R. Co.*, 100 N. Y. 462; *aff'g* s. c. 29 Hun (N. Y.) 637.

²⁵ *Mason v. Richmond &c. R. Co.*, 111 N. C. 482; s. c. 18 L. R. A. 845; 16 S. E. Rep. 698; 53 Am. & Eng. R. Cas. 183.

²⁶ *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612; s. c. 24 Pac. Rep. 969; 44 Am & Eng. R. Cas. 523.

²⁷ *Ohio &c. R. Co. v. Wangelin*, 43 Ill. App. 324.

Outside of these considerations, it seems to be a sound conclusion that it is not actionable negligence in a railway company to receive and haul over its own road cars of another company having coupling-arrangements of a different pattern from those which are in use on its own road;²⁸ or, at least, that when it does receive such cars, and commits them to the charge of brakemen who are well acquainted with their structure, and who, consequently, know the risk which will be run in coupling them to the cars in use upon the particular road, such brakemen assume the ordinary risks which arise from such difference in the coupling-arrangements.²⁹ For example, it is not negligence, as matter of law, for a railroad company to receive "foreign" cars, the draw-bars of which are lower than those of its own cars, and to furnish such cars to its own employés to handle in connection with its own cars. And if the draw-bar complained of is shown to be of the same height as those on cars in general use throughout the country, then the company receiving and using a car having such a draw-bar, is, as matter of law, not imputable with negligence.³⁰

§ 4383. Railroad Company Not Liable for Defects which a Reasonable Inspection would Not Disclose.—Outside of this, it is almost a truism that the railway company will not be liable because, in making such an inspection, it failed to discover all possible defects, latent or patent; it is only liable for such as should have been discovered by the exercise of reasonable care and skill.³¹ It is hence not responsible for injuries to its own employés from latent defects which could not be discovered by such an inspection as the exigencies of the traffic will permit in the exercise of reasonable care.³²

²⁸ *Louisville &c. R. Co. v. Boland*, 96 Ala. 626; s. c. 18 L. R. A. 260; 43 Am. & Eng. R. Cas. 169; 11 South. Rep. 667.

²⁹ *Kohn v. McNulta*, 147 U. S. 238. *Examine Baldwin v. Chicago &c. R. Co.*, 50 Iowa 680; *Indianapolis &c. R. Co. v. Flanigan*, 77 Ill. 365; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212; *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 253; *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187; s. c. 18 S. W. Rep. 980 (no matter how peculiar or hazardous their couplings are).

³⁰ *Wabash R. Co. v. Farrell*, 79 Ill. App. 508; s. c. 31 Chic. Leg. N. 199.

³¹ *Allen v. Union Pac. R. Co.*, 7 Utah 239; s. c. 26 Pac. Rep. 297.

³² *Wabash R. Co. v. Farrell*, 79 Ill. App. 508; s. c. 31 Chic. Leg. N.

199. When, therefore, the whole evidence showed beyond dispute that the sole cause of the injury was the use of one bolt of insufficient length in fastening a slat of the ladder of a foreign freight-car, together with the somewhat decayed condition of the wood at the bolt, and there was no external indication of these defects, and the injured employé had been in the habit of using the same car and the same ladder,—it was held that the railway company was not negligent in assuming that the car was in fact in good condition, since it appeared to be so, and consequently that there was no error in directing a nonsuit: *Ballou v. Chicago &c. R. Co.*, 54 Wis. 257; s. c. 41 Am. Rep. 31.

§ 4384. **Both the Sending and the Receiving Company may be Liable.**—Both the railroad company employing one injured by a defective car delivered to it by another company, and the latter company, are liable to such employé for the injury sustained, provided such defect be due to the negligence of such companies.³³

§ 4385. **Rule of Proximate Cause Operates to Charge Sending Company for an Injury to Servant of Receiving Company.**—Where companies controlling connecting lines transport over their respective lines loaded freight-cars of the other, under a traffic arrangement by which they share the earnings; and one company delivers to the other to be transported over its line a car that is so defective in its equipments as to be dangerous to handle, which should have been inspected and repaired before being so delivered; and in consequence of such defective condition of the car an employé of the receiving company is injured while handling it in the course of his employment,—the negligence of the sending company in delivering the car for transportation without proper inspection and repair is the proximate cause of the injury, although the employer company should also have inspected the car when it was received, and was negligent in that duty; the negligence of the receiving company, while contributing to produce the injury, is not an independent cause breaking the causal connection between the injury and original negligence of the company furnishing the car for transportation; and either company, or both, may be held responsible. The company delivering the car to the other company should anticipate that employés of the latter company would go upon the car and handle it, and thereby be exposed to the danger of receiving injury, as a natural and probable consequence of its defective condition, and owes such employés the duty of using reasonable care to discover and remove its dangerous defects before it is delivered.³⁴

³³ *Pennsylvania R. Co. v. Meyers*, 12 Ohio C. C. 263. It has been held that where one railroad company delivers a car-load of lumber to another railroad company for transshipment over its line, and the latter company neglects to inspect the manner in which the lumber is loaded, and some of it, by reason of not being properly loaded, falls on one of the switchmen of the receiving company and kills him, the former company is not liable for his death: *Lellis v. Michigan &c.*

R. Co., 124 Mich. 37; s. c. 82 N. W. Rep. 828. It would seem that the decision ought to have been the other way. The negligence of the master of the servant who was killed ought not to operate to relieve the company loading the car from liability, under the present doctrine with respect to *imputed negligence*: Vol. I, § 77.

³⁴ *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342; s. c. 45 N. E. Rep. 559.

§ 4386. **Railroad Company Not Liable for Defects which are Plainly Marked and Indicated so as to Put the Risk upon the Employé.**—According to the view of another court, a railroad company is not liable for delivering to a coal company a car having defects which are plainly marked and indicated, so as to enable the employés of the coal company to avoid injury from them, and so as to put upon such employés the risk of injury from using them. On this ground it was held that a railroad company was not liable for an injury to the employé of the coal company, caused by one missing brake and one defective brake on a car loaded with coal and delivered to the coal company to be unloaded, where the defects were plainly marked on one end of the car with chalk in large, plain letters, “No brake,” and on the other end, “Bad brake,” and the car was placed on a trestle in this condition by a fellow servant of the injured employé.³⁵ It was also reasoned in the same case that the coal company was not liable; since the defective car was not a part of their machinery, used in their business, but was the thing worked upon, not the thing worked with; and the negligence in placing the car on the trestle, though manifest, was that of a fellow servant.^{35a}

§ 4387. **Railroad Company Liable to its Employés for Care of Defective “Foreign” Cars while on its Repair-Tracks.**—A railroad company may also become liable to its employés for its want of care of defective “foreign” cars while on its repair-tracks, in consequence of which its own employés are injured. Thus, a railroad company which has had transient cars of other companies in its use or employment regularly inspected, condemned, and ordered to be sent to the shops for repair, and has had them regularly tagged so as to warn employés of that fact, does not fully discharge its duty towards one engaged in the performance of *night service* as a car-coupler unless the tags are of such size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact.³⁶

§ 4388. **Duty of Inspection of “Foreign” Cars Extends to the Manner in which such Cars are Loaded.**—This inspection has been held to extend to the manner in which such cars are *loaded*; so the fact that loaded cars were received by a railroad company from another road does not relieve the company from liability for injuries to

³⁵ *Rehm v. Pennsylvania R. Co.*, 164 Pa. St. 91; s. c. 30 Atl. Rep. 356. ³⁶ *Meyers v. Illinois & C. R. Co.*, 49 La. An. 21; s. c. 21 South. Rep. 120.

^{35a} *Rehm v. Pennsylvania R. Co.*, *supra*.

a brakeman, caused by the improper manner in which they were loaded.⁸⁷

§ 4389. **No Duty of Inspecting "Foreign" Cars Received for the Mere Purpose of Unloading.**—It has also been held, that the rule requiring such an inspection is not applicable to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting them to unload the freight.⁸⁸

§ 4390. **Injuries Received in Shifting Standard-Gauge Car-Bodies upon Narrow-Gauge Trucks.**—The same court has held that, the shifting of broad-gauge or standard car-bodies upon narrow-gauge trucks for transportation being a regular part of the business of narrow-gauge railroads, the narrow-gauge company is not liable for the death of an employé caused by the tipping over of a broad-gauge or standard car-body on which he was riding, where there is no showing that the way in which the shifting was done was either dangerous or unusual.⁸⁹

ARTICLE X. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTIVE BRAKES, BRAKE-BEAMS, CHAINS, ETC.

SECTION

4393. Liability of railway companies to their employés for injuries from defective brakes, brake-beams, chains, etc.

4394. Duty of exercising reasonable care with respect to such appliances a positive and unassignable one.

4395. Company under a duty of continuing inspection.

4396. Not liable for what latent defects.

4397. Defect must have been the proximate cause of the injury.

SECTION

4398. Company must have had knowledge or means of knowledge and opportunity to repair.

4399. Injuries arising from the failure of air-brakes to work.

4400. Conditions of fact under which company held liable.

4401. Circumstances under which company not liable.

4402. Illinois statute requiring brake on rear car of train.

4403. South Carolina statute requiring brakes on certain freight-cars.

⁸⁷ *Dewey v. Detroit &c. R. Co.*, 97 Mich. 329; s. c. 16 L. R. A. 342; 12 Rail. & Corp. L. J. 154; 52 N. W. Rep. 942. But see *Mexican &c. R. Co. v. Shean (Tex.)*, 18 S. W. Rep. 151 (no off. rep.).

⁸⁸ *McMullen v. Carnegie Bros.*, 158

Pa. St. 518; s. c. 23 L. R. A. 448; 27 Atl. Rep. 1043.

⁸⁹ *Titus v. Bradford &c. R. Co.*, 136 Pa. St. 618; s. c. 8 Lanc. L. Rev. 93; 26 W. N. C. (Pa.) 472; 21 Pitts. L. J. (N. S.) 165; 47 Phila. Leg. Int. 496; 20 Atl. Rep. 517.

§ 4393. **Liability of Railway Companies to their Employés for Injuries from Defective Brakes, Brake-Beams, Chains, etc.**—Under the principles of this chapter, railway companies have frequently been held liable in damages to their employés for injuries sustained by them through the failure of such railroad companies to exercise reasonable care and skill in providing and maintaining reasonably safe brakes, brake-beams, chains and similar appliances on their cars.¹

§ 4394. **Duty of Exercising Reasonable Care with Respect to such Appliances a Positive and Unassignable One.**—And here, as in other like cases,² this duty, being in the nature of an *absolute duty*, is not discharged by delegating it to a servant, but the company is liable to any of its servants for an injury caused by the failure of such servant to whom the duty is delegated, to exercise proper care and skill in discharging it.³

§ 4395. **Company under a Duty of Continuing Inspection.**—These, and other decisions, emphasize the duty of a *continuing inspection* which rests upon the railway company. Thus, before a railway company puts into its service a brake-chain, the duty rests upon it of causing it to be carefully tested and inspected by some one competent to judge of its fitness for the utmost strain that is likely to come upon it, and if an injury ensues to one of its servants by reason of its failure to have this inspection made, the railroad company will be liable.⁴

¹ Texas &c. R. Co. v. McAtee, 61 Tex. 695; Carpenter v. Mexican &c. R. Co., 39 Fed. Rep. 315; s. c. 17 Wash. L. Rep. 630; 6 Rail. & Corp. L. J. 327; Mackey v. Batimore &c. R. Co., 19 D. C. 282; s. c. 18 Wash. L. Rep. 767.

² *Ante*, §§ 3986, 3988.

³ Henry v. Wabash &c. R. Co., 109 Mo. 488; s. c. 19 S. W. Rep. 239.

⁴ Morton v. Detroit &c. R. Co., 81 Mich. 423; s. c. 46 N. W. Rep. 111. It follows that a railroad company is liable to a brakeman for injuries sustained by reason of a defective brake-wheel, which defect was of long standing, and would have been discovered by the car-inspector but for the insufficient manner in which his examination was made, where the superior officers of the company were, or should have been, aware of the *hasty and imperfect manner* of making such inspections, but took no step to remedy it: Lake

Shore &c. R. Co. v. Gilday, 16 Ohio C. C. 649; s. c. 9 Ohio C. D. 27 (in this jurisdiction brakemen and car-inspectors are fellow servants). It also follows that the fact that a defect, for example, a crack, is not visible *from above*, does not of itself exonerate the railroad company where it would have been plainly visible upon an inspection *from underneath*, and where such an inspection would have revealed not only its existence, but that it was not of recent origin: Van Tassell v. New York &c. R. Co., 1 Misc. (N. Y.) 299; s. c. 48 N. Y. St. Rep. 767; 20 N. Y. Supp. 708. Where a railroad car-inspector pronounced a brake-staff of a car defective (whether the brake-staff in question was not disclosed), and the car was taken into a shop for repairs, and, twenty-two days afterward, a brakeman on the car was injured by the breaking of a staff

§ 4396. Not Liable for what Latent Defects.—The doctrine of the preceding section implies that a railroad company is not liable for an injury to an employé caused by the breaking of a brake-rod due to an *imperfect welding* where the flaw was not discoverable by the usual methods of inspection, owing to rust on the rod,—in other words, where the flaw was *latent*.⁵

§ 4397. Defect must have been the Proximate Cause of the Injury.—Outside of this question, it is obviously insufficient, in order to sustain an action for injuries by reason of such a defect, to prove the existence of the defect without more: the plaintiff must also prove that the defect was the efficient cause of the injury. If the injury may as well be ascribed to some other cause for which the company is not responsible, or to inevitable accident, it will not be liable.⁶ It was so held where an injury happened in consequence of a car being blown, in the night, from a side-track upon the main track, injuring an employé, whose right of action was predicated upon the fact that the brake-shoes upon the car were very much worn down, but where he failed to show that they were so worn as to be ineffectual for the purpose for which they were intended,—that is, to grasp the wheel effectually.⁷

§ 4398. Company must have had Knowledge or Means of Knowledge and Opportunity to Repair.—Moreover, it is not enough to prove the existence of a defect at the very moment of the accident, but it must also appear that the master had an opportunity of previous knowledge, or that the facts were such that he might, by the exercise of the proper care and diligence, have known of the defect.⁸ Hence, although a railroad company has no right to assume that *cars received from another company* are in a safe condition, but is under the duty of inspecting them before requiring its servants to handle them,⁹—it is not liable for injuries to a brakeman from the breaking of a brake-staff upon such car through an old crack, which could only have been

at a crack, which was rusty, and the appearance of which, together with the description of it, justified an inference by the jury that it had existed for longer than twenty-two days, it was held that a verdict for plaintiff on the ground of the company's neglect to discover and repair this defect at the time when inspection and repairs were made on the car, would not be disturbed: *Myers v. Erie R. Co.*, 44 App. Div. (N. Y.) 11; s. c. 60 N. Y. Supp. 422.

⁵ *Read v. New York & C. R. Co.*, 20 R. I. 209; s. c. 3 Am. Neg. Rep. 500; 37 Atl. Rep. 947.

⁶ See, for example, *Louisville & C. R. Co. v. Binion*, 98 Ala. 570; s. c. 14 South. Rep. 619.

⁷ *Smith v. New York & C. R. Co.*, 118 N. Y. 645; s. c. 30 N. Y. St. Rep. 96; 23 N. E. Rep. 990.

⁸ *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395; s. c. 23 Pitts. L. J. (N. S.) 293; 25 Atl. Rep. 587.

⁹ *Ante*, § 4373.

detected by taking the staff off the car and striking it with a hammer, where there was nothing in the appearance of the car indicating that it needed repairs;¹⁰ nor for injuries to a brakeman by the giving way of a brake-rod in which there is an old crack, which could be discovered only by taking out and lifting up the brake-rod, and which is not apparent upon any inspection made in accordance with the universal custom of well-conducted railroads, in the absence of anything that would suggest, to the mind of a reasonably prudent person, a necessity for so lifting or taking out the brake-rod.¹¹

§ 4399. Injuries Arising from the Failure of Air-Brakes to Work.—Where a trainman was killed by the failure of air-brakes to work, because of a leak in a steam-pipe in the smoke-box, and the engine had not been inspected for several days prior to the accident, and apparently an inspection would have discovered the leak, and it was the custom on other roads to inspect engines daily before allowing them to be used,—a verdict that the defendant was guilty of negligence was justified.¹² The court reasoned that it was the failure to supply a suitable engine—one that would furnish sufficient steam to the air-brakes—that was the cause of the collision, and that the decedent (the engineer) did not assume that risk, he having a right to assume that a suitable engine had been furnished him.¹³

§ 4400. Conditions of Fact under which Company held Liable.—Such liability arises, under principles already considered,¹⁴ in case of an injury to a brakeman, without fault on his part, from a defect in a *brake-rod* under a car, which an ordinary inspection would have disclosed;¹⁵ from a defect in a chain on the brake of a car, which a careful inspection would have made known;¹⁶ from the fact that a brake-beam was so constructed as to hang only three inches from the

¹⁰ Chicago &c. R. Co. v. Fry, 131 Ind. 319; s. c. 28 N. E. Rep. 989.

¹¹ Louisville &c. R. Co. v. Campbell, 97 Ala. 147; s. c. 12 South. Rep. 574.

¹² Pierson v. New York &c. R. Co., 53 App. Div. (N. Y.) 363; s. c. 65 N. Y. Supp. 1039; 99 N. Y. St. Rep. 1039.

¹³ Pierson v. New York &c. R. Co., *supra*. Condition of evidence under which the question as to whether a train, which had, on four of its cars, air-brakes and Janney couplers, the rest of the train having old-style couplers and brakes, was provided with proper appli-

ances to stop the train so as to prevent the derailment, should have been submitted to the jury; so that it was error to direct a verdict for the defendant on the theory that "all the evidence tended to show that there was a sufficient number of air-brakes": Wright v. Southern R. Co., 127 N. C. 225; s. c. 37 S. E. Rep. 221.

¹⁴ *Ante*, § 3794, *et seq.*

¹⁵ Cowan v. Chicago &c. R. Co., 80 Wis. 284; s. c. 50 N. W. Rep. 180.

¹⁶ Richmond &c. R. Co. v. Burnett, 88 Va. 538; s. c. 16 Va. L. J. 21; 14 S. E. Rep. 372.

rails, when it should have hung at least six inches therefrom, whereby a brakeman's foot was caught underneath the beam while uncoupling cars;¹⁷ from the absence of a key which was necessary to the safety and efficiency of a brake-staff on a flat-car, and from the failure to place the lower end of the brake-staff in its socket upon setting it, causing a giving way of the brake-staff, whereby a switchman, without fault on his part, was thrown to the ground and injured,—the company having had ample time and opportunity to discover both defects;¹⁸ from the failure of a railway company to provide *buffers*, on an engine, of equal height with those upon a car which an employé is attempting to couple to the engine;¹⁹ for maintaining defective brakes upon its train, by reason of which a brakeman, endeavoring to stop the train, is struck by an overhead bridge to which his back is turned, when, if the brakes had not been defective, the train would have stopped before reaching the bridge;²⁰ from an injury to an employé resulting from a defect in a brake-rod, which would have been disclosed by an inspection, if, pursuant to a rule of the company, such *inspection had been made*;²¹ from a defect in the brake of a flat-car left standing on a side-track, which, by reason of such defect, failed to remain where it was left, but ran down the track, running over the conductor,—the court holding that the question of negligence was properly left to the jury;²² from the fact that the brakes of a train of cars loaded with coal, standing on the main track of a coal-mine, were defective, and that there was but one spragger on duty whose duty it was to apply the brakes and to “sprag” the cars, instead of two as usual, and this was known to the superintendent, and that another car, brought from one of the chambers of the mine and put upon the track, moved upon the stationary cars with such force as to set them in motion, causing them to run down the main track and to collide with the door out of which they were usually run, killing the “door-boy,” whose duty it was to open such door when signalled.²³

¹⁷ *Texas &c. R. Co. v. White*, 82 Tex. 543; s. c. 18 S. W. Rep. 478.

¹⁸ *Galveston &c. R. Co. v. Templeton* (Tex. Civ. App.), 25 S. W. Rep. 135 (no off. rep.); s. c. aff'd, 87 Tex. 42; 26 S. W. Rep. 1066.

¹⁹ *Donohue v. Brooklyn City R. Co.*, 38 N. Y. St. Rep. 485; s. e. 14 N. Y. Supp. 639.

²⁰ *Beard v. Chesapeake &c. R. Co.*, 90 Va. 351; s. c. 18 S. E. Rep. 559.

²¹ *Bailey v. Rome &c. R. Co.*, 139 N. Y. 302; s. c. 54 N. Y. St. Rep. 550; 34 N. E. Rep. 918; *ante*, § 4137.

²² *Mexican &c. R. Co. v. Jones*, 107 Fed. Rep. 64; s. c. 48 C. C. A. 227.

²³ *South West Imp. Co. v. Smith*, 85 Va. 306; s. c. 7 S. E. Rep. 365. From the fact that a brake-staff was allowed to remain loose in its socket, and to be bent at an angle of about thirty degrees from the perpendicular, when it was used by a brakeman and switchman for the purpose of mounting the platform of a flat-car used in front of a road-engine for switching purposes, so that a switchman, in attempting to mount the brake-beam, caught hold of the brake-staff, and, on account of its being bent, it swung around and caused him to

§ 4401. **Circumstances under which Company Not Liable.**—Railway companies are not liable to their employés for injuries sustained through defects in these appliances, except upon evidence that they were defective when first put into the service of the company, or became defective in such service, and that in either case the defect would have been discovered by the exercise of ordinary care on the part of the company.²⁴ Moreover, if a railroad company puts into the hands of its brakemen railway-brakes such as are in common use, and which its brakemen understand, it will not be liable to them in damages for injuries received by reason of the character of the brake, it not being defective for a brake of its kind, although there may be in use other brakes which are less dangerous.²⁵ It has been held, in one court, that a railway employé cannot recover damages from the company for an injury received while attempting to couple one of a train of gravel-cars loaded with stone, to a stationary car which had a broken brakehead, so that the brake could not be set, and which a fellow servant, whose duty it was to see to it, had neglected to set apart for repairs, or to keep coupled to another car or engine, or, if it was left alone on the side-track, if the fellow servant had neglected

lose his hold and fall,—it being necessary to use the flat-car in front of the road-engine so that the switchman could mount the brake-beam and hold to the brake-staff while moving around the yard, the road-engine not having a foot-board in front: *Prosser v. Montana & C. R. Co.*, 17 Mont. 372; s. c. 30 L. R. A. 814; 43 Pac. Rep. 81.

²⁴ *DeGraff v. New York & C. R. Co.*, 76 N. Y. 125.

²⁵ *Wright v. Delaware & C. Canal Co.*, 40 Hun (N. Y.) 343; *ante*, § 4244, *et seq.* Where, in an action against a railroad company for injuries to a brakeman, the accident, claimed to have been the result of the use of a brake with too long an eye-bolt, around which the chain was alleged to have wound, might just as probably have resulted from the winding of the chain on itself, a jury was not warranted in finding that the accident was caused in the manner alleged: *Hunt v. Caldwell*, 22 Ohio C. C. 283; s. c. 11 Ohio C. D. 562. Where the plaintiff, who was a brakeman in the defendant's switch-yard, was injured by a brake-wheel coming off, and the evidence showed that it had been inspected the day before, and a nut placed on the brake-staff, but left

the question in doubt whether or not the nut was on at the time of the accident, a verdict for the plaintiff should be set aside; since, if the nut was on, a proper inspection was the only duty required of the defendant, and it would not be liable for an injury resulting from the appliance becoming suddenly out of repair and before an opportunity could be had to discover and remedy the defect (following the rule in *Fenderson v. Atlantic City R. Co.*, 56 N. J. L. 708); and if it was off, it constituted an obvious danger, for which the company was not liable: *Ahearn v. Central R. Co.* (N. J.), 45 Atl. Rep. 1032 (no off. rep.). If, solely by the accumulation of ice or snow on the brake of a car, otherwise in good order, after it leaves a yard a short distance from the place of the accident, the brake will not work; so that the train cannot be stopped in time to prevent its running into a standing train and injuring an employé at work between the cars of such train and the engine, the company is not liable: *Hanrahan v. Brooklyn Elev. R. Co.*, 17 App. Div. (N. Y.) 588; s. c. 45 N. Y. Supp. 474.

to trig or choke a wheel to prevent its moving.²⁶ Negligence is not presumed from the happening of an accident to a railroad employé from the breaking of a defective brake-staff; but it is essential that plaintiff should prove that the defect was, or in the exercise of reasonable care should have been, known to the defendant.²⁷ It is incumbent upon a railroad employé who attributes his injury to the fact of brake-shoes being worn thin, to prove the facts permitting the inference that the brake could not be applied, or that, when applied, it was not as effective as it should or would have been with thicker brake-shoes; and in the absence of such evidence it is error to submit the question of the defendant's negligence to the jury.²⁸ In an action by a brakeman to recover of the railroad company damages for injuries occasioned by a defect in a brake-chain, whereby it broke when he applied the brakes, it was held that, in the absence of proof as to why the chain broke, or that the chain was defective when put on, or that the defect could have been discovered by the exercise of ordinary care, or that such care was not used, a nonsuit should not have been refused.²⁹

§ 4402. Illinois Statute Requiring Brake on Rear Car of Train.—The provision of the Illinois statute³⁰ that no railroad company shall run a freight-train without a sufficient brake attached to the rear car and a skillful brakeman in charge thereof, unless the brakes are efficiently operated by power applied from the locomotive, has been held to be inapplicable to the switching of loaded cars and the making up of trains in the yards of a railroad company.³¹

§ 4403. South Carolina Statute Requiring Brakes on Certain Freight-Cars.—Under the statute of South Carolina, requiring brakes to be placed on every car used for the transportation of freight or passengers, other than four-wheeled freight-cars used only for that purpose,³² it has been held that eight-wheeled gondola or flat cars,

²⁶ Dodge v. Boston &c. R. Co., 155 Mass. 448; s. c. 29 N. E. Rep. 1086.

²⁷ Chicago &c. R. Co. v. Fry, 131 Ind. 319; s. c. 28 N. E. Rep. 989 (case of a "foreign car" that had been in the defendant's possession for two weeks, and had been inspected four times, but the defect in the brake-staff was not discovered, and could not have been without taking it off and striking it with a hammer).

²⁸ Smith v. New York &c. R. Co., 118 N. Y. 645; s. c. 30 N. Y. St. Rep. 96; 23 N. E. Rep. 990.

²⁹ DeGraff v. New York &c. R. Co., 76 N. Y. 125. The evidence in the case justified a finding that the chain was defective, but it did not justify a finding that the company had been negligent in regard to it.

³⁰ Hurd's Ill. Rev. Stat. 1903, ch. 114, § 90.

³¹ Chicago &c. R. Co. v. Maloney, 77 Ill. App. 191; s. c. 3 Chic. L. J. Wkly. 298.

³² S. Car. Code 1902, § 2127; S. Car. Gen. Stat. 1882, § 1499.

if used for transporting freight, are not excepted from the provision of the statute, but must be equipped with brakes.³³

ARTICLE XI. INJURIES TO CAR-COUPPLERS FROM DEFECTS IN THE COUPLING-APPLIANCES.

SECTION	SECTION
4406. Liability of railway companies for furnishing defective arrangements for coupling and uncoupling cars.	4415. Failure to furnish brakemen with coupling-sticks.
4407. Various instances of such liability.	4416. Failing to equip cars with automatic self-couplers.
4408. Other illustrative decisions.	4417. Federal statute requiring use of automatic car-couplings.
4409. Cases of this kind where the company was exonerated.	4418. Construction of other statutes relating to coupling-devices.
4410. Use of coupling-devices which are dissimilar.	4419. Sending out cars with defective hand-holds on them.
4411. Using cars with double buffers or deadwoods.	4420. Various other coupling appliances negligently imperfect.
4412. Use of cars with buffers of unequal height.	4421. Coupling cars marked "bad order."
4413. Use of cars with buffers which pass each other.	4422. Coupler struck by timbers projecting over the end of a flat-car.
4414. Failure to furnish a crooked link where the buffers are of unequal height.	

§ 4406. **Liability of Railway Companies for Furnishing Defective Arrangements for Coupling and Uncoupling Cars.**—In general it may be stated, under the doctrines of this chapter, that if a railway company negligently or willfully employs in its service defective arrangements for coupling and uncoupling its cars, whereby its brakemen are injured without fault on their part, it will be liable to pay damages to them.¹ Reasoning generally, it has been said that it is the duty of a railway company to furnish cars with reasonably safe coupling-appliances, in good order, so far as it can by the exercise of ordinary care; and that an employé has the right to assume that the couplers are in proper order, unless he knows, or by ordinary care ought to know, the contrary,—it not being his duty to examine or inspect the attachments of the car.² Yet it is held, even here, that

³³ Mew v. Charleston &c. R. Co., 55 S. Car. 90; s. c. 32 S. E. Rep. 828.

¹ Gottlieb v. New York &c. R. Co., 100 N. Y. 462; Fordyce v. Yarbrough, 1 Tex. Civ. App. 260; s. c. 21 S. W. Rep. 421 (defective buf-

fers); Evans v. Chamberlain, 40 S. C. 104; s. c. 18 S. E. Rep. 213; Ellis v. New York &c. R. Co., 95 N. Y. 546.

² Fordyce v. Yarbrough, 1 Tex. Civ. App. 260; s. c. 21 S. W. Rep.

such a company is not liable for an injury received by a brakeman in coupling cars having *double buffers*, simply because a higher degree of care is necessary in using them than is demanded in the use of those differently constructed. Nor is such a company obliged to discard cars of an old pattern simply because it is more dangerous to couple them to cars of a new pattern than it is to couple new cars to each other.³ In all these cases, care must be taken to note the distinction between a vice common to a whole class of cars, with which the brakeman may be supposed to be familiar, and a vice peculiar to a particular car,—such as a defective draw-bar,—of which the brakeman may have no knowledge.⁴

§ 4407. **Various Instances of Such Liability.**—In cases of this kind, damages have been recovered where the *draw-bar* of a particular car was *too short*, permitting the tender and car to come so close together as to cause an accident to a brakeman having no knowledge of the defect;⁵ where the brakeman was crushed between a car and the tender of the engine without fault on his part, and in consequence of the coupling-arrangement being defective, as the jury found, the evidence being conflicting;⁶ where there were *no bumpers* on freight-cars, in consequence of which a brakeman, suddenly called upon in the night to couple them, without any knowledge of their defects, was injured;⁷ where a brakeman received an injury to his hand,

421. A railroad employé is not bound at his peril to inspect a coupler before pulling out a pin in order to determine whether or not it is defective: *Bradshaw v. Chicago & C. R. Co.*, 58 Kan. 618; s. c. 50 Pac. Rep. 876. A railroad company is bound to use ordinary or reasonable care to the end of seeing that the coupling-appliances upon its cars are in such a state of repair that couplings may be made without extraordinary danger to its employés; but it is not proper to tell the jury that it is bound to use reasonable care to the end of seeing that the coupling-appliances are in such repair that couplings may be made without *any* danger to the employé attempting to make them, from being squeezed or compressed; as this is one of the ordinary hazards of the business: *Van Winkle v. Chicago & C. R. Co.*, 93 Iowa 509; s. c. 61 N. W. Rep. 929.

³ *Fort Wayne & C. R. Co. v. Gildersleeve*, 33 Mich. 133; *Indianapolis & C. R. Co. v. Flanigan*, 77 Ill. 365.

As to *double buffers*, see *post*, § 4411.

⁴ *Fort Wayne & C. R. Co. v. Gildersleeve*, 33 Mich. 133; *Indianapolis & C. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo & C. R. Co. v. Fredericks*, 71 Ill. 294; *Greenleaf v. Illinois & C. R. Co.*, 29 Iowa 14; *Wedgwood v. Chicago & C. R. Co.*, 41 Wis. 478; s. c. 44 Wis. 44; 18 Alb. L. J. 137.

⁵ *Toledo & C. R. Co. v. Fredericks*, 71 Ill. 294; the court saying: "The machinery and cars furnished for use should not be so unskillfully constructed that the slightest indiscretion on the part of the operatives would prove fatal. Such was the character of the coupling in question." See also, *Crutchfield v. Richmond & C. R. Co.*, 78 N. C. 300; s. c. 76 N. C. 320.

⁶ *Le Claire v. First Division & C. R. Co.*, 20 Minn. 9.

⁷ *Mason v. Richmond & C. R. Co.*, 111 N. C. 482; s. c. 18 L. R. A. 845; 16 S. E. Rep. 698; 53 Am. & Eng. R. Cas. 183.

owing to the defective condition of the draft-timber holding up the drawhead on one of the cars, the bolt having sunk down into the timber and let the drawhead down four inches lower than it should be,—the defect being old, but not known to the brakeman;⁸ where a train-employé was injured by reason of the breaking of the car-coupling, caused by the defective character of the iron out of which it was made, of which defectiveness the company had prior notice;⁹ where a brakeman was injured in consequence of the company using a car with the face of the drawhead broken, leaving a sharp, ragged edge, which caught his clothing when coupling the cars;¹⁰ where the company failed to provide a freight-train with a suitable number of links with which to make the couplings required, and required a brakeman to use a link so out of shape that his hand was crushed between the cars in attempting to use it;¹¹ where a yardmaster was required to use a coupling consisting of a piece of a brake-beam rod partly bent, but not sufficiently so to stay in place when the cars bumped together, in consequence of which he was injured, he having no notice of the defect;¹² where a freight-brakeman was injured by the breaking of a defective coupling-link, allowing the front part of the train to suddenly shoot forward on an up grade while he was on the pilot of the engine in the performance of his duty (attempting to couple the engine to some cars ahead), where he had had no opportunity to examine the link and the defect could have been discovered by proper inspection;¹³ where a trainman was injured by a defect in a coupling-apparatus, which could have been discovered by ordinary care, and by reason of which the train broke in two, although the stopping of the forward section of the train by the engineer combined to produce the collision in which the accident occurred.¹⁴

§ 4408. **Other Illustrative Decisions.**—Where the complaint stated that the defendant railway company negligently took upon its track, used, and operated a car upon whose brake-frame or brake-beam, at the end of the car, was a large and long bolt out of place, and which unnecessarily, carelessly, and unskillfully projected beyond the frame,

⁸ Seese v. Northern Pac. R. Co., 39 Fed. Rep. 487.

⁹ Bowers v. Union & C. R. Co., 4 Utah 215; s. c. 7 Pac. Rep. 251.

¹⁰ McKnight v. Chicago & C. R. Co., 44 Minn. 141; s. c. 46 N. W. Rep. 294.

¹¹ Denver & C. R. Co. v. Simpson, 16 Colo. 55; s. c. 26 Pac. Rep. 339.

¹² Taylor v. Missouri & C. R. Co. (Mo.), 16 S. W. Rep. 206 (no off. rep.).

¹³ Louisville & C. R. Co. v. Howell, 147 Ind. 266; s. c. 45 N. E. Rep. 584 (plaintiff was holding up a heavy iron shackle-bar in order to make the coupling, and when the train shot forward he was thrown backward and had his arm crushed by the heavy bar).

¹⁴ Chicago & C. R. Co. v. Gillison, 72 Ill. App. 207; s. c. aff'd, 173 Ill. 264; 50 N. E. Rep. 657.

beam, or bar-head, in the way of the brakeman going to couple the cars; that the defendant negligently suffered the bolt to remain, without cutting off the projecting part thereof, and without informing the plaintiff of its dangerous condition; that, while going between the said car and another one to couple them, the plaintiff was tripped and thrown down by said bolt, and thus injured,—it was held that a good cause of action was stated;¹⁵ and, the case subsequently coming to trial, it was held, there being evidence to support these allegations, that the case was properly submitted to the jury.¹⁶ Such a projection, if a defect, being an obvious one, which the defendant was bound to remedy, it was not error to refuse to charge the jury that, if the car became thus defective after it was first put in use by the defendant (several years before the accident), the defendant was not liable unless it had *notice* of the defect.¹⁷ In the absence of proof that the plaintiff was in charge of the car at the time of the injury, except so far as is implied from his service as brakeman, and in the absence of proof that he was under a duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it, and to avoid it if dangerous, and that his failure to do so would prevent a recovery.¹⁸

¹⁵ Wedgwood v. Chicago &c. R. Co., 41 Wis. 478.

¹⁶ Wedgwood v. Chicago &c. R. Co., 44 Wis. 44; s. c. 18 Alb. L. J. 137.

¹⁷ Wedgwood v. Chicago &c. R. Co., *supra*.

¹⁸ Wedgwood v. Chicago &c. R. Co., *supra*. For instances of *contributory negligence* in coupling cars, see Vol. V, subtitle CONTRIBUTORY NEGLIGENCE OF THE SERVANT. In an instructive case the plaintiff, employed by the defendant railroad company as a pin-puller, was injured while attempting to uncouple a car from the tender of a moving engine. The coupling-appliance on the tender consisted of three semicircular projections, or plates, one above the other, with a hole through all three for the coupling-pin, and forming a part of the casting on the end of the tender. These projections extended about six inches from the face of the casting. When the plaintiff pulled the coupling-pin out, the coupler on the car slipped past the projections on the tender, and crushed the plaintiff's hand, which he had placed on the casting near the projections. The evidence

showed that the middle projection on the tender was broken, and the inner edges of the lips of the upper and lower projections were worn and battered down. The plaintiff's evidence showed that on account of the middle projection being broken out, the short end of the Janney coupler on the car slipped between the upper and lower projections far enough to allow the long end to strike his hand, which could not have happened had the tender-coupling been whole. One witness testified that it had been used for a month or more in its defective condition, and the plaintiff testified that he did not know of the defect. The accident happened at night. It was held that the company was not, as matter of law, free from negligence, but that the evidence should have been submitted to a jury: Bradshaw v. Chicago &c. R. Co., 58 Kan. 618; s. c. 50 Pac. Rep. 876. In an action against a railroad company for personal injuries, where recovery is sought for injuries sustained through the alleged negligence of the defendant in coupling cars which lacked drawheads with a switch-rope instead of a chain, an

§ 4409. Cases of this Kind where the Company was Exonerated.—

There is a seemingly untenable decision to the effect that a defective condition of a drawbar on a freight-car, allowing the deadwoods to come together, will not render a railroad company liable to a switchman whose arm is crushed between the deadwoods, where just before the accident he threw his arm between them by stumbling upon a piece of coal left upon the track through the negligence of fellow servants.¹⁹ The vice of this decision lies in the fact that it is contrary to the conclusion that the company is under the same duty to keep its track reasonably clear from obstructions which will not imperil its employes while coupling cars, that it is under to keep its car couplings in good order, and that it is immaterial by what servant this duty is performed;²⁰ but it is, of course, incumbent upon the injured servant to show something more than a defect in the coupling-apparatus in order to recover damages in case of his injury: he must go further and show that the defect was the efficient cause of the injury, and that it is not to be ascribed to mere accident or to some other cause.²¹ Even where the coupling-apparatus is defective he must do more than show that fact: he must show such a state of facts as imputes negligence to the company in permitting it to be or to remain so. He does not show this where he shows no more than the mere fact that the drawhead had become detached in the operation of moving the train;²² since this might be ascribed to the negligence of his fellow servants, not in the *construction* or in the *reparation* of the means of their service, but in the *manner of using those means*.²³ So, no recovery can be had from an injury resulting from the parting of the train, due to the absence of a key holding the drawbar in place, where the key may have fallen out in the ordinary operation of the train, and there is nothing, aside from the accident, to show that the key was not in place and properly fastened at the time the train started on its trip.²⁴ Again, where the brakeman was killed, while coupling cars loaded with iron, by being caught between

instruction is erroneous which makes the plaintiff's recovery depend upon the fact that the use of a rope made the coupling more unsafe than the use of a chain; since the question to be determined was, not whether one appliance was safer than another, but whether the rope was a reasonably safe coupling; and it was improper for the court to rule, as matter of law, that in the use of the rope the defendant did not exercise reasonable care: *Tabler v. Hannibal &c. R. Co.*, 93 Mo. 79; s. c. 5 S. W. Rep. 810 (in-

jury sustained in helping to clear away a wreck).

¹⁹ *Cincinnati &c. R. Co. v. Mealer*, 50 Fed. Rep. 725.

²⁰ *Ante*, § 4257. Compare *ante*, § 4271, *et seq.*; *post*, § 4425.

²¹ *Atchison &c. R. Co. v. Ledbetter*, 34 Kan. 326.

²² *Houston &c. R. Co. v. Barrager* (Tex.), 14 S. W. Rep. 242 (no off. rep.).

²³ *Ante*, § 3760.

²⁴ *Kinthead v. Oregon &c. R. Co.*, 22 Or. 35; s. c. 29 Pac. Rep. 3.

the projecting ends of the iron bars, it was held that there could be no recovery, the cars having been loaded in the ordinary way, and the deceased having been specially warned of the danger and told to stop when making the coupling.²⁵ It has been held that a railroad company is not imputable with negligence from the fact that the construction of the coupling-arrangements is peculiar, though common to all cars of that build, such cars being in frequent use on the particular road;²⁶ nor from the fact that the company used a heavy switch-rope for coupling its cars instead of the usual drawhead,—this not being negligence as matter of law, but whether it will be negligence will depend upon the facts and circumstances;²⁷ nor from the fact that a box at the rear of the tender used for holding on to in getting on and off was broken, whereby an employé was injured, he knowing of the fact that it was broken, provided it was originally safe and he had not brought the knowledge of its broken condition to the company.²⁸

§ 4410. Use of Coupling-Devices which are Dissimilar.—Negligence is not imputable to a railroad company, as matter of law, in the absence of statute, from the fact of its having in use on its different cars coupling-devices which are dissimilar, and therefore harder to couple and more dangerous to the employé who attempts to perform the act of coupling, provided, of course, that such couplings are in other respects safe and suitable appliances and in good order.²⁹

§ 4411. Using Cars with Double Buffers or Deadwoods.—Negligence is not imputable to a railroad company, as matter of law, in an action by its employé injured in coupling or uncoupling cars, from the fact that it had in its service cars with double buffers, and that it was from such cars that the injury proceeded.³⁰ Nor is the use by a railroad company of cars of another company having double deadwoods, such as are at the time in use on other well-managed roads, and such as are regarded by competent railroad men as ordinarily

²⁵ *Northern &c. R. Co. v. Husson*, 101 Pa. St. 1; s. c. 47 Am. Rep. 690.

²⁶ *Beaudin v. Central Vermont R. Co.*, 38 N. Y. St. Rep. 473; s. c. 14 N. Y. Supp. 700.

²⁷ *Muirhead v. Hannibal &c. R. Co.*, 103 Mo. 251; s. c. 15 S. W. Rep. 530.

²⁸ *Lytle v. Chicago &c. R. Co.*, 84 Mich. 289; s. c. 47 N. W. Rep. 571.

²⁹ *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687; s. c. 4 Am. & Eng. R. Cas. (N. S.) 200; 43 N. E. Rep. 936 (un-

even couplings or deadwoods); *Murphy v. Lake Shore &c. R. Co.*, 67 Ill. App. 527 (coupling-devices dissimilar and therefore harder to couple); *Woodworth v. St. Paul &c. R. Co.*, 18 Fed. Rep. 282 (cars having dissimilar drawheads).

³⁰ *Illinois &c. R. Co. v. Harris*, 53 Ill. App. 592; *Indianapolis &c. R. Co. v. Flanigan*, 77 Ill. 365; *Fort Wayne &c. R. Co. v. Gildersleeve*, 33 Mich. 133.

safe and fit to be used, if in good condition and free from defects, negligence as toward a brakeman, although it may enhance the risk to which he is exposed in making couplings.³¹

§ 4412. **Use of Cars with Buffers of Unequal Height.**—Whether the use by a railroad company of cars having buffers of unequal height, so that when being coupled the ends of them are liable to come together and kill the brakeman or switchman attempting to make the coupling, is negligence, is a question on which there is an unfortunate difference of judicial opinion. One court, dealing with the case of a *construction-train*, has held that the use of cars so constructed, whereby a brakeman is killed in attempting to make a coupling, is negligence *per se*,³² but the court concedes that this rule may not apply to a general freight-train made up of cars from different roads. Another court has, however, held that the use by a railroad company of *freight-cars* of unequal height, and having *mismatched couplings*, is not, *per se*, such negligence as will render it liable to a brakeman injured while uncoupling cars; since to require all cars and couplings in a freight-train to match, would impose the standard of extraordinary care upon the company.³³ The backward swing of the pendulum brings us to a seemingly more enlightened decision, which holds that a street-railway company is liable for injuries to a motorman in coupling together a street-car and a trailer, where the cars are of unequal height and the buffers overlap so as to afford him no protection; and this although he seems to have been aware of the defect and to have made no complaint of it.³⁴ Coming back now to a case of the other kind, where the action was predicated upon the defective condition of the drawhead of cars which the plaintiff, a brakeman, was injured in trying to couple, on the ground that the drawheads did not meet on the same level and consequently did not permit the insertion of a coupling-link,—it was held that the fact that the drawheads were of different heights did not exhibit negligence on the part of the company, where the difference in the height of them was not so great as to prevent the ends of them from striking against each other in the usual way, nor to allow them to pass one over the other, and

³¹ Northern Pac. R. Co. v. Blake, 63 Fed. Rep. 45; s. c. 11 C. C. A. 93.

³² Towns v. Vicksburg & C. R. Co., 37 La. An. 630; s. c. 55 Am. Rep. 508.

³³ Norfolk & C. R. Co. v. Brown, 91 Va. 668; s. c. 22 S. E. Rep. 496 (the *bumpers* on these cars were in good condition, and met each other).

³⁴ Bond v. Toronto R. Co., 22 Ont.

App. 78; s. c. aff'd, *sub nom.* Toronto R. Co. v. Bond, 24 Can. S. C. 715. The action was under a statute called the Workmen's Compensation for Injuries Act, for a defect in "arrangement of plant," and it was held that overlapping buffers constitute such a defect: Bond v. Toronto R. Co., *supra*.

where the cars came no nearer together than if the drawheads had been level with each other.³⁵

§ 4413. Use of Cars with Buffers which Pass Each Other.—On principle, the use by a railway company of cars in its service, having buffers which pass each other laterally, so as to permit the ends of cars to strike together in making couplings, stands on the same footing as the use of buffers which are of unequal height, so as to permit the ends of the cars to strike together. A well-drawn abstract of a recent case is that where a railroad company starts over its road a train of cars having coupling appliances so mismatched that on coupling the cars the appliance on one car may slip past that on the other, and let the cars come together, so as to endanger the life of the brakeman who is attending to the coupling, and the brakeman is so killed, the company is chargeable with negligence which is the proximate cause of the accident.³⁶

§ 4414. Failure to Furnish a Crooked Link where the Buffers are of Unequal Height.—Negligence is imputable to a railroad company, if so found by a jury, in failing to equip its cars with a crooked link necessary in many cases to the coupling of cars having drawheads of different heights received from other roads. Where a railway servant is injured in consequence of being required to couple such cars without the use of a crooked link, it cannot be said, as matter of law, that the railroad company has furnished its servant with safe tools and implements for the performance of his duties.³⁷

§ 4415. Failure to Furnish Brakemen with Coupling-Sticks.—A railway company has been held not liable for injuries to a brakeman

³⁵ *Edall v. New England R. Co.*, 18 App. Div. (N. Y.) 216; s. c. 45 N. Y. Supp. 959. For another case holding that the fact that the bumpers were not on a level did not exhibit negligence on the part of the railroad company,—see *Frounfelker v. Delaware & C. R. Co.*, 74 App. Div. (N. Y.) 224; s. c. 77 N. Y. Supp. 470.

³⁶ *Southern Pac. Co. v. Winton*, 27 Tex. Civ. App. 503; s. c. 66 S. W. Rep. 477. In another case it appeared that the plaintiff, a brakeman, was ordered on a dark night to couple two freight-cars. The cars did not belong to the defendant company, but were attached to the

train of the defendant company. The buffers were not long enough to permit the brakeman to stand safely between the cars in case the drawheads passed each other. He failed to notice this, and was injured. It was held that the question of defendant's negligence was properly for the jury, and that a verdict for plaintiff would not be disturbed: *Gottlieb v. New York & C. R. Co.*, 29 Hun (N. Y.) 637; s. c. aff'd, 100 N. Y. 462; 3 N. E. Rep. 344.

³⁷ *Bennett v. Greenwich & C. R. Co.*, 84 Hun (N. Y.) 216; s. c. 65 N. Y. St. Rep. 642; 32 N. Y. Supp. 457.

because of its *failure to furnish him with a coupling-stick*, as provided by one of its rules, where the evidence showed that such sticks were not in use by the brakeman on the road, and were regarded as useless appliances in coupling cars, and that the injured brakeman had been in its employ for a month, and made no objection on the ground of not being furnished with a stick.³⁸ Especially is it clear that the failure of a railroad company to furnish an employé with a coupling-stick does not make it liable to him for injuries in attempting to draw a pin from a coupling, for which purpose the stick could not have been used.³⁹

§ 4416. **Failing to Equip Cars with Automatic Self-Couplers.**—It is now proposed to note several decisions of an enlightened court which, independently of statute, has held that the failure of a railroad company to equip its cars with automatic self-couplers constitutes negligence as matter of law, and that neither contributory negligence nor assumption of the risk can be set up by a railway company against its servant in an action for injuries resulting from such negligence.⁴⁰ Such failure will render a railroad company liable to an employé for injuries received in attempting to couple cars having skeleton drawheads of unequal height.⁴¹ It renders a company liable for all injuries which would not have occurred if the cars had been equipped with modern self-acting couplers.⁴² According to the view of the same court, where the automatic coupler on a car has been out of repair for such a length of time that it might reasonably have been repaired, and a brakeman coupling cars in the discharge of his duty is injured, which he would not have been had the coupler been in order, the railroad company is guilty of negligence.⁴³

³⁸ *Louisville &c. R. Co. v. Bryant*, 15 Ky. L. Rep. 181; s. c. 22 S. W. Rep. 606 (no off. rep.).

³⁹ *Welch v. New York &c. R. Co.*, 63 Hun (N. Y.) 625; s. c. 43 N. Y. St. Rep. 958; 17 N. Y. Supp. 342. As to the imputation of *contributory negligence*, grounded on the failure of the brakeman to use a coupling-stick as required by the rules of the company, see Vol. V, subtitle CONTRIBUTORY NEGLIGENCE OF THE SERVANT.

⁴⁰ *Greenlee v. Southern R. Co.*, 122 N. C. 977; s. c. 30 S. E. Rep. 115; 41 L. R. A. 399; 11 Am. & Eng. R. Cas. (N. S.) 45 (the cars were freight-cars); *Troxler v. Southern R. Co.*, 124 N. C. 189; s. c. 44 L. R. A. 313; 32 S. E. Rep. 550 (freight-

cars); *Harden v. North Carolina R. Co.*, 129 N. C. 354; s. c. 40 S. E. Rep. 184; 55 L. R. A. 784.

⁴¹ *Troxler v. Southern R. Co.*, 124 N. C. 189; s. c. 44 L. R. A. 313; 32 S. E. Rep. 550.

⁴² *Harden v. North Carolina R. Co.*, 129 N. C. 354; s. c. 40 S. E. Rep. 184; 55 L. R. A. 784.

⁴³ *Elmore v. Seaboard Air Line R. Co.*, 130 N. C. 506; s. c. 41 S. E. Rep. 786. But on a rehearing the evidence showed that the link was out of the coupler, which made it necessary to open the lip by hand; that after the lip was open the coupler was in as good condition for coupling as if the link had not been missing in the first place. The fact that the coupler was not in the

§ 4417. **Federal Statute Requiring Use of Automatic Car-Couplings.**—A Federal statute⁴⁴ provides that the cars of carriers engaged in interstate commerce shall be provided with automatic couplings. It has been held that, though the petition in an action for injury from a defective car-coupling does not allege that the car was used in connection with interstate commerce, and though the plaintiff does not, by his argument or otherwise, indicate that he is relying on the Federal statute, the court may and should, if the fact appears in evidence that the car is so used, instruct the jury as to his rights under such statute.⁴⁵

§ 4418. **Construction of Other Statutes Relating to Coupling-Devices.**—We have already had occasion to note a decision of the Supreme Court of Canada, holding that overlapping buffers between a motor-car and a trailer, constitute a defect in the “arrangement of the plant” within the meaning of a statute enacted for the protection of workmen.⁴⁶ A statute of Nebraska made it unlawful for a railroad company to put into its service any new cars after the taking effect of the new act, which was Jan. 1, 1895, except such as were equipped with automatic couplers. This statute did not act retroactively so as to make it negligent in a railroad company to *continue* the use of cars having no automatic couplers, which it had put into its service prior to that date.⁴⁷ Another court has held that the failure on the part of a railroad company to introduce into its service automatic self-coupling devices, whereby its brakemen are killed or injured, is negli-

center the court held, as a matter of common knowledge, was not a defect, it being necessary for it to have a certain amount of play from side to side so as to adjust it to curves of the track; and if plaintiff chose to violate a rule of the company and use his foot to push it to the center, that was his fault: *Elmore v. Seaboard & C. R. Co.*, 131 N. C. 569; s. c. 42 S. E. Rep. 989; setting aside opinion in 130 N. C. 506; s. c. 41 S. E. Rep. 786, and granting defendant a new trial.

“U. S. Comp. Stat. 1901, p. 3174, § 2; 27 U. S. Stat. at Large, ch. 196, § 2; Act Cong. March 2, 1893.

“*Voelker v. Chicago & C. R. Co.*, 116 Fed. Rep. 867. The court said that charging the defendant with negligence was charging it with failure to meet or fulfill the duties imposed on it by law; and that it was not necessary, nor, indeed, per-

missible, under the rules of pleading, that the petition should set forth the law which had been violated: *Voelker v. Chicago & C. R. Co.*, *supra*. The Supreme Court of North Carolina holds that in view of former holdings of the same court, and the general adoption by railroad companies of such appliances, and the Federal statute above cited, the failure of any railroad company in that State to adopt automatic couplings is negligence *per se*: *Greenlee v. Southern R. Co.*, 122 N. Car. 977; s. c. 30 S. E. Rep. 115; 65 Am. St. Rep. 734; 41 L. R. A. 399.

“*Bond v. Toronto R. Co.*, 22 Ont. App. 78; s. c. *aff'd sub nom.* *Toronto R. Co. v. Bond*, 24 Can. Sup. Ct. 715.

“*Thompson v. Missouri Pac. R. Co.*, 51 Neb. 527; s. c. 71 N. W. Rep. 61.

gence, as matter of law, and that the extension of time granted by the Interstate Commerce Commission to railroad companies for placing self-couplers upon freight-cars, merely operates to relieve a railroad company from the penalty provided by Congress in the Act to Regulate Commerce, but does not affect their common-law liability grounded upon negligence.⁴⁸ A statute of Canada makes railway companies liable to "any person injured" by reason of any act or omission specified therein. Among such acts was the duty of packing or blocking the frogs of switches. A railroad company had the impudence to contend that railway servants were not within the protection of the act; but the court held otherwise.⁴⁹

§ 4419. Sending Out Cars with Defective Hand-Holds on them.—A railroad company is chargeable with negligence toward its employes in sending out a car with the hand-hold necessary for the safe and prompt performance of the duties of a brakeman in coupling and uncoupling, in an obviously defective condition.⁵⁰

§ 4420. Various Other Coupling-Appliances Negligently Imperfect.—A railroad company has been held chargeable with negligence in using, without warning its brakemen, cars having bumpers so badly worn and rotten that when brought together to be coupled there is but a few inches of space between the cars, and is liable to one of its brakemen injured by reason of such defects.⁵¹ It is scarcely necessary to say that a railroad company which fails to put in good order the coupling-devices upon its cars, which have been injured in a wreck, of which injury the company knows or ought to know, is liable for an injury to a brakeman caused by such failure.⁵² In the view of another court, a railroad company is negligent *per se*, in using a skeleton drawhead upon its cars which is so open that the link goes in

⁴⁸ *Greenlee v. Southern R. Co.*, 122 N. C. 977; s. c. 30 S. E. Rep. 115; 41 L. R. A. 399; 11 Am. & Eng. R. Cas. (N. S.) 45.

⁴⁹ *LeMay v. Canadian Pac. R. Co.*, 18 Ont. Rep. 314; s. c. 41 Am. & Eng. R. Cas. 331.

⁵⁰ *Settle v. St. Louis & C. R. Co.*, 127 Mo. 336; s. c. 30 S. W. Rep. 125 (bent so that it could only be grasped at the ends).

⁵¹ *Chesapeake & C. R. Co. v. Lash* (Va.), 3 Am. & Eng. R. Cas. (N. S.) 569; s. c. 24 S. E. Rep. 385 (no off. rep.). Where the evidence tended to show that the pilot-bar of the engine was bent at the time of the

accident, that it was very dangerous to attempt to make a coupling with such a pilot-bar, and that the plaintiff was acting within the scope of his employment in attempting to make the coupling, but the evidence was conflicting as to whether the pilot-bar was bent when the train started out, it was held that there was sufficient evidence of negligence on the part of the railroad company to go to the jury: *Kansas City & C. R. Co. v. Spellman*, 102 Fed. Rep. 251; s. c. 42 C. C. A. 321.

⁵² *Norfolk & C. R. Co. v. Ampey*, 93 Va. 108; s. c. 2 Va. L. Reg. 284; 25 S. E. Rep. 226.

slanting, rendering it necessary to adjust it by hand, and is liable for injuries to a brakeman's hand which was caught between the dead-blocks as he attempted to straighten a link in such a drawhead and insert the pin, if the jury find the defective appliance caused the accident.⁵³ But another court has held that it is not negligence *per se* for a railroad company to use a locomotive, the draw-bar of which is too short to permit *one* of its cars to be safely coupled thereto or detached.⁵⁴

§ 4421. **Coupling Cars Marked "Bad Order."**—It has been held that the fact that the drawhead of a loaded car which an experienced switchman was required to couple to another car was out of order, does not render the company liable for his death while making the coupling, where the car had a card posted thereon marked "Bad Order" in accordance with its usual method of notifying employes of defects, and it was also marked with chalk "Bad Order", and he was told of its dangerous condition before the injury, and it was the custom of the company to remove defective cars for the purpose of unloading them.⁵⁵

§ 4422. **Coupler Struck by Timbers Projecting over the End of a Flat-Car.**—A railroad company has been held liable for the death of an employe engaged in coupling cars, by being struck, without fault on his part, by timbers projecting from the end of a flat-car through their shifting, after they had been reloaded because they had previously shifted, where no means were adopted, on reloading, to prevent such shifting.⁵⁶

ARTICLE XII. INJURIES TO CAR-COUPPLERS FROM DEFECTS IN THE ROAD-BED OR COUPLING-GROUNDS.

SECTION

4425. Injuries to car-couplers from defects in the road-bed or coupling-grounds.

4426. Cases of injuries to couplers from defects in the road-bed where company was exonerated.

SECTION

4427. Permitting a team and wagon to stand so near the track as to come in contact with a brakeman making a coupling.

⁵³ *Troxler v. Southern R. Co.*, 122 N. C. 902; s. c. 30 S. E. Rep. 117.

⁵⁴ *Whitwam v. Wisconsin &c. R. Co.*, 58 Wis. 408. It did not appear but that all other cars of defendant could be safely attached to and detached from the locomotive. The car had been attached by a fellow servant, which was the only act of

negligence, if any, proved: *Whitwam v. Wisconsin &c. R. Co.*, *supra*.

⁵⁵ *Gulf &c. R. Co. v. Mayo*, 14 Tex. Civ. App. 253; s. c. 37 S. W. Rep. 659.

⁵⁶ *Illinois &c. R. Co. v. Reardon*, 56 Ill. App. 542. See *post*, §§ 4534, 4535.

§ 4425. **Injuries to Car-Couplers from Defects in the Road-Bed or Coupling-Grounds.**—In dealing with the subject of defective appliances for coupling and uncoupling cars, defects in the road-bed or coupling-grounds are not to be overlooked; for, although not strictly appliances, the ground whereon the coupler must walk in the discharge of his duties is a portion of the means for the discharge of such duties, provided by the railroad company; and with respect to the safe condition of those means it stands under the obligation of exercising reasonable care to the end that they shall be reasonably safe for the purpose intended. The condonation by the judges of defects of this kind which are discoverable by the exercise of ordinary care and remediable at slight expense, forms a distinct blot upon American jurisprudence. There is a disposition in many of the decisions, as shown in a future chapter,¹ to put upon the employé the risk of being killed or maimed by murder machines or man-traps of this nature. It is gratifying, however, to note that not all the decisions condone this infamous species of negligence, and put the risk of it upon the railway servant or ascribe injuries proceeding from it to his contributory negligence. The sound and humane modern view is that a railroad company is bound to grade up its tracks within switching-limits even with the bottom of the rails and top of the ties, if necessary to make them reasonably safe for employés engaged in coupling and uncoupling cars.² It was held that damages were recoverable where the company negligently left sticks of firewood scattered along and between the tracks at a station, whereby a brakeman was injured while coupling cars in the exercise of due care;³ where a brakeman, without contributory negligence, and while standing on a plank extending across the rear end of a switch-engine a few inches above the track, and which was placed there to enable brakemen to couple cars, was thrown off, while the engine was backing, by such plank striking a *tie negligently left on the track* by employés who had been making repairs at that place two days before;⁴ where a railroad company negligently left in a planking between its tracks, constructed for people who were lawfully upon the premises to walk upon, a rotten, split, and broken board, which sprang up and down when stepped upon, and which left a space between it and the rail, in which a brake-

¹ *Post*, § 4734, *et seq.*

² *Lake Erie &c. R. Co. v. Morrissey*, 177 Ill. 376; s. c. 5 Am. Neg. Rep. 120; 12 Am. & Eng. R. Cas. (N. S.) 624; 52 N. E. Rep. 299; aff'g s. c. 75 Ill. App. 466; 30 Chic. Leg. N. 342.

³ *Hulehan v. Green Bay &c. R. Co.*, 58 Wis. 319.

⁴ *Kentucky &c. R. Co. v. Ryle*, 13 Ky. L. Rep. 862; s. c. 18 S. W. Rep. 938 (no off. rep.).

man's foot was caught while coupling cars, so that he was injured;⁵ where a railroad company negligently left a hole adjacent to the rail of a side-track in its yard, into which a brakeman stepped while attempting to pass between two cars in order to couple them, and was injured;⁶ where a railroad company allowed a space between the rails of its tracks and the adjacent boards of a street-crossing to become so large from wear or from other causes, as to be dangerous to its employes engaged in coupling or uncoupling cars, which defect was so manifest and so long continued that in the exercise of due care the company ought to have discovered and remedied it,—in consequence of which one of its employes got hurt without fault on his part.⁷ Although a portion only of a railroad-track has been completed, and is being operated for construction purposes only, still the company is bound to use all reasonable care to put the road-bed in such condition that its employes engaged in running trains over it, may use it with safety to themselves and to their co-employes. It was so held where a brakeman was injured without his own fault while attempting to couple cars on a siding, because of the spaces between the ties not being filled in.⁸

§ 4426. **Cases of Injuries to Couplers from Defects in the Road-Bed where Company was Exonerated.**—On the other hand, it has been held that to permit long grass and weeds to accumulate on a side-track, where the feet of the coupler come in contact with them, impeding his progress, is not such negligence as will render the railway company liable to an employe for an injury thus visited upon him;⁹ but the decision is not to be commended,¹⁰ although an American court has held that a railroad company is not liable to a switchman or a brakeman who is injured in making a coupling by accidentally stepping upon a car-spring concealed from sight in a railway-yard by grass growing upon the track.¹¹ It would seem that railway com-

⁵ *Bird v. Long Island R. Co.*, 11 App. Div. (N. Y.) 134; s. c. 42 N. Y. Supp. 888.

⁶ *Missouri &c. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528; s. c. 32 S. W. Rep. 588.

⁷ *Louisville &c. R. Co. v. Johnson*, 81 Fed. Rep. 679; s. c. 53 U. S. App. 381.

⁸ *Gulf &c. R. Co. v. Redeker*, 67 Tex. 181.

⁹ *Wood v. Canadian Pac. R. Co.*, 30 Can. S. C. 110; aff'g s. c. 6 Brit. Col. Rep. 561.

¹⁰ The lower court proceeded on the theory that where defendant

furnished a properly-constructed side-track, and it was allowed to get in bad condition by the roadmaster and a section-man, the negligence was that of fellow servants. The higher court affirmed the case on this ground, and on the further ground that there was no evidence of negligence to go to a jury; the Chief Justice thinking no danger was reasonably to be anticipated from long weeds and grasses on the track: *Wood v. Canadian Pac. R. Co.*, *supra*.

¹¹ *Williams v. St. Louis &c. R. Co.*, 119 Mo. 316; s. c. 24 S. W. Rep. 782.

panies ought to be held to the duty, in favor of their employés, of keeping such obstructions away from the vicinity of their tracks, especially in their yards. Whether the railroad company has used, in keeping its switching-grounds safe from pit-falls and man-traps, that reasonable care which the law puts upon it, has been held to be a *question for the jury*.¹² But this, of course, assumes that there is evidence of negligence sufficient to take the question to the jury. The question will not properly be submitted to the jury where it rests upon mere conjecture or surmise; as where a brakeman, while coupling moving cars, between which he went in the night-time, was killed, and the conjecture was that he fell in consequence of a shallow hole or depression in the road-bed.¹³ Nor was it proper to submit to the jury the question whether a railroad receiver was guilty of negligence in leaving a ditch open, instead of covering it, where he had acted in good faith, had made inquiries as to the safest kind of a ditch, and had adopted the uncovered one because he deemed it safer, since a mere error of judgment made after inquiry is not to be imputed to one as negligence.¹⁴ Another court could not say, as matter of law, that it was the duty of a railroad company to furnish a safe standing-place for its employés when alighting to couple or uncouple cars.¹⁵

§ 4427. Permitting a Team and Wagon to Stand So Near the Track as to Come in Contact with a Brakeman Making a Coupling.—It has been held that a railroad company is not chargeable with negligence because a team and a wagon belonging to and used by other parties in drawing coal from its cars, were allowed by such third parties to stand so near the track that there was not sufficient room for a brakeman to stand between the wagon and the car after making a coupling, where such wagon had not previously been left so near the track except on one occasion two weeks before, of which the company had no actual notice.¹⁶

¹² Toledo &c. R. Co. v. Frick, 14 Ohio C. C. 453; s. c. 8 Ohio C. D. 28.

¹³ Ellison v. Truesdale, 49 Minn. 240; s. c. 51 N. W. Rep. 918.

¹⁴ De Forest v. Jewett, 19 Hun (N. Y.) 509.

¹⁵ Little Rock &c. R. Co. v. Townsend, 41 Ark. 382. The theory of the court seems to have been that

a railroad company fulfills its duty in furnishing a safe road-bed, if the road-bed will safely support the weight of the passing trains,—a decision not to be commended.

¹⁶ Connors v. Elmira &c. R. Co., 92 Hun (N. Y.) 339; s. c. 72 N. Y. St. Rep. 331; 36 N. Y. Supp. 926.

ARTICLE XIII. INJURIES TO CAR-COUPLERS FROM THE MODE OF OPERATION IN MAKING SUCH COUPLINGS OR UNCOUPLINGS.

SECTION	SECTION
4429. Operation of the fellow-servant rule.	4436. Instructions to jury in cases of injuries in making couplings.
4430. Injuries to servants making the coupling or the uncoupling from the operation of the engine or failure to give signal.	4437. Coupling cars standing on repair-track.
4431. Giving erroneous signals where men are engaged in coupling or uncoupling.	4438. Suffering unlocked and unblocked car to stand on a descending grade.
4432. Coupling and uncoupling cars while in motion.	4439. Negligent failure to have trains sufficiently manned that coupling may be done in safety.
4433. Compelling inexperienced brakeman to make dangerous coupling.	4440. Questions for the jury with respect to injuries in coupling and uncoupling cars.
4434. Employés attempting to make couplings outside the line of their duty.	4441. Evidentiary facts not sufficient to impute negligence to the master with respect to coupling and uncoupling cars.
4435. Contributory negligence in making couplings.	4442. Injuries to third persons in coupling cars.

§ 4429. **Operation of the Fellow-Servant Rule.**—It is necessary to caution the reader that where the fellow-servant rule obtains, the decisions which are collected in this article have no practical utility. They are rendered in jurisdictions where the fellow-servant rule has either been abolished by statute, or where the courts have held that the rule does not apply.¹

§ 4430. **Injuries to Servants Making the Coupling or the Uncoupling from the Operation of the Engine or Failure to Give Signal.**—A jury may find that a railroad company is guilty of negligence in driving a locomotive against a car to which it is about to be coupled, with an extraordinarily sudden impulse, without necessity, and without the exercise of care to avoid doing so;² in backing cars intended to be coupled, without the customary signal from the brakeman;³ in the operation of its engine by its engineer, although he does so in prompt

¹See *post*, § 5278, *et seq.*, where various statutes affecting the fellow-servant rule are considered.

²*McKnight v. Chicago & c. R. Co.*,

44 Minn. 141; s. c. 46 N. W. Rep. 294.

³*Romick v. Chicago & c. R. Co.*, 62 Iowa 167.

and careful compliance with the signals of the conductor, if the signal called for the performance of an act on the part of the engineer which would be negligent as toward the brakeman endeavoring to make the coupling;⁴ in kicking or shunting cars together where, after shunting them the first time, the automatic coupler failed to work and a workman had gone in between them to manipulate the coupling-apparatus;⁵ in starting the train back without notice and without waiting for the directions of the brakeman attempting to make the coupling, so that while engaged in changing the link with his hand between the bumpers, it was caught and injured,—the view being taken that the brakeman had the right to rely upon the assumption that the train would not start from the place where it had been stopped by his directions until he should give the signal.⁶ It has also been held to be negligence *per se* for which the railroad company is liable, for the engineer of a switching-crew so to station himself, when he knows that a member of the crew is between moving cars attempting to uncouple them, that it is necessary for the switch-foreman first to signal the fireman, and for the fireman in turn to signal the engineer, before the latter can stop his train.⁷ So, it is negligence on the part of a railroad company to run over a brakeman on a dark night by the engine of his train, while he is going ahead to make a necessary coupling, after he has thrown a switch to side-track his train, which is late, the engineer, in his haste to clear the main track for an approaching train, having come ahead without waiting for proper signals.⁸

§ 4431. Giving Erroneous Signals where Men are Engaged in Coupling or Uncoupling.—A railway conductor who knows that a brakeman has gone between cars to uncouple them, is negligent in giving a signal to the engineer to move the cars without knowing that

⁴Alabama &c. R. Co. v. Richie, 99 Ala. 346; s. c. 12 South. Rep. 612 (hence a charge that defendant was not liable if the engineer promptly and carefully complied with the signals of the conductor, was properly refused. It was a question for the jury whether a signal to back an engine forcibly on an up-grade, so as to give slack to allow cars to be uncoupled, should have been given or obeyed).

⁵Voelker v. Chicago &c. R. Co., 116 Fed. Rep. 867.

⁶Nicholaus v. Chicago &c. R. Co., 90 Iowa 85; s. c. 57 N. W. Rep. 694. For a somewhat similar case, see

Cincinnati &c. R. Co. v. Cook, — Ky. —; s. c. 23 Ky. L. Rep. 2410; 67 S. W. Rep. 383.

⁷Louisville &c. R. Co. v. Hurst, 14 Ky. L. Rep. 632; s. c. 20 S. W. Rep. 317 (no off. rep.).

⁸Richards v. Louisville &c. R. Co., 20 Ky. L. Rep. 1478; s. c. 49 S. W. Rep. 419 (no off. rep.) (after five years' litigation, during which there were three jury trials, the Supreme Court setting aside the order granting the third trial and ordering judgment upon the verdict rendered at the second trial for \$5,700).

the brakeman is not in a place of danger; and (the operation of the fellow-servant rule in the case of superior servants being excluded by statute) the railway company is liable for the negligence of its conductor.⁹ The act of a railway engineer in backing an engine voluntarily, without giving notice to a switchman, who he knows or ought to know is between the cars in the discharge of his duty, is an act of *misfeasance*, and not merely an act of *nonfeasance*, and he will be liable to the switchman in damages for the injury thereby visited upon him.¹⁰ But it has been held that the conductor of a freight-train is not guilty of negligence in signalling the engineer to move the train forward for the purpose of easing up on a coupling-pin, after giving instructions to his subordinates to open a switch, cut off a flat-car, and place it upon a side-track; since he has a right to assume that his subordinates have obeyed his order and are in a position safely and properly to uncouple the cars as directed.¹¹

§ 4432. **Coupling and Uncoupling Cars while in Motion.**—As hereafter seen, when dealing with the subject of the contributory negligence of employes,¹² it is not necessarily negligence to require an uncoupling to be made while the engine and cars are in motion, when it is shown to be a necessary and common practice to make such uncouplings while the train is moving slowly;¹³ even though the practice of cutting off the engine while the train is in motion is unusual on other roads.¹⁴

§ 4433. **Compelling Inexperienced Brakeman to Make Dangerous Coupling.**—A railroad company is liable for injury received by an inexperienced brakeman in making a dangerous coupling in the nighttime, where a more experienced fellow brakeman offered to make such coupling, but the conductor refused to allow any one but the former to make it.¹⁵

§ 4434. **Employés Attempting to Make Couplings Outside the Line of their Duty.**—As hereafter seen, an employé who, without the command of a superior or the existence of an emergency, steps outside the line of his regular employment and attempts the performance of

⁹ *Andrews v. Toledo &c. R. Co.*, 8 Ohio C. D. 584. See also, *Fort Worth &c. R. Co. v. Bowen*, 30 Tex. Civ. App. 14; s. c. 68 S. W. Rep. 700.

¹⁰ *Warax v. Cincinnati &c. R. Co.*, 72 Fed. Rep. 637.

¹¹ *Hudson v. Charleston &c. R. Co.*, 55 Fed. Rep. 248.

¹² Vol. V, CONTRIBUTORY NEGLIGENCE OF THE SERVANT.

¹³ *Gorman v. Minneapolis &c. R. Co.*, 78 Iowa 509; s. c. 43 N. W. Rep. 303.

¹⁴ *Gorman v. Minneapolis &c. R. Co.*, *supra*.

¹⁵ *Shadd v. Georgia &c. R. Co.*, 116 N. C. 968; s. c. 21 S. E. Rep. 554.

some other duty toward his employer, is imputable with contributory negligence or with acceptance of the risk of the dangers attending such other duty. This principle is of obvious application in the case of a duty so dangerous as that of coupling or uncoupling railway-cars. But it has been held that a finding that a wiper in a roundhouse, permanently injured while attempting to couple an engine to a car in assisting to take the engine out of the roundhouse, was acting in the line of his duty while making the coupling, is authorized where such employé was a man-of-all-work and required to assist in taking engines into and bringing them out of the roundhouse, and it is shown that other wipers coupled cars, though the injured employé had never attempted to do so before.¹⁶

§ 4435. **Contributory Negligence in Making Couplings.**—Evidence that a brakeman was injured while coupling cars at a point on the road where the business of the company required couplings of cars to be frequently made, and where the road was defective to such an extent as to interfere with the duties of a brakeman in making couplings; that the accident occurred in the night, while he was obliged to carry a lantern, and at a time when, from the movement of the engine and the nature of his other duties, it was necessary that he should act with promptness; and that he was not familiar with the condition of the track at that point,—has been held sufficient to sustain a finding that he was not chargeable with contributory negligence in going between the cars while they were moving in attempting to make the coupling.¹⁷

§ 4436. **Instructions to Jury in Cases of Injuries in Making Couplings.**—In an action for injuries to a railroad brakeman in coupling cars, grounded on the incompetency of a fireman acting as engineer, the engineer being absent, an instruction that the fact that the conductor (who was also absent) did not personally superintend the coupling cannot be charged against the company as negligent conduct, is properly refused, where, when the injury occurred, but three of the five men constituting the train-crew were on duty, and the duties of the absent ones devolved upon the others; since the question whether or not the shortage in the crew was the cause of the improper management or movement of the train resulting in the injury is for the jury.¹⁸

¹⁶ Grannis v. Chicago &c. R. Co., 81 Iowa 444; s. c. 46 N. W. Rep. 1067.

¹⁷ Horan v. Chicago &c. R. Co., 89 Iowa 328; s. c. 56 N. W. Rep. 507.

See Vol. V, subtitle CONTRIBUTORY NEGLIGENCE OF THE SERVANT.

¹⁸ Nicolaus v. Chicago &c. R. Co., 90 Iowa 85; s. c. 57 N. W. Rep. 694.

§ 4437. **Coupling Cars Standing on Repair-Track.**—Where a switchman attempted to couple two cars standing on the defendant's repair-track, an entry in a car-inspector's book, indicating that one of the cars had been placed upon the repair-track to have a side-board put in, and not for the repair of the coupling-attachment, does not afford any ground for holding the company liable for an injury to the employé caused by the defective coupling, where he did not see the book until after the accident. He could not have been misled into the belief that there was no defect except in the side-board, as he had not seen the book; and the fact that the car was standing upon the repair-track was notice to him that the car was out of repair in some particular, and he had no right to assume that the coupling was in good order.¹⁹

§ 4438. **Suffering Unlocked and Unblocked Car to Stand on a Descending Grade.**—In the absence of any rule for the government of a railroad-yard, suffering a car loaded with iron rails projecting over the ends, to stand on a descending grade without having the brakes on to prevent its moving by its own weight on an attempt to couple it, is an omission of the company, and not of a fellow servant of the one making the coupling.²⁰

§ 4439. **Negligent Failure to have Trains Sufficiently Manned that Coupling may be done in Safety.**—Evidence that there was but one brakeman on a train with ten loaded cars going down a descending grade in order to couple a stationary car, and that the connection with it was very forceful, whereby an employé attempting to make the coupling was injured, is sufficient to sustain a verdict in his favor against the company, under a count charging a negligent failure to have the train sufficiently manned.²¹

§ 4440. **Questions for the Jury with Respect to Injuries in Coupling and Uncoupling Cars.**—Where a brakeman was injured at an uncovered culvert about 300 feet east of a switch on a heavy down-grade while trying to make a coupling; and the evidence tended to show that frequently several attempts were necessary before a train could be successfully coupled at that point, and that at every attempt the train would move farther down the hill, so that it was not improbable that the train would get down as far as the culvert; but the evidence

¹⁹ *Brown v. Chicago &c. R. Co.*, 59 Kan. 70; s. c. 11 Am. & Eng. R. Cas. (N. S.) 408; 52 Pac. Rep. 65. *Co.*, 84 Hun (N. Y.) 231; s. c. 32 N. Y. Supp. 535.

²¹ *Georgia &c. R. Co. v. Propst*, 90 Ala. 1; s. c. 7 South. Rep. 635.

showed that the deceased had only been employed on the road for a month, and that he did not in fact know of the culvert; that sometimes for a month there would be no occasion for coupling a train at this point; and there was but the slightest evidence that the train on which deceased was, was ever coupled there; and unless something special had occurred to call his attention to it, he would not necessarily have opportunity or occasion to observe the culvert while merely passing over the road on his train,—the question whether he *ought* to have known of it was a question for a jury.²²

§ 4441. Evidentiary Facts Not Sufficient to Impute Negligence to the Master with Respect to Coupling and Uncoupling Cars.—A railroad switchman cannot recover for an injury caused by his slipping or stumbling against the arm of a guard-rail while uncoupling cars, such an injury being accidental, or at least incident to his employment.²³ The mere fact that a coupling-pin in cars which a switchman was attempting to couple, was stuck fast in the drawhead, was not deemed of itself sufficient to show that the coupling-pin, link, drawhead, and other coupling-apparatus were defective and that the company had knowledge of such defect, or ought in the exercise of ordinary care to have known of it.²⁴ Evidence of the death of a brakeman by being caught between a bumper and a drawhead of cars which he was coupling, and that the drawhead was then defective, was not deemed sufficient to show negligence on the part of the railroad company, where he had at the starting of the train at another station coupled the same cars safely, and there was no proof of want of inspection.²⁵

§ 4442. Injuries to Third Persons in Coupling Cars.—A railway company was charged with negligence for the conduct of its local

²² *Franklin v. Winona &c. R. Co.*, 37 Minn. 409; s. c. 34 N. W. Rep. 898; 5 Am. St. Rep. 856. Where a brakeman, attempting to couple cars, was injured at an uncovered culvert some 300 feet from a switch at or near which the coupling was supposed to be made, the question of whether the defendant company should, under the circumstances, have reasonably expected that brakemen might sometimes have to go along the road to that point in coupling cars, and, hence, whether it was negligent in failing to cover the culvert, was for the jury: *Franklin v. Winona &c. R. Co.*, *supra*. Whether an improper play of the drawhead of a car contributed to the injury of a railroad

employé, and whether it existed when the train left its starting-place, and might by proper inspection have been discovered and remedied, are questions of fact for the jury: *Joyce v. Rome &c. R. Co.*, 61 N. Y. St. Rep. 586; s. c. 29 N. Y. Supp. 898.

²³ *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460; s. c. 70 N. W. Rep. 665.

²⁴ *Missouri &c. R. Co. v. Thompson*, 11 Tex. Civ. App. 658; s. c. 33 S. W. Rep. 718 (not shown why the pin stuck, nor how long it had been in that condition, nor that the company knew or ought to have known of it).

²⁵ *Mahoney v. New York &c. R. Co.*, 46 N. Y. St. Rep. 738; s. c. 19 N. Y. Supp. 511.

agent having direction and control of its cars, in ordering an employé in charge of an engine to couple on to a car standing on the siding of a cotton-compress company, in which car the agent knew that an employé of the compress company was engaged in counting the bales of cotton therein, rendering the railway company liable for an injury to the employé of the compress company, from the fall of a bale caused by the jolt incident to the coupling, he being in the exercise of due care.²⁸

ARTICLE XIV. INJURIES TO RAILWAY EMPLOYEES FROM DEFECTIVE HAND-CARS.

SECTION	SECTION
4445. Duty of railway company to exercise care to the end of providing safe hand-cars for their employés to use is an absolute and unassignable duty.	4446. Instances of liability for failing to perform this duty.
	4447. Instances where there was no such liability.
	4448. Liability for injuries to employés in operating hand-cars.

§ 4445. Duty of Railway Company to Exercise Care to the End of Providing Safe Hand-Cars for their Employés to Use is an Absolute and Unassignable Duty.—Under the principles of this chapter, if a railway company fails to exercise reasonable care and skill in providing and maintaining hand-cars which are reasonably safe and free from dangerous defects, in consequence of which failure of duty their employés, required to use such cars, are injured, they will be liable to them in damages; nor will the fact that the section-foreman in charge of the hand-car, whose duty it was to keep it in repair, was a fellow servant of the servant sustaining the injury, avert the liability of the company, since the proper inspection and reparation of such cars is one of the *absolute duties* which the law puts upon the master in favor of his servant.¹

§ 4446. Instances of Liability for Failing to Perform this Duty.—It was so held where a railroad company furnished its employés with a hand-car which had a handle of brash and brittle wood, which condition the employé could not detect by reason of its being painted,

²⁸ Missouri &c. R. Co. v. Holman, 15 Tex. Civ. App. 16; s. c. 39 S. W. Rep. 130.

¹ Northern Pac. R. Co. v. Charless, 2 C. C. A. 380; s. c. 51 Fed. Rep. 562; 51 Am. & Eng. R. Cas. 198;

Chicago &c. R. Co. v. Artery, 137 U. S. 507; s. c. 34 L. ed. 747; 11 Sup. Ct. Rep. 129; 44 Am. & Eng. R. Cas. 573 (under Iowa Code 1873, § 1307).

and by reason of the fact that he was near-sighted, where the handle broke, injuring him;² where a hand-car had been injured in a collision, and the foreman failed to discover the injury by reason of neglecting an inspection, but caused the car to be used the next day, in consequence of which an employé of the company was injured;³ where a hand-car was derailed in consequence of the slipping of the cage on the pinion-wheel, which was too small, so that the cage caught, binding the car to a rail as it was going up grade on a curve;⁴ where, owing to a defect in the handle of a hand-car which was not discoverable by casual observation, but which would have been detected by a proper inspection, it broke, causing an employé who was working it to fall from the car, in consequence of which he was run over by another hand-car closely following,—the defect being deemed the proximate cause of the injury.⁵

§ 4447. **Instances where there was No such Liability.**—But where a steam-car jumped the track, injuring an employé of the company riding thereon, and the evidence left the cause of the accident obscure, and showed plainly that, if there was a defect in the car, the injured employé must have been aware of it, and he had never made any complaint to the company,—it was held that there could be no recovery.⁶ Nor was a railroad company liable to an employé injured by falling from a hand-car which he was assisting to operate, due to the breaking of a handle by which the lever was worked, owing to a defect which was in such a place, relatively to the socket of the lever through which the handle passed, as not to be apparent, in the absence of actual knowledge of the defect by the company.⁷ Nor is a

² *Siela v. Hannibal & Co. R. Co.*, 82 Mo. 430.

³ *Solomon R. Co. v. Jones*, 30 Kan. 601.

⁴ *Evans v. Delk* (Tex.), 9 S. W. Rep. 550 (no off. rep.).

⁵ *Banks v. Wabash & Co. R. Co.*, 40 Mo. App. 458. Condition of fact under which, the hand-car being old and so worn out that the wheels played back and forward, it was error to give a peremptory instruction for the defendant, there being no evidence that the defect was known to the plaintiff: *De Hart v. Chesapeake & Co. R. Co.*, 24 Ky. L. Rep. 431; s. c. 68 S. W. Rep. 647 (no off. rep.). Where an employé, in operating a hand-car, was injured by reason of the handle becoming loose and turning in the socket, causing him to be thrown from the car, evidence showing that the han-

dle, having previously become loose, had, under the direction of the section-boss, been secured by a nail, and tending to show that a screw would have been proper and much safer, was sufficient to authorize the submission of the case to the jury; there being no evidence to show that plaintiff had any reason to apprehend danger: *Louisville & Co. R. Co. v. Miller*, 22 Ky. L. Rep. 327; s. c. 57 S. W. Rep. 230 (no off. rep.).

⁶ *McQueen v. Central Branch & Co. R. Co.*, 30 Kan. 689.

⁷ *Louisville & Co. R. Co. v. Hinder*, 16 Ky. L. Rep. 841; s. c. 30 S. W. Rep. 399 (no off. rep.) (defect was in that part of the handle fastened in an iron socket, and could not have been discovered without removing the handle).

railroad company negligent as matter of law in furnishing to its employes hand-cars constructed in the same manner as others of like make, although different makes are used on some railroads.⁸

§ 4448. Liability for Injuries to Employes in Operating Hand-Cars.—Outside of any question as to the obligation of the railroad company to provide safe hand-cars for its employes, it has been held that, where a section-hand in the employ of defendant company, while in the performance of his duties, took a hand-car off the track to allow a train to pass, and while standing near it was struck in the eye by *steam and water thrown from the passing engine*,—he had a cause of action.⁹ Whether a railroad company is guilty of negligence making it liable for the death of an employe thrown to the ground by a collision between the hand-car on which he was riding, and one in advance of it, due to the section-boss causing them to be run too close together across a bridge and directing the checking of both at the same time, and the sudden application of the brake on the rear car jerking the handle from such employe, so that when the two hand-cars collided he was thrown off and killed, was a question for a jury.¹⁰ A section-foreman is not, as matter of law, guilty of negligence in giving at the same time a signal to check the speed of two similar hand-cars fifteen or twenty feet apart, running over a bridge at the same rate of speed, so as to make the company liable for an injury to a section-hand on the rear car, caused by a collision with the front car.¹¹ A railroad section-hand, while returning from his day's work on a hand-car, was injured by another hand-car coming from behind it, carelessly propelled by other employes of the company. It was held that a statute¹² making railroad companies liable for damages to employes in consequence of the negligence of agents, or of the mismanagement of other employes, applied to the case, and that the injured section-hand was entitled to recover damages.¹³ Evidence that

⁸ *Hamilton v. Chicago & C. R. Co.*, 93 Iowa 46; s. c. 61 N. W. Rep. 415 (so constructed that part of the lever machinery was enclosed in the tool-box, there being plenty of room at each side of the box, but none in the center of the front when the car was in motion; employe attempted to put his mittens into the tool-box, and the car was started, catching his hand).

⁹ *Atchison & C. R. Co. v. Thul*, 32 Kan. 255.

¹⁰ *Jones v. Alabama & C. R. Co.*, 107 Ala. 400; s. c. 18 South. Rep. 30; s. c. on second appeal, 121 Ala.

113; 15 Am. & Eng. R. Cas. (N. S.) 752; 25 South. Rep. 814.

¹¹ *Alabama & C. R. Co. v. Jones*, 121 Ala. 113; s. c. 15 Am. & Eng. R. Cas. (N. S.) 752; 25 South. Rep. 814; s. c. on former appeal, 107 Ala. 400; 18 South. Rep. 30.

¹² Kan. Gen. Stat. 1901, § 5858; Laws 1874, ch. 93, § 1. See *post*, § 5296.

¹³ *Union Trust Co. v. Thomason*, 25 Kan. 1 (statute held to apply only to employes exposed to the hazards of railroading, but this does not mean those alone who are engaged in running trains; following

railroad employes running a hand-car at a high rate of speed on a down-grade and slippery track only sixty feet behind another hand-car, where the usual distance at which hand-cars are kept apart is five hundred and forty feet, and where, at the rate they were going, they could not have stopped within one hundred feet; so that, when plaintiff fell off the front car, those in the rear were unable to stop in time to avoid running over him,—is sufficient to justify a finding by the jury that those on the rear car were guilty of negligence which caused the injury.¹⁴ A foreman, occupying under the Missouri doctrine the place of vice-principal, has been held guilty of negligence in directing a water-keg to be placed at the front end of a hand-car on which he is riding with the hands under him, to be used by him as a seat from which to keep a lookout, and leaving it where it is liable to roll off in front by the motion of the car, while he assists the men in operating the car.¹⁵ A hand-car is within the meaning of a statute of Texas,¹⁶ providing that railroad companies shall be liable for all damages sustained by any servant or employé while engaged in the work of operating their “cars, locomotives, or trains” by reason of the negligence of any other servant or employé, and that the fact that such servants or employes were fellow servants shall not destroy such liability.¹⁷ In the opinion of the Supreme Court of the United States, the doctrine as to the duty of the master to furnish a safe place for the servant to work, has no application to the failure of a foreman in charge of a hand-car to watch for an approaching train, when the car itself is in every way fit for the purpose for which it is used; but such failure is the negligence of a fellow servant of an employé on the hand-car injured in a collision with such train, which was backing.¹⁸

the construction of the Iowa act, which is similar—see *post*, §§ 5294, 5295).

¹⁴ *Christianson v. Chicago & C. R. Co.*, 67 Minn. 94; s. c. 2 Chic. L. J. Wkly. 86; 69 N. W. Rep. 640.

¹⁵ *Russ v. Wabash & C. R. Co.*, 112 Mo. 45; s. c. 18 L. R. A. 823; 20 S. W. Rep. 472. His negligent act in having the keg placed where he did was held to be in the performance of duties devolved upon him by the master; and his getting up and leaving the keg unsecured was held to be a failure in the performance of the duty devolved upon him of looking after the safety of his men: *Russ v. Wabash & C. R. Co.*, *supra*.

¹⁶ *Sayles' Tex. Civ. Stat.* 1897, art. 4560f; *Acts Spec. Sess.* 1897, p. 14, § 1.

¹⁷ *Texas & C. R. Co. v. Smith*, 114

Fed. Rep. 728; s. c. 52 C. C. A. 360. See *post*, § 5307.

¹⁸ *Martin v. Atchison & C. R. Co.*, 166 U. S. 399; s. c. 41 L. ed. 1051; 17 Sup. Ct. Rep. 603 (the plaintiff had noticed the work-train starting out from a station some distance away, and had spoken to the foreman about it, who instructed plaintiff to keep his eyes to the front and mind his own business, and that he, the foreman, would take care of approaching trains). Railway trainmen were deemed guilty of negligence in running a train at an excessive rate of speed around a curve in an obscure place, without sounding the whistle as required by a rule of the company, so as to render the company liable for the death of a section-foreman free from contributory negligence, in a

ARTICLE XV. VARIOUS INJURIES TO RAILWAY EMPLOYEES IN
OPERATING ENGINES AND CARS.

SUBDIVISION I. *Moving of Trains.*

SECTION

4450. Rules and regulations.

4451. Discretion of a railroad company as to methods of directing the movements of its trains.

SECTION

4452. Changing the running-time.

4453. Running trains in sections.

4454. Running trains too close to each other.

collision between the train and a hand-car on which he was riding. But the section-foreman was guilty of contributory negligence, in that he failed to obey an instruction which required him to flag around all curves, which, had he done so on this occasion, would have prevented the collision. Judgment for plaintiff reversed, the evidence clearly showing disobedience of the rule: *Southern Pac. Co. v. Ryan* (Tex. Civ. App.), 29 S. W. Rep. 527 (no off. rep.). Case of injury received by a section-man in assisting other section-men to lift a hand-car from the track to get it out of the way of a train which suddenly appeared around a curve at a high rate of speed, without warning, where one of the lifters lost his nerve and let go his hold, thereby throwing extra weight upon and injuring the plaintiff by giving him a sprain in the back, where the evidence was held sufficient to sustain a finding that the negligence of the company was the proximate cause of the injury: *International & C. R. Co. v. Newburn*, 94 Tex. 310; s. c. 60 S. W. Rep. 429; aff'g s. c. (Tex. Civ. App.), 58 S. W. Rep. 542 (no off. rep.). Case where a section-hand sustained injuries by being thrown from an overcrowded hand-car, and it was held that the question of negligence in overcrowding the car was for the jury: *Haworth v. Kansas City & C. R. Co.*, 94 Mo. App. 215; s. c. 68 S. W. Rep. 111. A railway company operated a railroad in Wisconsin, and engaged a bridge-gang to operate from West Superior for the reconstruction of bridges along its line. The company agreed, as part of the consideration, to transport the men back and forth between West Superior

and the station nearest the place of their day's labor by means of regular trains; and for the transportation back and forth between the station and their place of work it furnished hand-cars to be propelled by the men. Plaintiff was riding on a hand-car from the place of work to a station where they could board defendant's train back to West Superior, and another hand-car, propelled by another member of the crew, overtook the first car and was negligently propelled against it, derailing it and injuring plaintiff. One of the handles on the front end of the rear car, intended to be used in lifting the car from the track, was broken off, and because of its absence the other handle on the same end of that car caused the preceding car to be pushed laterally and derailed. The company had not provided any rules or regulations to control the running of hand-cars on its track. It was held that plaintiff and the other members of the crew were employes of the railway company and engaged in their duties as such at the time of the injury, and that plaintiff's complaint, setting forth the above facts, stated a cause of action; in that defendant was guilty of negligence in failing to provide suitable rules, etc.; and for the further reason that the defective handle might have been the proximate cause of the accident under the circumstances, as the company might reasonably have anticipated that some accident would result from its absence, though it might not have anticipated the particular accident: *Wallin v. Eastern R. Co.*, 83 Minn. 149; s. c. 86 N. W. Rep. 76; 54 L. R. A. 481.

SECTION

- 4455. Sending out an irregular or "wild" train without notice to track-repairers and others.
- 4456. Double track—Running a train on the wrong track.
- 4457. Breaking in two of a train.
- 4458. Locomotive or train starting with a sudden jerk.
- 4459. Stopping suddenly and without warning.
- 4460. Instances where negligence was not imputed to the act of stopping suddenly and without warning.
- 4461. Allowing fireman to run locomotive-engine.
- 4462. Obstructions on the track.
- 4463. Running train backwards.
- 4464. Pushing cars too suddenly against other cars.
- 4465. Attempting to move car which has run off the track.
- 4466. Failure to have lookout on rear of backing train.
- 4467. Illinois statute requiring brakeman on rear car of train.
- 4468. Other statutory precautions—"Lookout on engine," etc.
- 4469. Running a train without a conductor.

SECTION

- 4470. Conductor temporarily leaving train in charge of engineer.
- 4471. Negligence of railroad conductor in failing to instruct brakeman before temporarily leaving train.
- 4472. Cutting off cars.
- 4473. Making up a train so that a lumber-car is the first car in the train.
- 4474. Failure to keep a lookout ahead.
- 4475. Running down hand-cars and push-cars.
- 4476. Running over switchmen.
- 4477. Running a train rapidly around a curve upon section-men.
- 4478. Running down track-repairers at work on the track.
- 4479. Running over bridge watchman.
- 4480. Running down employes using railway-tracks as passways.
- 4481. Right of engineer to assume that section-men will be on the lookout and get out of the way.
- 4482. Employé struck by a man or an animal thrown from the track.
- 4483. Injuries on the tracks of other companies.

§ 4450. **Rules and Regulations.**—A railroad company must not only adopt, but also use reasonable care to enforce, adequate rules for the running of its trains.¹ Where, in an action to recover damages for alleged negligence, causing the death of the plaintiff's intestate, it appeared that the death resulted from a collision in the night-time between a freight-train on which the deceased was employed as fireman and an engine left standing on the defendant's main track, in violation of one of its rules, by its engineer while waiting for orders; and

¹ Nolan v. New York & C. R. Co., 70 Conn. 159; s. c. 43 L. R. A. 305; 39 Atl. Rep. 115 (but in this case the failure to flag a following extra train, whereby an employé on the

latter was killed, was due wholly to the negligence of a brakeman on the preceding train, and not to the negligence of defendant).

there was evidence that such engineer and other engineers had for at least a year been in the habit of frequently disobeying such rule,—the complaint should not have been dismissed, but the question of the defendant's negligence should have been submitted to the jury; since a railroad company does not discharge its whole duty by framing and publishing rules for the conduct of its business and the guidance and control of its servants; but must exercise such supervision over them and the prosecution of its business as to have reason to believe that its rules are being observed.² It is the duty of a railway company to establish regulations which will advise its servants moving cars at a station as to the presence of other employes at work on the cars and liable to injury from the movement of cars on the switch-tracks. It should also provide means by which employes on such tracks may be notified of the approach of moving cars. Such regulations should be published and made known to its employes; and the company cannot avail itself of a rule which it has not properly published, and which it has uniformly neglected to enforce.³ When rules and regulations established by the master are *habitually disobeyed*, with the knowledge or express consent of the master, or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that the master (whose duty it is not only to make and promulgate, whenever engaged in a business of such a nature as to require it, suitable rules and regulations for the protection of his servants, but also to use due care and diligence to have them enforced) must have become aware of such habitual disregard and approved the same, such rules and regulations will be disregarded. But evidence showing such a violation (in this case of a rule as to running trains between stations) on only two occasions, one of them being the occasion of the accident, is not sufficient to show an abrogation of the rule.⁴ Where the cars of a work-train were being pushed before the

²Whittaker v. Delaware &c. Canal Co., 126 N. Y. 544; s. c. 27 N. E. Rep. 1042; 38 N. Y. St. Rep. 523; aff'g s. c. 11 N. Y. Supp. 914; 34 N. Y. St. Rep. 822.

³International &c. R. Co. v. Hinz, 82 Tex. 623; s. c. 18 S. W. Rep. 681 (employé painting cars injured by reason of cars being kicked against them without warning to him; company had signal-flags for such employes to protect themselves with, and required them to be used; but plaintiff had never been informed either of the flags or of the rule).

⁴Konold v. Rio Grande &c. R. Co., 21 Utah 379; s. c. 60 Pac. Rep. 1021

(action by locomotive-engineer injured by explosion of boiler; defended on ground that violating a rule as to running-time made it necessary to overwork the boiler: plaintiff attempted to meet an opposing passenger-train at the next station and allow it five minutes' clearance, as required by a rule, to do which he had to run five and seven-tenths miles in nineteen minutes at the outside, the schedule time for freight-trains being thirty minutes, thirty-five minutes being the least time in which it was usually attempted when running against a passenger-train).

engine, the failure to post a flagman on the leading car to warn the engineer of approaching danger, as required by the rules of the company, constituted negligence on the part of the conductor, who had full control of the operation of the train, rendering the company liable for the death of the assistant roadmaster in the collision which resulted; the deceased having had control of the work, but not of the running of the train.⁵

§ 4451. Discretion of a Railroad Company as to the Methods of Directing the Movements of its Trains.—A comprehensive dictum of an enlightened court, as contained in the official syllabus of the case, is to the effect that the law does not require a railroad company to direct the movement of its trains by orders from the train-despatcher alone, nor by a system of signals only; nor does it require the company to adopt any particular form of orders, or any particular system for communicating them; but the company has the right to direct the movement of its trains by train-orders alone, or by train-orders of any form and signals, or by signals alone, or by time-card alone, provided that the means adopted are brought to the knowledge of its employes, and they are reasonably well calculated to secure the safety of the men, if obeyed by them.⁶ Another case holds that it is not necessary in all cases, and as matter of law, that information of the position of other trains on a railroad should be given by the train-despatcher. Hence, where the evidence was conflicting as to the usual course of communicating information as to the position of certain other trains on the road than the one on which the plaintiff was injured,—whether by messages from train-despatchers or by inquiry at

⁵ *Rinard v. Omaha &c. R. Co.*, 164 Mo. 270; s. c. 64 S. W. Rep. 124. The death of a brakeman and baggage-master by collision was caused by the negligence of the engineer of the following train, a fellow servant, and not by an unsafe schedule or defective rules, where the engineer of the colliding train received an order to run two hours late, but the schedule of the train struck would interfere with such order, and the general rule required following trains to run ten minutes behind the time of the train followed; as it is the duty of the trainmen of the following train to look out for the train in advance, although there is no special order to do so; and since special orders are to be read in connection with the general rules, which the engin-

eer negligently failed to do: *Kenelty v. Baltimore &c. R. Co.*, 166 Pa. St. 60; s. c. 36 W. N. C. (Pa.) 50; 30 Atl. Rep. 1014; 25 Pitts. L. J. (N. S.) 316.

⁶ *Hannibal &c. R. Co. v. Kanaley*, 39 Kan. 1; s. c. 17 Pac. Rep. 324 (train-despatcher ordered plaintiff's train to "meet No. 11" at a certain place. After one section of No. 11 had passed, plaintiff's train pulled out and collided with the second section, which was not mentioned in the train-order; but it was proved that the first section had sounded a signal and was carrying lights indicating that a second section was following, and that the conductor of the plaintiff's train heard, saw and comprehended the signals but disregarded them).

the stations,—an instruction making it the duty of the company to give information through its train-despatchers was held to be erroneous.⁷

§ 4452. Changing the Running-Time.—The duty of giving notice of a change in the running-time of a railroad-train to those in charge of the train has been classed with that of exercising reasonable care to provide a safe place for a servant to work.^{7a}

§ 4453. Running Trains in Sections.—It is not negligence, as matter of law, on the part of a railroad company, with respect to its employés, to run a train in three sections five minutes apart, with orders to pass another train at a given place.⁸ But where a freight-train is divided into two sections, those in charge of the first section may incur the imputation of negligence with respect to those in charge of the second section, growing out of the manner of running the first section, although the sections are scheduled to run not less than ten minutes apart. In such case, those in charge of the first section have no right to lose ten minutes without warning those in charge of the second section.⁹

§ 4454. Running Trains Too Close to Each Other.—A recovery cannot be predicated on the negligence of the trainmaster in running two trains too close together, in the absence of proof that they were dangerously near even if proper care had been taken, nor on the ground of negligence in insufficiently manning the train, where it appears that one man could have set the brakes in time, if he had done his duty, and that the proximate cause of the collision which took place was the negligence of a brakeman in failing to set the brakes and thereby prevent the cars from running backwards.¹⁰ Though there is no *rule* requiring a train-despatcher to notify an engineer of the

⁷ *Houston &c. R. Co. v. Stewart*, 92 Tex. 540; s. c. 50 S. W. Rep. 333; rev'g s. c. (Tex. Civ. App.), 48 S. W. Rep. 799 (no off. rep.).

^{7a} *Frost v. Oregon &c. R. Co.*, 69 Fed. Rep. 936 (engineer killed in collision due to failure of telegraph-operator to transmit order of train-despatcher relative to change of running-time).

⁸ *Terre Haute &c. R. Co. v. Leeper*, 60 Ill. App. 194 (first two sections entered switch at meeting-point with the other train, and had the proper signal-lights out; third section, knowing it would find other

two on the siding, ran into the switch at too great a speed).

⁹ For illustrative facts,—see *Chesapeake &c. R. Co. v. Hoskins*, 19 Ky. L. Rep. 1359; s. c. 43 S. W. Rep. 484 (no off. rep.).

¹⁰ *Relyea v. Kansas City &c. R. Co.*, 112 Mo. 86; s. c. 19 S. W. Rep. 1116 (brakeman cut off four front cars to set them on a switch, but neglected to set brakes on rear cars, by reason of which they ran backward down a long grade and collided with an approaching train, killing the fireman).

whereabouts of a train with which he is liable to collide, it is his *duty*, when knowing that a train, which has orders to make and is making 25 miles an hour, is only 10 minutes behind a train allowed to make but 16 miles an hour, and which is three hours late, to telegraph warning to both or one of the trains.¹¹ The mere fact that a train is a "wild" train not running on schedule time does not justify an inference that the conductor is relieved from obeying the rules regulating the running of trains; nor does the mere fact that it is under the control of some agent or despatcher of the company justify such an inference.¹²

§ 4455. **Sending Out an Irregular or "Wild" Train without Notice to Track-Repairers and Others.**—There is a difference of judicial opinion upon the question whether it is negligence on the part of a railway company to send out an *irregular* or "*wild*" train without notifying track-repairers or section-men of its approach. It has been held that, where this has been done without any rule having been established and enforced for the protection of the section-men, and without giving them any notice of the approach of the train, the proof of the fact that one of them is killed, on a hand-car, by a collision with the train, makes out a *prima facie* case of negligence.¹³ On the other hand, it has been held that it is not negligence on the part of a railroad company to send out a "wild" train without previous warning to a gang of section-men, where its rules, known to such men, provide that the crew of a wild train shall see that the train preceding it carries a red signal, but that if it is impossible for those running the "wild" train to see that the train preceding carries such signal, they must reduce their speed to fifteen miles an hour around all curves and sound the whistle before approaching them; and the train had sounded its whistle, and, at the time of the accident, was running between ten and twelve miles an hour.¹⁴ Another court has held that, where it is the custom of a railroad company to run special trains without notice, sending out an engine with a *snow-plough* in a storm, without notice, is not negligence as to a trackman.¹⁵ So, where a rail-

¹¹ Houston &c. R. Co. v. Higgins, 22 Tex. Civ. App. 430; s. c. 55 S. W. Rep. 744.

¹² Northern Pac. R. Co. v. Poirier, 167 U. S. 48; s. c. 42 L. ed. 74; 17 Sup. Ct. Rep. 741 ("wild" train running too fast, or following another train too closely, in violation of rules governing *all* trains).

¹³ Cincinnati &c. R. Co. v. Lang, 118 Ind. 579; s. c. 21 N. E. Rep. 317.

¹⁴ Shepard v. Boston &c. R. Co., 158 Mass. 174; s. c. 33 N. E. Rep. 508.

¹⁵ Olson v. St. Paul &c. R. Co., 38 Minn. 117; s. c. 35 N. W. Rep. 866. The mere fact that a railway company ordered a train to run ahead of *schedule time*, without giving notice of that fact to the conductor of a train ahead of it, where this practice is not unusual, has been

road corporation was in the habit of running special trains without notice, and an employé, knowing this, while on a hand-car, was run into and injured by a special train going at a high rate of speed without notice, it was held that he had no right of action against the corporation.¹⁶

§ 4456. **Double Track—Running a Train on the Wrong Track.**—Where a railroad consists of a double track, and, in cases of emergency, trains are sometimes run “on the wrong track,” and, in consequence of the failure of a telephone to work, a watchman is not notified of the approach of a train on the wrong track, so that, while going out to throw a switch, he is struck and killed by such train, the failure to notify the watchman is the proximate cause of the accident, and the railway company is liable.¹⁷

§ 4457. **Breaking in Two of a Train.**—The breaking in two of a railway-train may or may not furnish evidence of negligence, according to the causes of the accident.¹⁸ Negligent mismanagement may quite easily *follow* the breaking in two of a train, although negligence may not be imputable to the company because of the breaking. For example, where a freight-train parted in the night-time, and thereafter the engine backed rapily in search of the lost cars, with which it

held not to be evidence of negligence, especially where it does not appear that the rear train was to run on the time of the forward train, and more especially where the running of the rear train ahead of time was not the proximate cause of a collision in which the fireman thereon was injured, but such collision was caused by the negligence of the brakeman on the forward train in failing to set the brakes on the rear cars of his train, which had been cut off from the engine, thereby allowing them to roll back and collide with the following train: *Relyea v. Kansas City & C. R. Co.*, 112 Mo. 86; s. c. 18 L. R. A. 817; 53 Am. & Eng. R. Cas. 578; 20 S. W. Rep. 480. A work-train was given the right of way between H. and D., except as to regular trains. An extra freight was ordered to “look out” for a work-train between H. and D. The engineer of the freight train interpreted the order to mean that he should look out for flags set by the work-train, and not as meaning “protect yourself against” the

work-train, and, failing to look out for the work-train in any other way, a collision resulted. It was held that if the freight engineer was justified in thus interpreting his order, the failure of the train-despatcher to notify the operators of the work-train of the approach of the freight, so that flags could have been set, constituted negligence: *Rinard v. Omaha & C. R. Co.*, 164 Mo. 270; s. c. 64 S. W. Rep. 124 (roadmaster riding on work-train killed—recovery).

¹⁶ *Pennsylvania & C. R. Co. v. Wachter*, 60 Md. 395.

¹⁷ *Lake Shore & C. R. Co. v. Schultz*, 19 Ohio C. C. 639; s. c. 9 Ohio C. D. 816.

¹⁸ For a case where the evidence is discussed, and where a finding that the railway company was negligent with respect to a knuckle-pin which broke, causing a train to separate, was held to be supported by the evidence,—see *Western & C. R. Co. v. Beason*, 112 Ga. 553; s. c. 37 S. E. Rep. 863.

collided, killing a brakeman, this was held to be "gross negligence" under the Kentucky rule, and the railroad company was held liable in damages.¹⁹

§ 4458. **Locomotive or Train Starting with a Sudden Jerk.**—It may be concluded that for those in charge of a train to start it with a sudden motion, without warning trainmen who are upon it, so that they are liable to be thrown off and killed or injured, is an act from which a jury is authorized to infer negligence. In one case the plaintiff was employed on a construction-train, and in the discharge of his duty walked to the rear of the train while it was in motion; when within five feet of the rear end of the last flat-car in front of the caboose, the latter was uncoupled by the conductor, who warned the plaintiff to stop, and, at a signal, the engineer increased the speed, causing a sudden and unusual jerk, which threw the plaintiff from the car, and he was run over. It was held that a verdict for the plaintiff was justified by the evidence, which showed negligence on the part of both the engineer and the conductor.²⁰

§ 4459. **Stopping Suddenly and Without Warning.**—To stop a locomotive or a train suddenly and without any warning to servants of the company on board the train, may or may not be negligence, according to the circumstances of the particular case. If there is no emergency requiring such action, then negligence ought to be imputed to it unless there is a custom of not giving warnings in such cases, and

¹⁹ Southern R. Co. v. Barr, 21 Ky. L. Rep. 1615; s. c. 55 S. W. Rep. 900 (no off. rep.).

²⁰ Jeffrey v. Keokuk & C. R. Co., 56 Iowa 546. Where, in an action against a railroad company for injuries received by a yard-clerk of several years' standing, part of whose duty it was to keep a record of seals on the tops of fruit-cars passing through defendant's yard, and who was thrown from the top of such a car by a sudden jerk of a switch-engine, the overwhelming weight of evidence was against plaintiff's contention that it was the custom not to switch cars while a seal-taker was on top without notice to him, the court properly directed a verdict for the defendant; since, if a verdict had been rendered for the plaintiff, the court would have been bound to set it aside: Cummings v. Chicago & C. R. Co. 89

Ill. App. 199; writ of error dismissed, 189 Ill. 608; s. c. 60 N. E. Rep. 51. For a case where a railroad company was held liable for an injury to an employé from the sudden starting of a locomotive by reason of leaky valves, where he was free from contributory negligence, although it may not have had actual notice of such defective condition, under Ohio Act of April 2, 1890, providing that where an injury occurs to an employé of a railroad company by reason of defective machinery, the company shall be presumed to have had notice of the defect, and to have been negligent,—see Lake Shore & C. R. Co. v. Raitz, 10 Ohio C. C. 70 (employé injured while cleaning ash-pan of locomotive; coincidence noted by court that accident happened in the morning of the day on which above law was passed).

even then such a custom would be a bad custom. It has been held that where a train is made up of *log-cars*, the footing upon which is precarious, it is negligence for the engineer to reverse his engine without warning, upon receiving a signal to stop, since he thereby subjects the brakeman to the danger of being thrown off; and where such negligence is due to the incompetency of the engineer, and the master has been negligent in employing or retaining him in the service, the master is liable.²¹ It has also been held that where a freight-engineer approaches a work-train in plain view in front of him, so near and at such a rate of speed that it is necessary to make a sudden and violent application of the air-brakes to prevent a collision, whereby the engine breaks loose from the cars, which stop very suddenly, and a brakeman is thrown from the top of a car and is killed, a jury may properly find the engineer guilty of negligence rendering the company liable for the death of the brakeman.²²

²¹ *Bell v. Globe Lumber Co.*, 107 La. 725; s. c. 31 South. Rep. 994.

²² *Atchison & C. R. Co. v. Carter*, 60 Kan. 65; s. c. 55 Pac. Rep. 279; 5 Am. Neg. Rep. 347. In an action against a railroad company for personal injuries to a car-cleaner, while the cars of which a train had been made up were being distributed, evidence by the plaintiff that when the cars hit the bunting-post the two ends next each other went right up and then fell down again, and threw her over a seat; by the division superintendent of the company that the car struck the post because there had been too much momentum for the space there was to stop in, and that he saw the brakeman putting on the brake, and that he seemed to be winding it up as hard as he could; that it was going faster than it should; and that he had expected it to strike sooner than it did; and by the conductor that he was present and gave the stop motion for some other cars in the train, and the kick motion for the two causing the accident, but that he did not remember whether he gave the stop motion for those two, and that the stop motion was usually given by him; and nobody appeared to remember who gave the stop motion for these two,—warrants a finding that the injury was caused either by too great momentum being given to the cars through

the negligence of the engineer, or by the negligence of the conductor in not giving the stop motion soon enough, rendering the company liable: *Devine v. Boston & C. R. Co.*, 159 Mass. 348; s. c. 34 N. E. Rep. 539. Where an engine of another railroad, at the request of defendant's servant, was fastened to the rear of his train to assist it, and signals were given by the conductor and the whistle of the other road's engine, which were answered by the starting up of the train, and afterwards, on a "slow-up signal" from the yard foreman, defendant's engineer applied the "emergency air," stopping the train so suddenly that an accident resulted to plaintiff, defendant's servant, from the engine of the other company crushing the platform of the caboose, the question of the negligence of defendant's engineer was for the jury; there being a rule of defendant's that engineers should not use the emergency air-brakes "except to prevent a wreck or derailment or to save life or property," and no such emergency being shown; and his response to the signals of the other company's engine tending to show that he knew it was coupled to his train: *Galveston & C. R. Co. v. Adams*, 94 Tex. 100; s. c. 58 S. W. Rep. 831; aff'g s. c. (Tex. Civ. App.), 55 S. W. Rep. 803 (no off. rep.).

§ 4460. **Instances where Negligence was Not Imputed to the Act of Stopping Suddenly and without Warning.**—In a case in Kansas, it was said by Mr. Justice Valentine: "We suppose it will be admitted that the reversal of an engine is not negligence *per se*, and that negligence is never presumed without proof, but in all cases it must be proved."²³ Another court has reasoned similarly by holding that the conduct of an engineer in applying the air-brake and bringing the train to a sudden stop, one-quarter of a mile away from a switch, to which he was conveying an employé to work, without giving any signal or warning, does not necessarily constitute actionable negligence on the part of the company with respect to an employé who was injured by being thrown off a flat-car by reason of such sudden stopping; and where there was a special finding of facts which did not make it appear that the law or the rules of the company required signals to be given before the brakes were applied at that point, the court properly directed a verdict for the defendant,²⁴—thus placing the rules of a railroad company on the same footing as the law, which is the conception of some judges. The conclusion is less objectionable, that instantaneously stopping a work-train, by order of the foreman, without warning to a section-hand standing on the platform of a caboose, is not negligence rendering the company liable for injuries to the section-hand from being thrown against the brake by reason of the jar occasioned by the caboose striking against the next car, where he knew that the train was to be moved forward only a car's length.²⁵

²³ Jackson v. Kansas City &c. R. Co., 31 Kan. 761. Whether the rule thus stated was correctly applied in the particular case is more doubtful. The plaintiff was injured while attempting to mount an engine by way of the side-step, by reason of the engineer suddenly reversing the engine, causing the plaintiff to slip from the step and under the wheels. There was no evidence tending to show that the engine should not have been reversed at the time, or that the engineer knew of the plaintiff's presence or of his attempt to mount the engine,—in short, as the court concluded, no evidence of negligence: Jackson v. Kansas City &c. R. Co., *supra*.

²⁴ Cooper v. Wabash R. Co., 11 Ind. App. 211; s. c. 38 N. E. Rep. 823.

²⁵ Union Pac. R. Co. v. Doyle, 50 Neb. 555; s. c. 70 N. W. Rep. 43. A railroad employé upon a construc-

tion-train, whose business was to carry water for the trainmen, and to gather and put up tools, was upon the train, which was backing at the rate of four miles an hour, and was directed to pick up a tool on the rear end of the rear flat-car, and in attempting to do so, was thrown off, run over, and killed, by a jerk caused by reversing the engine to avoid cattle near the track, at the rear of the train, no signal being given before reversing the engine, and neither statute, the rules of the company, nor custom requiring such. In an action to recover damages under Kan. Act of Feb. 26, 1874, providing that every railroad company in the State shall be liable to any employé for any damages sustained in consequence of the negligence of its agents or other employés,—it was held, 1. That the act was constitutional; 2. That one employed in the duties of plaintiff was within its provisions;

§ 4461. **Allowing Fireman to Run Locomotive-Engine.**—Outside of the operation of the fellow-servant rule, it is not necessarily negligence for which the railway company will be responsible, that the engineer of a switch-engine permitted his fireman, who had been employed as a brakeman for six months and as a fireman for twenty months, and who had handled the engine more or less,—to operate it in coupling and in removing freight-cars standing on the track, so as to render the company liable for injuries sustained by a switchman because of the fireman starting the engine too suddenly.²⁶ But a fireman temporarily in charge and control of an engine in accordance with the rules of the company is an “engineman” within a rule of the company that enginemen are responsible for the proper management of their engines, and must use great care in switching and handling their trains to avoid danger to persons and property, and must avoid all unnecessary *jerking*.²⁷

§ 4462. **Obstructions on the Track.**—It has been held that a delay by trackmen of a little over twenty minutes after the commencement of a storm in inspecting the track, as required by a rule of the company in case of a storm, does not constitute negligence which will support an action for injuries to an employé caused by the engine catching up a limb which had been blown upon the track, and by reason thereof becoming derailed at a switch.²⁸ Where a hand-car oc-

3. That upon the facts, plaintiff could not maintain his action, no negligence on the part of his co-employés being shown: *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35. In an action by a brakeman against a railroad company for injuries caused by being thrown off a train by a jolt of the train in stopping, there was evidence showing that engineers, when approaching a station and not receiving notice from the conductor to go ahead at the mile-board, should signal by whistle and proceed. In approaching a station, but before reaching the mile-board, the conductor told the brakeman that he would go ahead over the train and give the engineer orders to stop at the next station, and directed the brakeman to follow him, in order to be ready, when the train stopped, to repair a hot-box. The engineer, without fault, failed to see the conductor's signals until at a point five-eighths of mile from the station, but in passing the mile-board he had

given signals of his intention to proceed, which the brakeman must have heard. The engineer stated that, as soon as he received the conductor's signals, he adopted the usual course for a station stop, except that he put on a little more air than usual,—the usual course for a station stop being to begin to shut off steam at the mile-board, and let the train gradually decrease in speed before applying air, thereby allowing the slack of the train to run in and avoiding violent jerking. It was held that the evidence failed to show that the engineer was guilty of negligence, and the brakeman was not entitled to recover: *Crane v. Chicago &c. R. Co.*, 83 Minn. 278; s. c. 86 N. W. Rep. 328.

²⁶ *Thompson v. Lake Shore &c. R. Co.*, 84 Mich. 281; s. c. 47 N. W. Rep. 584.

²⁷ *Louisville &c. R. Co. v. Morgan*, 114 Ala. 449; s. c. 22 South. Rep. 20.

²⁸ *Cox v. Chicago &c. R. Co.*, 102 Iowa 711; s. c. 72 N. W. Rep. 301; 9 Am. & Eng. R. Cas. (N. S.) 604.

cupied by a section-crew was derailed by running on a stick across one of the rails of the track, the fact that it was the foreman's duty to be watchful and see that the track was clear is not sufficient to show that he was negligent in *failing to look out for obstructions*; it being also his duty to notice any defects in the track and road-bed, and there being no evidence showing that he was not reasonably diligent in the performance of such duty; nor could negligence be imputed to the foreman from the mere fact that the car was not stopped in time to avoid the accident, where the lay of the track, the distance at which the obstruction could have been seen, and how soon the car might have been stopped, were not disclosed.²⁹

§ 4463. **Running Train Backwards.**—A railroad company has been held not liable for the death of a water-boy on a gravel-train, through its failure, while constructing its road, to maintain a turntable at each gravel-pit and place of unloading each car, or to provide check-chains for gravel-trains, or through its backing such trains, instead of drawing them.³⁰

§ 4464. **Pushing Cars Too Suddenly against Other Cars.**—Negligence on the part of the *person in charge of a train*, whether it be considered that the engineer or the brakeman was such, resulting in an injury to an employé, is shown by evidence that the engine with a car attached was pushed, while the employé was in the car, and while the brakeman stood on the front platform, against other cars with such force as to break the platform of the cars and throw the employé from her seat. It was the duty of the person in charge of the train, whether the brakman or the engineer, to arrange, by signal or otherwise, for stopping the train in time to avoid a collision.³¹

§ 4465. **Attempting to Move Car which has Run Off the Track.**—A railroad company fails to perform its duty towards its employés

Where the action was predicated, not on the negligence of the railway company in allowing its track to be obstructed by a log which a third party was hauling across the track, but upon the negligence of the engineer in not stopping the train sooner than he did upon discovering the obstruction, and the evidence showed that he did all that he possibly could under the circumstances to stop the train,—it was held that the company was not liable for the death of the fireman, who was

killed in consequence of jumping from the engine: *Lake Shore &c. R. Co. v. Brazzill*, 2 Ohio Dec. 691.

²⁹ *Koralewski v. Great Northern R. Co.*, 85 Minn. 140; s. c. 88 N. W. Rep. 410.

³⁰ *Carr v North River Constr. Co.*, 48 Hun (N. Y.) 266; s. c. 17 N. Y. St. Rep. 945 (killed in collision with hand-car).

³¹ *Shea v. New York &c. R. Co.*, 173 Mass. 177; s. c. 6 Am. Neg. Rep. 82; 53 N. E. Rep. 396.

in undertaking to move a car when a pair of wheels are off the track, as a result of which an employé is caught between such car and other cars standing on an adjoining track and killed.³²

§ 4466. **Failure to have Lookout on Rear of Backing Train.**—The failure to have a servant on the rear of a backing train to give warning of its approach to a street-crossing, was not negligence as to a flagman at the crossing, who could have seen the train if he had been performing his duty to keep a watch for approaching trains.³³

§ 4467. **Illinois Statute Requiring Brakeman on Rear Car of Train.**—The Illinois statute providing that each freight-train operated by a railroad company shall have a sufficient brake on the rear car, with a skillful brakeman in charge thereof,³⁴ was held to have been practically complied with where the switchman in a railroad-yard, who was stationed on the rear car of a train, after opening a switch, notified one employed to clean snow and ice from the tracks that the train was about to back through the switch, and to look out for it; and the company was not liable where he failed to heed the warning and was run over, though the switchman was not on the car at the time of the accident.³⁵

§ 4468. **Other Statutory Precautions—"Lookout on Engine," etc.**—A railroad company was engaged in switching some sleeping-cars around a curve near a depot-platform. The curve was so near the platform that sleeping-cars in passing around it frequently touched it, although freight-cars could pass it without danger to a person standing between the cars and the platform. The engine was pushing the cars. The whistle was blown in starting and the bell was rung all the way around, and there was a lookout on the end of the front car, who saw the deceased and warned him. The deceased passed toward the platform and leaned against it to let the cars pass, and the front car crushed him in passing. He could have stepped

³² Chicago &c. R. Co. v. Driscoll, 70 Ill. App. 91. The accident happened after dark. The car had run off the end of a stub-track, which could have been discovered by the exercise of that reasonable diligence on the part of the company which the law requires of it to see that its cars are in such condition and place as not unnecessarily to endanger the safety of employées; and the plaintiff was not required to know

and was not shown to have known the position of the car: Chicago &c. R. Co. v. Driscoll, *supra*.

³³ Coleman v. Pittsburg &c. R. Co., 23 Ky. L. Rep. 401; s. c. 63 S. W. Rep. 39 (no off. rep.).

³⁴ Hurd's Ill. Rev. Stat. 1903, ch. 114, § 90.

³⁵ Chicago &c. R. Co. v. Maloney, 77 Ill. App. 191; s. c. 3 Chic. L. J. Wkly. 298.

off the track in another direction or have stooped beneath the platform after reaching it. The Tennessee Code, § 1166, provides that a lookout shall always be kept out ahead, and whenever any person or other obstruction appears on the road, the whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident. It was charged that the defendant was negligent in failing to have a bell-rope or other means of communication between the lookout and the engine, so that the engineer could observe the statutory requirements; but it was held that the provisions of the statute do not apply to the running of engines about the depots and yards of railroad companies, or to employes moving across or around the tracks in the discharge of their duties, and that the company had done all that reasonable care required.³⁶

§ 4469. Running a Train without a Conductor.—A railroad company is not, as matter of law, negligent toward the employes operating a *freight-train*, in failing to furnish a conductor, although a passenger-coach is attached for the accommodation of the public, where nothing else is shown.³⁷ In the case where this was held, it was shown on a new trial that the passenger-coach was not run merely for the accommodation of the public, but for the profit of the company, and on a regular schedule, and that the company was trying to build up the business; under which circumstances it was held to be negligence as matter of law not to have a conductor on the train. But whether such negligence was the cause of the death of the brakeman, for whose death the action was brought, was a question for the jury under proper instructions as to the law, and it was, hence, error to grant a nonsuit.³⁸ So, the mere fact that railroad companies generally adopted a custom to send out *water-trains* equipped with a conductor, does not make failure on the part of a company to observe such custom negligence, providing its method of operating its trains is in point of fact reasonably safe.³⁹

§ 4470. Conductor Temporarily Leaving Train in Charge of Engineer.—It seems that it is not negligence which will render a rail-

³⁶ *Haley v. Mobile &c. R. Co.*, 7 Baxt. (Tenn.) 239.

³⁷ *Means v. Carolina &c. R. Co.*, 122 N. C. 990; s. c. 29 S. E. Rep. 939 (engineer acted as conductor, and ordered a brakeman to collect the tickets, who was killed while returning to the passenger-coach after

going to the engine with the tickets).

³⁸ *Means v. Carolina &c. R. Co.*, 124 N. C. 574; s. c. 45 L. R. A. 164; 32 S. E. Rep. 960; s. c. on third appeal, 126 N. C. 424; 35 S. E. Rep. 813.

³⁹ *Gulf &c. R. Co. v. Compton*, 75 Tex. 667; s. c. 13 S. W. Rep. 667.

road company liable for injuries to a brakeman, for the conductor of a freight-train to go into the office of the company for the purpose of sending a despatch to inform the proper authorities that a disabled car has been left upon a side-track, leaving the engineer and crew to shift the car to the side-track.⁴⁰

§ 4471. Negligence of Railroad Conductor in Failing to Instruct Brakeman Before Temporarily Leaving Train.—Whether a railroad conductor is negligent in omitting, before temporarily leaving the train, to tell the brakeman of a broken draw-bar, which causes an injury to the brakeman while using it in his absence, and whether such negligence is the proximate cause of the injury, are questions for a jury.⁴¹

§ 4472. Cutting Off Cars.—A freight-conductor cut out and side-tracked a car without causing the detached cars to be held in place, although the grade was steep and another train was closely following, by reason of which, a brakeman being asleep, the detached cars escaped down the grade, and collided with the following train, killing a brakeman thereon. It was held that the company was liable, although the brakeman was asleep. The liability was put on the ground of the want of careful supervision by the conductor. The fact that the brakeman was asleep was deemed immaterial.⁴²

§ 4473. Making Up a Train so that a Lumber-Car is the First Car in the Train.—A railroad company is not negligent toward a brakeman in so placing a lumber-car dangerous to mount and pass over, that it is the first car in the train of those on which brakes are required to be set by hand, where it is so placed that it is unnecessary for him to climb over it, and the only brake necessary to be set thereon can be reached from the car following.⁴³

§ 4474. Failure to Keep a Lookout Ahead.—A railroad engineer and fireman are not guilty of negligence toward another employé

⁴⁰ *Richmond &c. R. Co. v. De Butts*, 90 Va. 405; s. c. 18 S. E. Rep. 837. It was not necessary to decide this point, as the contributory negligence of the brakeman was so plainly the cause of the accident. The court merely says: "If this can be considered negligence under the circumstances of this case, it is the

sole indication thereof": *Richmond &c. R. Co. v. De Butts*, *supra*.

⁴¹ *Donahoe v. Old Colony R. Co.*, 153 Mass. 356; s. c. 26 N. E. Rep. 868.

⁴² *Au v. New York &c. R. Co.*, 29 Fed. Rep. 72.

⁴³ *Harris v. Chesapeake &c. R. Co. (Va.)*, 23 S. E. Rep. 219 (no off.).

walking along the track, in failing to keep a lookout ahead, at a time when their attention is otherwise required by the work they are doing.⁴⁴

§ 4475. **Running Down Hand-Cars and Push-Cars.**—To run a train toward a hand-car after warning, without keeping any lookout ahead, is a neglect of duty on the part of the trainmen, for which the railroad company is liable in case of injuries to trackmen on the hand-car from a collision.⁴⁵ Evidence of the running of a freight-train past a station at thirty to thirty-five miles an hour, when the rules required a speed not exceeding eight miles, justifies a finding that it was negligence and a proximate cause of a collision with a hand-car running over the road in advance of the train.⁴⁶ An engineer was held negligent in failing to stop a train in time to prevent a collision with a hand-car upon the track, where he had time to do so after it was reasonably apparent to him that the car could not be moved from the track by workmen who were engaged in such an attempt.⁴⁷ A jury may impute negligence to a railway company whose engineer, in charge of a switch-engine, fails to observe that a *push-car*, which he sees in front of him at a sufficient distance to stop the engine before reaching it, is so close to the track as to collide with an employé riding on the engine and having duties to attend to requiring his attention.⁴⁸ On the other hand, it has been held that a railroad engineer (and consequently the railroad company), was not negligent in not sooner concluding that sectionmen on a hand-car on the track in front of the train were in danger, where they could have removed the hand-car and cleared the track before the train reached them if they had seen it when he first began to stop it;⁴⁹ nor in running a train around a curve at a speed of from twenty-five to thirty-two miles an hour, so as to run over section-hands riding on a hand-car.⁵⁰ Nor was an engineer of a special train guilty of negligence in running down a hand-car proceeding in the same direction and operated by employés whose backs were toward the train, where he gave all the signals that diligence required, appreciating the fact that a strong wind then blowing might prevent his signals from being heard, and

⁴⁴ Chicago &c. R. Co. v. Maney, 55 Ill. App. 588.

⁴⁵ Howard v. Delaware &c. Canal Co., 40 Fed. Rep. 195; s. c. 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473 (boss of hand-car crew had sent a flag ahead and warned the train-crew of their approach).

⁴⁶ Slette v. Great Northern R. Co., 53 Minn. 341; s. c. 55 N. W. Rep. 137.

⁴⁷ Walker v. Shelton, 59 Kan. 774

(*mem.*); s. c. 11 Am. & Eng. R. Cas. (N. S.) 15; 52 Pac. Rep. 441.

⁴⁸ Atchison &c. R. Co. v. Slaterry, 57 Kan. 499; s. c. 46 Pac. Rep. 941.

⁴⁹ Nelling v. Chicago &c. R. Co., 98 Iowa 554; s. c. 63 N. W. Rep. 568; 67 N. W. Rep. 404; 4 Am. & Eng. R. Cas. (N. S.) 539.

⁵⁰ International &c. R. Co. v. Arias, 10 Tex. Civ. App. 190; s. c. 30 S. W. Rep. 446.

used every appliance and effort at his command to stop the train as soon as he had reason to believe that his signals had not been heard.⁵¹

§ 4476. **Running Over Switchmen.**—In the view of one court, those in charge of a switch-engine have the right to assume that a switchman who has attempted to mount on the front foot-board for the purpose of riding to and making a switch has succeeded in doing so, where he is hidden from their view by the boiler; and they are not required to stop the engine to ascertain whether or not he has done so.⁵²

§ 4477. **Running a Train Rapidly around a Curve upon Section-Men.**—It has been held that a railroad company is not as a matter of law guilty of negligence toward section-hands in its employ by running a train around a curve at the rate of from twenty-five to thirty-two miles an hour.⁵³ Where a gang of track-hands under a section-foreman, working with a hand-car, were surprised by the approach of a train around a curve and through a cut, and it appeared that there were two or three lines of action, any one of which might have been taken, and the foreman, with ordinary skill, being compelled to choose one of them on the instant, did so in good faith,—it was held that the mere fact that it was afterwards found that he had not chosen the best means of escape was not sufficient to charge him (and indirectly the company) with negligence.⁵⁴

§ 4478. **Running Down Track-Repairers at Work on the Track.**—It is the duty of a railroad company to maintain a lookout upon its trains to the end of discovering section-men at work upon the tracks, of giving them seasonable warning by use of the steam-whistle or the

⁵¹ *Nelling v. Chicago &c. R. Co.*, 98 Iowa 554; s. c. 63 N. W. Rep. 568; 67 N. W. Rep. 404; 4 Am. & Eng. R. Cas. (N. S.) 539.

⁵² *Ferguson v. Chicago &c. R. Co.*, 100 Iowa 733; s. c. 69 N. W. Rep. 1026; 8 Am. & Eng. R. Cas. (N. S.) 241.

⁵³ *International &c. R. Co. v. Arias*, 10 Tex. Civ. App. 190; s. c. 30 S. W. Rep. 446. The testimony showed that the train could not be stopped on the curve in question in a less distance than from 500 to 1,000 yards, but there was nothing to indicate the ordinary distance in which such a train could be stopped,

hence no negligence was shown by the evidence: *International &c. R. Co. v. Arias*, *supra*.

⁵⁴ *Gumz v. Chicago &c. R. Co.*, 52 Wis. 672. It seems that the section-men saw the train in time to save themselves, but the foreman ordered them to "push the car back," or "run her back," and the deceased was killed while on the hand-car trying to get it out of danger. The court could not impute to the foreman a desire merely to save the hand-car, but thought his order may have been dictated by the imminent danger to those on the train: *Gumz v. Chicago &c. R. Co.*, *supra*.

bell, and of exercising reasonable care to avoid running over them.⁵⁵ For example, a railroad company is liable for the death of a track-repairer while walking along or on the track to his place of labor, caused by the engineer's failure to exercise due care and watchfulness to discover him, or to exercise such care, after he saw him on the track, to avoid injuring him, although such repairer may not have taken due care in looking out for approaching trains.⁵⁶

§ 4479. **Running Over Bridge Watchman.**—Where the servants in charge of a train saw a bridge watchman on his tricycle on a trestle, approaching the bridge, when the train was three-quarters of a mile away, it was their duty to use proper care to avoid running him down, especially after they saw a signal from him, and saw that he was trying to reach a cage in front of him, provided for the safety both of himself and his tricycle.⁵⁷

§ 4480. **Running Down Employés Using Railway-Tracks as Passways.**—Where a servant of a railroad company, rightfully on its tracks, is seen by its employés on an approaching train, it becomes their duty, even before discovering that the servant is in peril, to exercise the degree of care which an ordinarily prudent person would

⁵⁵ See note upon this subject in 25 L. R. A. 290.

⁵⁶ *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87; s. c. 21 S. W. Rep. 1110. The track was level and the view unobstructed. The engine and tender had followed the deceased a few moments after he started out, and had gone only 1,300 feet when the accident occurred. — — — That the removal by some one, without authority, of a flag to guard a car on which repairers were at work, will not make the railroad company liable for injury to such a workman, in the absence of negligence on the part of the employer, — see *Gulf & C. R. Co. v. Wittig* (Tex. Civ. App.), 35 S. W. Rep. 857 (no off. rep.). It has been held that a railroad company is liable for injuries to a section-hand who, while working upon the track, was *struck by a fireman who sprang from a train under apprehension of danger*, as the train approached a place where repairs were being made, where it was negligent in not having sufficient brakes on the train, and the flagman sent out by the section-boss failed to give the "slow"

signal, but gave the "stop" signal, thereby increasing the fireman's alarm, even though the flagman was a fellow servant with the injured servant. But a judgment for the plaintiff was reversed on account of error in charging the jury: *Galveston & C. R. Co. v. Jackson* (Tex. Civ. App.), 44 S. W. Rep. 1072 (no off. rep.) (evidence indicated that fireman would not have been so alarmed as to cause him to jump had only the "slow" signal been given). That the foreman of one gang of section-men, under whose direction a member of another gang was working at the time he received an injury, supposed the latter was a mere volunteer with reference to the particular work, does not affect the master's liability, where he in fact was directed by his own foreman to work under the direction of the other foreman, — was held in *Southern R. Co. v. Guyton*, 122 Ala. 231; s. c. 25 South. Rep. 34.

⁵⁷ *Louisville & C. R. Co. v. Seibert*, 21 Ky. L. Rep. 1603; s. c. 55 S. W. Rep. 892 (no off. rep.).

exercise under similar circumstances to avoid injury to the servant.⁵⁸ Where railroad-tracks are elevated above the streets, and a city ordinance makes it an offense for any one to be on them at such place, save those employed by the railroad company and in the discharge of their duties, the fact that employes were in the habit of going across the tracks at that place would not raise a duty on the part of those operating the engines to be constantly on the lookout to conserve the safety of persons so using the track.⁵⁹

§ 4481. **Right of Engineer to Assume that Section-Men will be on the Lookout and Get Out of the Way.**—A locomotive-engineer has a right to assume that a section-man will perform his duty in watching for trains, the section-man having been specifically instructed that extra trains may pass at any time, and is under no obligation to check his train on seeing him and another section-man on a hand-car on the track, until it is reasonably apparent that, from any cause, they are not likely to clear the track in time.⁶⁰

§ 4482. **Employé Struck by a Man or an Animal Thrown from the Track.**—It has been held that a railroad company is liable for personal injuries sustained by an employé who, while free from negligence and in his proper place near the track, performing his duties as a servant of the company, was struck by the body of a *trespasser* who was killed by being thrown from the track by an engine, where the engineer saw the trespasser upon the track in time to stop before striking him, but carelessly, negligently, and recklessly allowed the train to run at a dangerous rate of speed, without giving any signal of its approach, or making any effort to check its speed;⁶¹ and the same conclusion has been reached where a person, not a servant, near the track, was injured by an animal on the track being struck by the en-

⁵⁸ *St. Louis & C. R. Co. v. Jacobson*, 28 Tex. Civ. App. 150; s. c. 66 S. W. Rep. 1111. Compare Vol. I, §§ 237, 238; Vol. II, § 1734, *et seq.* Where there were two railroad-tracks, one being used for south-bound trains and the other for north-bound trains in the ordinary course of business, but during the work of lowering the grade of the road first one and then the other was used for all trains, the company, knowing that a number of employes were using the tracks as a passway, was bound to reduce the speed of fast trains after leading them to believe, by setting out its slow flags, that it would do so:

Louisville & C. R. Co. v. Simpson, 23 Ky. L. Rep. 1075; s. c. 64 S. W. Rep. 750 (no off. rep.).

⁵⁹ *Martin v. Chicago & C. R. Co.*, 194 Ill. 138; s. c. 62 N. E. Rep. 599; *rev'g*, on other grounds, s. c. 92 Ill. App. 133 (engineer using tracks to go to work, the reason therefor not being shown, when there were other safer ways). Compare Vol. II, §§ 1725, 1726.

⁶⁰ *Nelling v. Chicago & C. R. Co.*, 98 Iowa 554; s. c. 67 N. W. Rep. 404; 4 Am. & Eng. R. Cas. (N. S.) 539.

⁶¹ *Western & C. R. Co. v. Bailey*, 105 Ga. 100; s. c. 31 S. E. Rep. 547; 12 Am. & Eng. R. Cas. (N. S.) 739 (willful wrong).

gine and thrown against such person,—the conclusion being that the company would be liable if the striking of the animal was due to the negligence of the engineer.⁶²

§ 4483. *Injuries on the Tracks of Other Companies.*—It should seem that if a railroad company sends its own servant to haul the trains of another company over the tracks of such other company, it becomes responsible to its own servant for the reasonably safe condition of such other track.^{62a} But there is an obtuse decision to the effect that a railroad company sending its locomotive-engineer (employed by the month) with one of its engines to haul temporarily for another company the trains of the latter over the line of such latter company, is not responsible to the engineer for the bad condition of the track, nor for the want of adaptation of the engine to the track, it not being alleged or made to appear that the employer company knew of such bad condition or want or adaptation and concealed its information.⁶³

SUBDIVISION II. *Lights, Flagmen, and Signals.*

SECTION

4488. Duty to provide sufficient signals of danger.

4489. Further of the duty of giving signals and warnings.

4490. Duty of giving signals to car-inspectors and car-repairers.

SECTION

4491. Further of the duty of giving signals to car-inspectors and car-repairers.

4492. Sending back flagman to warn following train.

⁶² Alabama &c. R. Co. v. Chapman, 80 Ala. 615; s. c. 2 South. Rep. 738; 31 Am. & Eng. R. Cas. 394.

^{62a} See *ante*, §§ 3730, 3735.

⁶³ Dunlap v. Richmond &c. R. Co., 81 Ga. 136; s. c. 7 S. E. Rep. 283. This case contains the further proposition that when a railroad company, chartered by a public law of the State, is in fact in open possession and use of its own line, there is no presumption that another company, which sends an engineer with an engine to haul the trains temporarily, has leased the road from the proprietary company or is otherwise using its franchises, although the other company may own a majority of the stock, vote the same at stockholders' meetings, thus electing such directors

and officers at it sees fit, and has and uses a connecting line, and pays habitually from its regular pay-car the operatives of its ally or dependent. It is the duty of such engineer, running trains upon a chartered railroad, to know who is in possession of the line and its franchises, or to use due diligence to ascertain the same, a public law of the State putting him upon notice of the ownership. And under such circumstances the engineer cannot recover of his employer, for injuries received from defects in such other track, on the ground that he did not know that he was working for another employer: Dunlap v. Richmond &c. R. Co., *supra*.

SECTION

4493. Interpretation of rule requiring danger-signals to be given when a train "stops for any cause."
4494. Railway signals for use during fogs.
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4496. Signals by unauthorized persons.
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SECTION

- tends to protection of servants.
4499. Failure to ring bell within city limits as required by municipal ordinance.
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4503. Moving a gravel-train without notice or warning to men at work upon it.
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4505. Failing to place a flagman at an open switch.

§ 4488. **Duty to Provide Sufficient Signals of Danger.**—It is the manifest duty of a railway company to provide that, when a train approaches a group of track-repairers engaged in their work, it shall signal them to the end that they may get out of the way.¹ The reason is plain to judges who are desirous of justice and right. A squad of railway laborers will not be able, while attending closely to their duties, to keep a strict lookout for approaching trains; but, absorbed in the performance of those duties, bent down, watching the track, shovelling gravel or driving spikes, a rapidly-moving train may come upon them without their being aware of its presence in time to step aside for it to pass. On the other hand, the servants of the company in charge of the train are driving the instrument of danger, and there is a manifest duty on their part to keep a constant lookout to the end of protecting from danger all persons who may be lawfully on the track, and of warning them in time to enable them to avoid being run over. If the duty of giving signals under such circumstances, or under any circumstances where they would be available to protect such track-repairers, has been imposed upon the company by a valid statute or municipal ordinance, then the failure to give such signal ought to be regarded as negligence *per se*; so that if a track-repairer, engaged in his duties, and without fault on his part, relying upon the assumption that the duty to give a signal will be performed, is run

¹ Illinois Cent. R. Co. v. Gilbert, 157 Ill. 354; s. c. 41 N. E. Rep. 724; aff'g s. c. 51 Ill. App. 404. It has been held that a *laborer*, ordered to *unload a car*, has a right to assume

that other cars will not be backed down on the car while he is at work, without notice to him: North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57.

over, in consequence of its not being given, he, or in case of his death, his statutory representative, will have an action for damages against the company.² If there is a public crossing near the place where the track-repairer is at work, at which crossing the statute law requires the railroad company to sound the steam-whistle on approaching it with a train, it is a just conclusion that he has the right to rely upon the assumption that the statutory signal will be given; and he ought not, as held by one court, to be precluded from his recovery of damages on the ground that the statute was enacted for the protection of the travelling public, and not for the protection of the servants of the company.³ For the same reason, it does not seem to be a sound conclusion, as held by another court, that a railway employé who is injured in consequence of the absence of a flagman at a street-crossing, where a flagman is required to be stationed by a city ordinance, cannot recover damages, on the ground that the ordinance was passed to promote the safety of the travelling public, and not the safety of the employés of the company.⁴

§ 4489. **Further of the Duty of Giving Signals and Warnings.**—The starting or running of a switch-engine, in a switch-yard filled with a network of tracks upon which cars are constantly moving, and upon which yardmen are constantly at work, without the ringing of a bell or blowing of a whistle, is evidence of negligence, irrespective of any statute on the subject.⁵ An established custom in the management of a depot-yard, that, in switching cars therein, it is not the duty of the company to have a brakeman or other person upon each group of cars or single car, separately in motion, to give warning of its approach to men at work in the yard, but that the men in such cases must look out for themselves, would not relieve a brakeman actually in charge of a moving car, upon seeing that it was approaching a workman upon the track, from the duty of stopping it, or warning him of its approach; but the company is liable to such workman for an injury thus caused.⁶ A railway company is guilty of negligence in allowing a number of different employés to undertake the duty of

² Kelly v. Union R. & Co., 95 Mo. 279; s. c. 14 West. Rep. 721; 8 S. W. Rep. 420; aff'g s. c. *sub nom.* Kelley v. Union R. & Co., 18 Mo. App. 151.

³ Louisville & C. R. Co. v. Markee, 103 Ala. 160; s. c. 15 South. Rep. 511. Compare Sullivan v. Fitchburg R. Co., 161 Mass. 125; s. c. 36 N. E. Rep. 751 (wild trains required to run cautiously around curves and over grade crossings, looking

out for trackmen; circumstances under which rule was held to refer to safety of train, and not of trackmen).

⁴ Kansas City & C. R. Co. v. Kirksey, 60 Fed. Rep. 999.

⁵ Union Pac. R. Co. v. Elliott, 54 Neb. 299; s. c. 74 N. W. Rep. 627.

⁶ Berg v. Chicago & C. R. Co., 50 Wis. 419 (under a statute of Wisconsin known as the Railway Fellow-Servant Act).

warning or causing to be warned employ  s engaged on the repair-tracks, of the switching of cars on to such tracks, without making it certain who is to discharge such duty in each instance, so as to avoid confusion and mistake.⁷ The owner of an iron mill, who uses locomotives to shift the iron from place to place in the mill and around the yard, cannot be said to have done his whole duty to an employ   in sounding a whistle before the locomotive emerges from the building, if the locomotive cannot be seen from the outside and other whistles are constantly sounding within the building, and the employ  , who has just been employed, has received no warning of the danger.⁸

  4490. **Duty of Giving Signals to Car-Inspectors and Car-Repairers.**—It is the manifest duty of a railway company so to systematize its business as to protect men engaged under its cars in repairing them, when its trains are stopped on the track for that purpose. A car-repairer so engaged has a right to rely upon the railroad company for the exercise of that degree of care in protecting him from injury by running other cars upon that track, which a person of ordinary prudence would exercise in view of the extreme and obvious hazards to which he is exposed.⁹ If he is directed by his superior to

⁷ *Texas &c. R. Co. v. Eberhart* (Tex. Civ. App.), 40 S. W. Rep. 1060 (no off. rep.); s. c. aff'd, 91 Tex. 321; 43 S. W. Rep. 510. Where a switchman signalled a tower-man, who controlled the manual throwing of all the switches in a railroad-yard, to throw a certain switch, by holding up a lantern and shouting the number of the track, and the tower-man signified that he heard him and then threw a wrong switch, causing an approaching train to run against the switchman, it was error to direct a verdict for the defendant. Nor was the fact that the ground was covered with snow, and a snowstorm was raging, and that the switchman failed to go to the foot of the tower, and clear away the snow and ice covering a dwarf-switch, which would have shown him that his signal was not obeyed,—conclusive evidence of contributory negligence, but that question also should have been submitted to the jury: *Welch v. New York &c. R. Co.*, 176 Mass. 393; s. c. 57 N. E. Rep. 668.

⁸ *Weiss v. Bethlehem Iron Co.*, 88 Fed. Rep. 23; s. c. 59 U. S. App. 627; 31 C. C. A. 363. A railroad com-

pany is liable for an injury *to an employ   of a coal company*, where the employ  s of the former company back a train on a main coal-track at the south end thereof, and, after putting it in rapid motion, detach empty cars and allow them to move at a dangerously rapid rate of speed along such track toward its north end, where they are to be set so they can be loaded, without at work on the coal-track, where giving any signal to warn employ  s the long-established custom has been to set such empty cars on the north end of the coal-track by means of a switch at its north end, the operations of the railway company at the south end of the track being confined to removing loaded cars after they had been set at the south end by the coal company: *Chicago &c. R. Co. v. Anderson*, 55 Ill. App. 649; s. c. on second appeal, 67 Ill. App. 386; s. c. aff'd, 166 Ill. 572; 46 N. E. Rep. 1125.

⁹ *St. Louis &c. R. Co. v. Triplett*, 54 Ark. 289; s. c. 15 S. W. Rep. 831; 16 S. W. Rep. 266; 11 L. R. A. 773; *Louisville &c. R. Co. v. Davis*, 91 Ala. 487; s. c. 8 South. Rep. 552.

repair a car on a switch-track, instead of on the tracks provided for that special purpose, and upon which no trains are run or switched, he has the right to assume that his superior will do his duty by placing the proper signal-flags to warn trainmen of his presence; and in the absence of contributory negligence the company is liable for the non-performance of such duty.¹⁰ But it has been held that it was not negligence on the railroad's part in not having a *watchman* or *bumpers* to protect cars standing upon a switch and under which the men were at work engaged in their repair, from being struck because of cars backed upon them.¹¹ While a car-repairer who is sent under a car to repair it, when it is standing upon a track where it is liable to be struck by other cars, ought to be provided with a *flag* to warn those in charge of other trains or cars that he is engaged in the performance of this duty, yet if he is an experienced car-repairer, and continues in the service without demanding that a flag be furnished him, he has been regarded as waiving the right to that species of protection and accepting the risk of discharging his duties without it.¹²

§ 4491. Further of the Duty of Giving Signals to Car-Inspectors and Car-Repairers.—The servants in charge of an engine in a railroad-yard owe to a car-inspector the duty of giving signals of the approach of an engine and of keeping a lookout to prevent engines or cars from striking against the car under which such inspector is at work; and where the fellow-servant rule does not interfere, their failure to discharge this duty will render the railroad company liable in damages to the injured car-inspector.¹³ Where the nature of the employment of car-repairer is shown by undisputed evidence to be very hazardous, as where repairs are made on a switch-track instead of on a repair-track, the duty is imposed on the master, as matter of law, of *making and promulgating a rule* requiring the placing of danger-flags on cars where repairers are under them, and forbidding any coupling to be done by a locomotive while they are so engaged.¹⁴ Another court has held that whether a railroad company was negligent

¹⁰ Louisville &c. R. Co. v. Han-
ning, 131 Ind. 528; s. c. 31 N. E.
Rep. 187. See also, Street's West-
ern Stable Car Line v. Bonander,
196 Ill. 15; s. c. 63 N. E. Rep. 688;
aff'g s. c. 97 Ill. App. 601 (cars
kicked on to track on which re-
pairer was at work, by direction of
foreman under whom he was work-
ing, who failed to notify him).

¹¹ Peterson v. Chicago &c. R. Co.,
64 Mich. 621; s. c. 10 West. Rep.
870; 34 N. W. Rep. 260.

¹² O'Rorke v. Union &c. R. Co., 22
Fed. Rep. 189; Unfried v. Baltimore
&c. R. Co., 34 W. Va. 260; s. c. 12
S. E. Rep. 512. What rule is insuffi-
cient for the protection of a track-
repairer,—see St. Louis &c. R. Co.
v. Triplett, 54 Ark. 289; s. c. 15 S.
W. Rep. 831; 16 S. W. Rep. 266; 11
L. R. A. 773.

¹³ Louisville &c. R. Co. v. Lowe,
— Ky. —; s. c. 66 S. W. Rep. 736.

¹⁴ Pool v. Southern Pac. Co., 20
Utah 210; s. c. 58 Pac. Rep. 326.

in failing to promulgate and enforce a rule adopted by it, requiring the use of specified signals upon cars under which inspectors are at work, is a question for the jury.¹⁵ Where the plaintiff, a car-repairer, worked with another repairer, the latter's failure to keep watch while the plaintiff went between the cars to make a slight repair was not such negligence, in view of the custom of not keeping a watch under such circumstances, as would defeat a recovery for injury to plaintiff from a collision with other cars, caused by the negligence of defendant's foreman of repairers.¹⁶

¹⁵ *Warn v. New York & C. R. Co.*, 92 Hun (N. Y.) 91; s. c. 36 N. Y. Supp. 336; 71 N. Y. St. Rep. 120 (s. c. rev'd, 157 N. Y. 109, on the ground that the rule *did not require* the use of signals on the cars in question. See *infra*, note, where the reversing case is considered).

¹⁶ *Street's Western Stable Car Line v. Bonander*, 196 Ill. 15; s. c. 63 N. E. Rep. 688; aff'g s. c. 97 Ill. App. 601. A railroad company having an equal right to the use of two tracks is not negligent as to a car-inspector in the employment of *another road* in changing from the track which it has been in the habit of using to the other without notice to such inspector of its intention to do so: *Hoy v. Terminal R. Assn.*, 65 Ill. App. 349 (it does not appear that the accident was due to any negligence in the *operation* of the train). A car-repairer was directed to repair a car standing on a track other than a repair-track. He went under the car for the purpose of making repairs, as directed, but no danger-flag was placed on the car being repaired, and while he was so employed an engine and caboose, under the direction of the foreman of the switchmen in the train department, who had actual knowledge of his position under the car, were backed against the car, resulting in his injury and death. It was held that defendant was guilty of gross negligence, because of unnecessarily exposing the car-repairer to danger: *Pool v. Southern Pac. Co.*, 20 Utah 210; s. c. 58 Pac. Rep. 326. A rule of a railroad company providing that certain signals on the end of a car shall denote that inspectors are at work under or about the car or train, and that the car or train so protected shall not be coupled

to or moved until the signal is removed by the car-inspectors, and that, when a train or car standing on a siding is so protected, other cars shall not be placed in front of it so as to obscure the signal without first notifying the car-inspector, that he may protect himself,—does not apply to a regular passenger-train which has stopped at a station on the main track and is being inspected, and negligence cannot be predicated of the omission to observe it under such circumstances; since the rule obviously relates to cars or trains on sidings or in yards, and not to passenger-trains making transient stops at a station; and there being nothing in the language of the rule requiring such a signal to be placed on such a train or the cars composing it,—especially where it is proved to have been the custom merely to notify the trainmen verbally that repairs or inspection was being made, as was done in this case: *Warn v. New York & C. R. Co.*, 157 N. Y. 109; s. c. 51 N. E. Rep. 744; rev'g s. c. 92 Hun (N. Y.) 91 (train backed while repairer was at work under it). Proof merely that an employé injured by the moving of a car under which he had gone to repair it was in a position where he could not see an engine approaching, is insufficient to support a verdict against the railroad company, in the absence of evidence that he was not otherwise warned of the approach of the engine; since such proof does not support the essential allegation of his complaint that the company "carelessly and negligently and without any notice or warning to the plaintiff" set the car in motion: *Sweeney v. Great Falls & C. R. Co.*, 11 Mont. 523; s. c. 29 Pac. Rep. 15.

§ 4492. **Sending Back Flagman to Warn Following Train.**—It is the duty of an engineer to give the signal provided by the rules of the company for a flagman to be sent back, upon stopping the train between stations for a purpose only known to him and not to the conductor, although the rules do not expressly require him to do so, where they have been practically construed to include such duty; but his failure to perform that duty does not excuse the conductor, under whose direction the train is run, from observing a rule providing that no train shall be stopped except at regular stopping-places without a flagman being sent back to protect it, where the stop is in such a position as to endanger the train.¹⁷

§ 4493. **Interpretation of Rule Requiring Danger-Signals to be Given when a Train "Stops for any Cause."**—The rule of a railroad company that when a train "stops for any cause," danger-signals must

¹⁷ *International &c. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182; s. c. 46 S. W. Rep. 922. In this case the engineer stopped his train in order to remedy a hot-box on the engine, without, it was alleged, giving a signal of his intention to do so; and while he was under the engine packing the journal a following train collided with the standing train. The train had been stopped on a curve, and in such a position that it could not be seen by a following train, from which fact the conductor must have known it was necessary to set out flags; and if he had done so promptly the collision would have been averted. The conductor's negligence was held to have been the proximate cause of the collision, having intervened between the alleged negligence of the engineer and the collision. Had the following train been so close that the conductor would not have had time to flag it, then the engineer's neglect to give the signal, if proved, would have precluded a recovery; since the rules require brakemen to get off the train *before it stops* when such signal is given, and go back and flag: *International &c. R. Co. v. Culpepper*, *supra*. *Burns' Rev. St. Ind.*, § 7083, provides that every railroad operated in the State shall be liable for personal injuries suffered by any employé while in its service, where the injury was caused by the negligence of any person in the

service of the company and in charge of any signal. A freight-train had but eight minutes, by the schedule, to take the side-track at a station where there was no telegraph office, and, owing to a fog, ran past the switch. The air-brakes refused to unset, and the train was unable to back so as to take the side-track. The rules of the company required that, when a train stopped on the main track between telegraph-stations, the fireman or brakeman should go forward 1,200 yards and there place torpedoes, and then still further 500 yards and place torpedoes, and then return within 1,500 yards and use his red signal until the arrival of the oncoming train. The brakeman, who was sent forward six minutes before the coming train was due, placed torpedoes about 700 yards distant, and no red signal was seen by the engineer of the approaching train, and a collision occurred. It was held that the defendant was guilty of negligence, rendering it liable for the death of the fireman of the approaching train; since one of two things was apparent,—either that the schedule did not, considering all possibilities, provide sufficient time for the train to take the siding; or else that the brakeman negligently failed to comply with the rules; in either of which events the company was liable: *Cowen v. Ray*, 108 Fed. Rep. 320; s. c. 47 C. C. A. 352.

be given, including the placing of torpedoes on the track at least thirty telegraph-poles from the rear end of the train, and the same distance from the front end if necessary, seems plainly intended to apply to trains stopped *by accident or obstruction, or unexpectedly* compelled to stop between stations, and not intended to be followed every time a train stops at a station.¹⁸

§ 4494. **Railway Signals for Use During Fogs.**—An employer (an elevated-railway company) is not liable for an injury to an employé resulting from a collision between its trains during a fog, although a better system for giving signals during fogs is in existence, where the one employed by it is reasonably safe.¹⁹

§ 4495. **Circumstances under which Negligence has Not been Imputed to Railway Companies with Respect to the Failure to Give Signals or the Giving of Erroneous Signals.**—It has been held that actionable negligence toward a locomotive-fireman, injured by falling from the engine as cars attached to it came in contact with standing cars, cannot be predicated of the act of a trainman in giving a signal indicating a longer distance to the point of the coupling than should have been indicated, where the signals were only designed to indicate in a general way the distance to be traversed before reaching the coupling-point, and the trainman did not know, and had no reason to expect, that the fireman was in a place of danger;²⁰ that negligence on the part of a railroad engineer on a switching-engine in a railroad-yard cannot be predicated of his failure to stop his engine, after having struck a section-hand attempting to cross the track, in response to *warning cries* of witnesses of the accident, in the absence of evidence that he understood the signals as meant for him;²¹ that an engineer is not negligent in not stopping at a station to inquire the whereabouts of a train ahead, where a signal is displayed at the station meaning no orders, but a clear track, and conveying a direction to go on.²²

¹⁸ Northern Pac. R. Co. v. Poirier, 167 U. S. 48; s. c. 42 L. ed. 74; 17 Sup. Ct. Rep. 741; rev'g s. c. 67 Fed. Rep. 881; 15 C. C. A. 52.

¹⁹ Kemmerer v. Manhattan R. Co., 81 Hun (N. Y.) 444; s. c. 31 N. Y. Supp. 82; 63 N. Y. St. Rep. 323 (system had been in use over fourteen years without accident—company justified in continuing to use it—nonsuit proper).

²⁰ Kelsey v. Chicago & C. R. Co., 106 Iowa 253; s. c. 76 N. W. Rep. 670 (fireman was standing on steam-

chest, and when he saw the signal, indicating that the engine would have to back quite a distance, he started to get off the engine by way of the pilot, in order to get back to the cab, and was thrown off by the unexpected bump while he was reaching for a hold to balance himself).

²¹ Loring v. Kansas City & C. R. Co., 128 Mo. 349; s. c. 31 S. W. Rep. 6.

²² Houston & C. R. Co. v. Higgins, 22 Tex. Civ. App. 430; s. c. 55 S. W.

§ 4496. **Signals by Unauthorized Persons.**—Whether a railroad company will be imputable with negligence for the act of its servants in charge of its engines or trains, in obeying a signal given by an unauthorized person, will obviously be a question which cannot be decided with reference to any rule of law. There are obviously many situations in which it will be negligence in a railway engineer not to heed a danger signal or warning given by an unauthorized person,—as, for example, in the case of a bridge being washed away, or an obstruction being placed upon the track. It has been held that a railroad company is not liable to a car-inspector injured by the act of an engineer in starting his train on a signal given by a person not in the employ of the company, where there is no evidence that the train was moved in an improper manner, or at an improper time,—in which case such a signal cannot be regarded as the proximate cause of the injury.²³

§ 4497. **Negligence in Not Waiting for the Proper Signal.**—It was held to be gross negligence for an engineer to attempt to run his engine upon a switch without a signal from the plaintiff, a switchman, to move forward; so that the railroad company was liable for an injury to the plaintiff's foot resulting from the engine striking the switch-rail and throwing the lever over, jerking it out of plaintiff's

Rep. 744 (case where train-despatcher failed to notify engineer of fast freight-train that there was a slow freight-train only 10 minutes ahead of him, and over 3 hours behind time). In another case the plaintiff, a brakeman, was injured while assisting in switching cars. A signal was given by the conductor, which the engineer and another brakeman at the tender understood to be to cut off all the cars, while the plaintiff, at the rear of the train, understood it to be to cut off the last car. It was held, where it was conceded that the engineer was not guilty of negligence in understanding the signal to be cut off all the cars, that he was not guilty of negligence in giving his attention to the brakeman at the tender, who was cutting off all the cars, and in failing to see the signals of plaintiff, who was injured by the speed of the train being increased while he was endeavoring to cut off one car at the other end: *Despins v. Chicago & C. R. Co.*, 105 Wis. 69; s. c. 81 N. W. Rep. 493.

²³ *Gadbois v. Chicago & C. R. Co.*, 75 Iowa 530; s. c. 39 N. W. Rep. 871. The court reasoned that the question whether a signal to move the train was or was not given by a person authorized to do so, could not be considered in determining whether the defendant was negligent. Such a signal, by whomsoever given, was not the proximate cause of the injury. The material question is whether the train was moved in a proper manner and at a proper time; and evidence that the signal was unauthorized has no bearing on the question. Hence, where the court instructed that defendant was not responsible for the act of an unauthorized person in giving such signal, but in another instruction told the jury they might consider such fact in explaining in what manner the train was moved,—the latter instruction was erroneous and ground for reversing a judgment for plaintiff: *Gadbois v. Chicago & C. R. Co.*, *supra*.

hand, and the ball on the end of the lever, weighing twelve or fifteen pounds, coming down and mashing the plaintiff's toe.²⁴

§ 4498. City Ordinance Requiring Continuous Ringing of Bell Extends to Protection of Servants.—It has been held that the protection of an ordinance requiring the *bell on the engine to be rung* continuously while the train is in motion within the city limits, extends to railroad employes in the performance of their duties, as well as to other persons; since whoever would be benefited by a compliance with the ordinance is entitled to the protection that obedience to the law would furnish, whether an employé or not.²⁵

§ 4499. Failure to Ring Bell within City Limits as Required by Municipal Ordinance.—It has been held that the failure to ring a bell while an engine is moving within the city limits, as required by an ordinance, constitutes actionable negligence where it is the proximate cause of the death of an employé who is not a fellow servant with the employes on the engine.²⁶

§ 4500. Using an Engine-Bell that is Cracked and Defective.—A railroad company, in whose yards it is the rule to give warning of the approach of an engine by ringing the bell, does not perform its duty toward employes where the bell is cracked and otherwise defective, so that it does not sound loudly enough to warn persons of the approach of the engine under ordinary circumstances.²⁷

§ 4501. Absence of Headlight.—It is palpable and gross negligence toward an employé who is required, in the discharge of his duty, to traverse a railway-track in the night-time, to run a train without a headlight on the locomotive on a dark night.²⁸ Somewhat opposed to this, it has been held in the same State, that where the rules of a railroad company provide that *during periods of fog* a headlight on

²⁴ Illinois & C. R. Co. v. Stewart, — Ky. —; s. c. 23 Ky. L. Rep. 637; 63 S. W. Rep. 596.

²⁵ Illinois & C. R. Co. v. Gilbert, 157 Ill. 354; s. c. 41 N. E. Rep. 724; aff'g s. c. 51 Ill. App. 404.

²⁶ Gulf & C. R. Co. v. Calvert, 11 Tex. Civ. App. 297; s. c. 32 S. W. Rep. 246 (station-agent killed—not a fellow servant with train-crew).

²⁷ Northern Pac. R. Co. v. Krohne, 86 Fed. Rep. 230; s. c. 56 U. S. App. 593; 29 C. C. A. 674; distinguishing Aerkfetz v. Humphreys, 145 U. S.

418; s. c. 12 Sup. Ct. Rep. 835; 36 L. ed. 758 (where it was held that a track-repairer in a yard where there was no rule requiring a bell to be rung could not recover, his duties requiring him to be on the track all day, and he having no right to rely on a warning from a slowly moving engine being given).

²⁸ Baltimore & C. R. Co. v. Alsop, 176 Ill. 471; s. c. 52 N. E. Rep. 253, 732; aff'g s. c. 71 Ill. App. 54; Burling v. Illinois & C. R. Co., 85 Ill. 18.

the engine shall be kept constantly burning, evidence of a failure to have the headlight burning at a time when the fog was dense, and an employé was sent by his superior officer to make an inspection that might, in the absence of due care for his safety in the operation of its trains by the company, be attended with peril to him, is competent and of a very important character; but such fact does not amount to negligence as matter of law.²⁹

§ 4502. Absence of Other Lights on Trains or Cars.—Where a railroad company failed to provide a suitable red light for the cupola of the caboose of its freight-train, it cannot be relieved from liability for an injury caused by the absence of such light, by the fact that there was a red lantern on the train that might have been fastened to the outside of the cupola, where there was no rule requiring employés to do so in the absence of the regular cupola-lamp.³⁰

§ 4503. Moving a Gravel-Train without Notice or Warning to Men at Work upon it.—It is "gross negligence," under the Kentucky rule, for the boss of a gang of workmen on a railway gravel-train, after

²⁹ Illinois Cent. R. Co. v. McNicholas, 98 Ill. App. 54.

³⁰ Denver &c. R. Co. v. Sipes, 26 Colo. 17; s. c. on former appeal, 23 Colo. 226. In this case it appeared that the rules of a railroad company required trains running at night to display the headlight in front and two or more red lights in the rear; and, when a train was sidetracked to allow another train to pass, required the red lights to be removed or turned and green displayed toward the expected train when the track was clear. It was the custom of the company to display a red light in the cupola of the caboose of freight-trains, for which purpose a special kind of lamp was used, and this light was removed when the train was sidetracked, as soon as the switch was closed. A train was sent out unprovided with a cupola-lamp, for the reason that the lamp used for that purpose had been left at the shops for repair and none was supplied in its place. The train was sidetracked to let a passenger-train meeting it pass, and the conductor and rear brakeman, whose duty it was to close the switch when the train was on the sidetrack, were asleep and failed to

close the switch. The fireman, supposing the switch had been closed, covered the headlight of his engine, which was a signal to the approaching train that the track was clear. The locomotive of the passenger-train trailed through the open switch and was derailed, killing the fireman. If the cupola had been provided with a red light, which could be seen from all directions, it would not have been removed until the switch was closed, and the approaching trainmen could have seen it and stopped the train and avoided injury. It was held that the failure to provide the cupola-light was the proximate cause of the injury, and that the company was liable, notwithstanding the negligence of the fellow servants of deceased, in failing to close the switch and in covering the headlight, contributed to the injury; since the light was an appliance which the company was bound to furnish, and the failure of the employés to see that the train was supplied with a suitable light was the negligence of the company and not that of fellow servants: *Denver &c. R. Co. v. Sipes, supra.*

telling the men to continue work although the approach of another train makes it necessary to move the train on which they are working, to signal for the movement of the train without their knowledge, causing a timber which the boss has insecurely fastened to fall and injure a workman, who has his back turned toward the timber and has no notice of the danger.³¹

§ 4504. Giving a Signal by Shouting instead of by Bell or Whistle.—Where the signal to men employed in the train-yard of an elevator company that a train was coming, was a shout by one of the men: "The cars are coming," this being shown by the evidence to be a safer signal at that place than the blowing of a whistle or the ringing of a bell,—it was held, in an action for injuries by a laborer in the employ of the elevator company who knew of the signal, having been employed at the yard for several weeks, that failure to ring or whistle was not negligence on the part of the defendant railway company.³²

§ 4505. Failing to Place a Flagman at an Open Switch.—It must be regarded as palpable negligence for those in charge of a railway operation, to open a switch and to leave it open without placing a flagman near it to warn approaching trains. If there is a custom which justifies such action, it is a bad custom and should not be allowed to make the law. In one case a fireman was injured in jumping from an engine to avoid a collision made imminent by reason of a switch being left open by a local freight-train. He had information that the trains would probably meet at this point, but not that the local would have switching to do. In an action to recover damages for such injuries, the defendant offered evidence that it was customary for local trains to leave switches open while switching and not place flagmen to warn approaching trains, while the fireman testified that such custom did not prevail. It was held that the question as to whether the crew of the local freight was negligent in leaving the switch open and in failing to put out a flagman was for the jury.³³

³¹ *Louisville &c. R. Co. v. Hawkins*, 21 Ky. L. Rep. 354; s. c. 51 S. W. Rep. 426 (no off. rep.) (side-board of gravel-car propped up on one end so that car could be unloaded).

³² *Speed v. Atlantic &c. R. Co.*, 71 Mo. 303.

³³ *Missouri &c. R. Co. v. Follin*, 29 Tex. Civ. App. 512; s. c. 68 S. W. Rep. 810.

SUBDIVISION III. *Speed.*

SECTION

4508. Excessive speed.

4509. Speed must be governed by
condition of the track.

SECTION

4510. City ordinances limiting rate
of speed.

§ 4508. **Excessive Speed.**—As already suggested,¹ no rate of speed applied to a railway-train is negligence as matter of law.² For example, it is not negligence for an engineer to run at a greater rate of speed than twenty-five miles an hour where the evidence shows that the order to make twenty-five miles an hour applied to the whole trip, including stops.³ The fact that a train was running at an unlawful rate of speed when an accident occurred, raises no presumption of law that the excessive speed caused the injury.⁴ Where the engineer who drives the train is killed or injured, the facts will commonly present the question of his own contributory negligence. In such a case it was held that an order by the general superintendent to engineers of the company "not to run faster than card time until the track can be got into better condition," was in effect a declaration that the road was not necessarily hazardous, and that the engineer could continue to run over it, exercising care, and that the superintendent would remedy the defect; and, there being no proof that the engineer was not using due care, the company was held liable for his death, where the evidence tended to show that the engine was upset by reason of a low joint.⁵ Whether or not the rate of speed at which a train is run-

¹ Vol. II, § 1873.² *Perdue v. Louisville &c. R. Co.*, 100 Ala. 535; s. c. 14 South. Rep. 366.³ *Houston &c. R. Co. v. Higgins*, 22 Tex. Civ. App. 430; s. c. 55 S. W. Rep. 744 (in an action by the engineer the defendant complained of an instruction saying, in effect, that the speed must have been *much* greater than 25 miles an hour in order to constitute negligent disobedience of the order).⁴ *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258; s. c. 25 S. W. Rep. 943 (yard-switchman struck at night by train on another track, running at a speed in excess of that allowed by ordinance, while he was engaged in switching a train). In an action by a father for loss of services of his minor son, seventeen years old, who was killed while running a train as locomotive-engineer, it was heldthat a verdict for plaintiff was sustained by evidence suggesting that if the accident occurred from fast running by deceased, his immediate superior, who was on the train at the time, ought to have controlled and restrained him so as to confine him to a safe speed, where such superior's failure to testify as to the real cause of the accident is not accounted for: *East Tennessee &c. R. Co. v. Douglass*, 94 Ga. 547; s. c. 19 S. E. Rep. 885.⁵ *Flynn v. Kansas City &c. R. Co.*, 78 Mo. 195; s. c. 10 West. Rep. 418 (but judgment reversed for an erroneous instruction as to the assessment of damages). In an action by a civil engineer for injuries received while riding under orders, in a train, over a new track which he had laid some weeks before, the accident being alleged to have resulted from undue speed of the

ning is negligence such as will render the company liable for the death of a brakeman falling from the top of the train, depends upon facts and circumstances which are for the consideration of a jury.⁶

§ 4509. **Speed must be Governed by Condition of the Track.**—It has been held that it is the duty of a person controlling a train, toward the employes on board the train, to inform himself before starting the train as to the nature of the track which he is to traverse, and to govern the speed of the train accordingly, and that if, by reason of his failure to perform this duty, a trainman is injured, the company may be liable.⁷

§ 4510. **City Ordinances Limiting Rate of Speed.**—On the principle already considered, that the violation of valid statutes and municipal ordinances is negligence *per se*,⁸ it has been held that the violation by a railroad company of a valid city ordinance governing the running of locomotives in railroad-yards within the city, *limiting the speed* to five miles an hour, is negligence *per se* as to an employé killed thereby while in the performance of his duties.⁹ In like manner, it has been held that a city ordinance *limiting the speed* of railway-trains within the city limits, being for the protection of persons and property, is available to a railway employé who is injured, without fault on his part, through the violation of such ordinance by his employer,—his right of recovery in such case not being solely dependent on his contract of employment.¹⁰

train, proof that the track had slid so as to make short, uneven curves; that one side was buried in the mud at intervals, while the other side was raised on planks; that, owing to the great speed, the brakes were applied by the rear brakeman, in anticipation of danger, to check speed, without orders; and that plaintiff, because of the swaying of the cars, went to the end of the train to jump off, anticipating an accident,—was held sufficient to warrant a finding of negligence in running the train at a dangerous rate of speed, and in maintaining the track in an unsafe condition: *Meloy v. Chicago &c. R. Co.*, 77 Iowa 743; s. c. 42 N. W. Rep. 563; 4 L. R. A. 287.

⁶ *Perdue v. Louisville &c. R. Co.*,

100 Ala. 535; s. c. 14 South. Rep. 366.

⁷ *Wilson v. Louisiana &c. R. Co.*, 51 La. An. 1133; s. c. 25 South. Rep. 961; 14 Am. & Eng. R. Cas. (N. S.) 648 (repair-train running at too great a rate of speed over a bad portion of the track, causing the tender, which was loaded high with firewood, to rock, whereby a stick of wood was caused to fall off and derail the following flat-car, on which plaintiff, a laborer, was riding).

⁸ Vol. I, § 10.

⁹ *Central R. &c. Co. v. Brantley*, 93 Ga. 259; s. c. 20 S. E. Rep. 98.

¹⁰ *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439; s. c. 18 S. W. Rep. 1103; 32 Am. St. Rep. 615; s. c. on second appeal, 121 Mo. 258; 25 S. W. Rep. 943.

SUBDIVISION IV. *Collisions.*

SECTION	SECTION
4512. Injuries to employés in collisions.	4515. Cases of injuries to employés in collisions where the railway company was exonerated.
4513. Collision due to negligence of independent contractor in operating signals of electric railway.	4516. Instructions in such cases which have been approved.
4514. Trainman jarred from car by collision.	

§ 4512. **Injuries to Employés in Collisions.**—Excluding the operation of the fellow-servant rule, railroad companies have been held liable for injuries to their employés by collisions between their engines or trains, under the following conditions of fact:—Where a switch-crew used the main track of a railroad for switching purposes at the time when a passenger-train was due, in violation of the rules of the company,—this being denounced as gross negligence, almost wanton and criminal, rendering the company liable for injuries to the engineer of the passenger-train resulting therefrom;¹ where a railroad company despatched a freight-train at a late hour of the night through its yards, without notice to employés in charge of the train, of cars standing upon the track, and without displaying lights on such standing cars, and where but three cars out of thirty-four of the freight-train had air-brakes, so that the train could not be readily stopped, and a fireman was injured in jumping to avoid a collision which followed;² where the employés of a railroad company running a train, stopped the train at night at an unusual place, where other trains were liable to pass at any moment, without the display of any signals, whereby a rear-end collision took place to the injury of a fireman in the employ of another company, the halt being made for the important purpose of transferring a dog from the engine to a caboose on a parallel track, belonging to the train which the engine was to haul; and the company could not escape responsibility on the ground that the act was wholly without the scope of the employment of the employé so acting, the court remarking, “We shall waste no time in discussing the contention”;³ where the cars of one railroad company were placed upon the

¹ Hall v. Chicago &c. R. Co., 46 Minn. 439; s. c. 49 N. W. Rep. 239.

² McGraw v. Texas &c. R. Co., 50 La. An. 466; s. c. 23 South. Rep. 461 (engineer was proceeding on appropriate signal and at reduced rate of speed—did not see obstruction in time by reason of darkness and ab-

sence of lights and warning—injury not attributable to negligence on his part).

³ Smithson v. Chicago &c. R. Co., 71 Minn. 216; s. c. 11 Am. & Eng. R. Cas. (N. S.) 726; 73 N. W. Rep. 853 (both companies used the same tracks, owned by a third company,

main track of another company, with which the company owning the cars had traffic arrangements for the interchange of cars, without notice of the fact, and without giving any danger-signals, although the act was done at night and at an unauthorized time,—this being held to be negligence of the grossest character, for which the company so acting was liable in case of injuries to an employé of the latter company in a collision which followed;⁴ and so in the other cases noted in the margin.⁵

§ 4513. Collision Due to Negligence of Independent Contractor in Operating Signals of Electric Railway.—Where an electric-railway company allowed contractors ballasting the road-bed to operate cars thereon, subject to the rules of the company and the orders of the company's superintendent, the company could not escape liability for injuries to a motorman in its own employ from a collision occasioned by the contractor's negligence in operating the signals, on the ground that the injuries were by independent contractors, nor on the ground that the company was not negligent in entrusting the operation of the signals to the contractors; since the contract was independent only as to the work of constructing the road-bed: in all matters incident to the *use of the track*, the contractors and their workmen represented the will of the company, and its responsibility remained.⁶

§ 4514. Trainman Jarred from Car by Collision.—A railway employé injured by falling from a car without fault on his part, while obeying the conductor's direction to run forward over intervening cars and give warning to the engineer in order to prevent a collision which had become imminent because of the company's negligence, is not prevented from recovering therefor against the railway company, on the ground that such negligence was too remote; provided the danger was so imminent as to render the employé's conduct necessary and proper under all the circumstances; and whether it was so or not is a question for a jury.⁷

which promulgated the rules for trainmen using the tracks).

⁴Lockhart v. Little Rock & C. R. Co., 40 Fed. Rep. 631.

⁵Felton v. Harbeson, 104 Fed. Rep. 737; s. c. 44 C. C. A. 188 (collision by running past switch which meeting train was to enter, on single-track line, in consequence of the negligence of the train-despatcher, conjoined with that of the engineer in failing to have his train under proper control); Southern R. Co. v. Craig, 113 Fed. Rep. 76; s. c. 51

C. C. A. 63 (collision between an incoming extra train, and a switch-engine in the yard having the right of way, but those in charge of switch-engine being under the obligation of using reasonable care to avoid such accidents).

⁶Ortlip v. Philadelphia & C. Traction Co., 198 Pa. St. 586; s. c. 48 Atl. Rep. 497.

⁷Simmons v. East Tennessee & C. R. Co., 92 Ga. 658; s. c. 18 S. E. Rep. 999.

§ 4515. **Cases of Injuries to Employés in Collisions where the Railway Company was Exonerated.**—In the following cases of collisions resulting in injuries to employés, the railroad company was exonerated:—Where a railway company failed to notify its engineer that an advance train stood on the track at a given station, and a collision with such train consequently took place,—this not rendering the company *liable to the engineer* for the injury received by him in the collision, in view of the fact that a rule of the company required the engineer, under such circumstances, to act on the supposition that another train would be met, or that the main track would be occupied at such station;⁸ where the evidence showed that the engineer of a passenger-train was killed in a collision between his train and a freight-train, on a dark and rainy night; and that the deceased was not required by the schedule to stop at the station where the collision took place, unless he had passengers to discharge there,—in the absence of any proof that he was running on schedule time, or of the absence of signals, or that he could not have seen the headlight of the freight-engine in time to avoid the collision;⁹ where the engineer and fireman of a train ascending a mountain were killed by a descending train crashing into theirs, it being alleged that a competent engineer was not put in charge of the descending train; that the defendant should have had three brakemen instead of two, on such train; that the passing-siding should have been at the top or foot of the grade, instead of half way up; that air-retainers should have been on the trains; and that it was negligence not to have double tracks instead of a single track;—there being no evidence that any of such causes was the specific cause of the accident;¹⁰ and in the other cases noted in the margin.¹¹

⁸ Whalen v. Michigan &c. R. Co., 114 Mich. 512; s. c. 4 Det. Leg. N. 653; 72 N. W. Rep. 323.

⁹ Smith v. Missouri Pac. R. Co., 113 Mo. 70; s. c. 20 S. W. Rep. 896 (no presumption of negligence toward the employé from mere proof of the collision).

¹⁰ Price v. Lehigh Valley R. Co., 202 Pa. St. 176; s. c. 51 Atl. Rep. 756.

¹¹ Chesapeake &c. R. Co. v. McMichael, 13 Ky. L. Rep. 758; s. c. 15 S. W. Rep. 878 (no off. rep.) (engineer not guilty of "willful" negligence under the Kentucky rule, rendering the company liable for the death of the conductor); Bryant v.

New York &c. R. Co., 81 Hun (N. Y.) 164; s. c. 62 N. Y. St. Rep. 670; 30 N. Y. Supp. 737 (collision between a special and a regular train, the special having the right of track); Brown v. Southern R. Co., 126 N. C. 458; s. c. 36 S. E. Rep. 19 (collision in consequence of engineer and conductor making the mistake of reading "64" on an engine as "54," as it stood on a siding, afterwards colliding with 54, the train they had been instructed to await; due to negligence of fellow servant, the fellow-servant rule not having been then abolished in North Carolina).

§ 4516. **Instructions in Such Cases which have been Approved.**—Where the plaintiff's intestate was killed in a collision with a switching-engine in the defendant's yards, while preceding a delayed regular train into the yards, no instructions having been given to look out for any other train on entering the yards, an instruction that the crew of the switching-engine should take proper precautions against collisions with incoming trains, and that the character of such precautions should be determined by the circumstances of the night, heavy fog, and the difficulty of hearing and seeing signals, was proper.¹² Where the plaintiff was injured in a collision between a passenger-train and a freight-car which had been blown out of a siding by a high wind, it was proper to charge the jury that, if they found that the negligence of the defendant in leaving the car on the siding without its wheels blocked or brakes set, and the high and unprecedented windstorm, were concurring causes of the collision and plaintiff's injuries, then their verdict should be for the plaintiff.¹³

SUBDIVISION V. *Injuries in and about Railway-Yards and Switches.*

SECTION	SECTION
4518. Care required in the operation of railway yards.	4524. Driving cars too hard against bunting-post.
4519. Engine returning unexpectedly to yard and backing through without signals.	4525. Escape of cars left standing on the track.
4520. Injuries to railway employés in making the "flying switch."	4526. Sudden closing of openings between cars.
4521. Other instances where the railway company was held liable for injuries to employés in making the running or flying switch.	4527. Failing to have a man on the end of a car which is being pushed in a railroad-yard.
4522. Cases of injuries to employés in making the "flying switch" where negligence of the company was not inferred.	4528. Pushing a car in a railway-yard at night without man or light upon it.
4523. Further of injuries in making the running or flying switch.	4529. Running into misplaced switches, or switches improperly set.
	4530. Running trains or hand-cars over tracks obscured by smoke.

¹² Southern R. Co. v. Craig, 113 Fed. Rep. 76; s. c. 51 C. C. A. 63.

¹³ Galveston &c. R. Co. v. Lynch, 22 Tex. Civ. App. 336; s. c. 55 S. W. Rep. 389 (it was also left to the

jury to find whether the car had been left in such condition on the siding, and whether so leaving it was negligence).

§ 4518. Care Required in the Operation of Railway-Yards.—

While considering that what is called ordinary or reasonable care is a varying quantity depending upon the danger to be avoided,¹ it has been well reasoned that a railroad company owes its employes as well as other persons the duty of exercising greater caution and prudence in the operation of its trains over its yards, where there are pathways therein used by the public with the implied consent of the company, than if no such pathways were there; and hence an employe at work in the yards may presume that the company is using that care in the operation of its trains which it owes to the public, and may rely on the protection thus afforded him; and where he is run down without fault on his part by a train running at a speed in excess of that allowed by ordinance, the company is liable. Such ordinance applies inside as well as outside of the company's yards.² A city ordinance limiting the speed of railway-trains within the city limits, but containing no allusion to streets or to public or private grounds, has been held to apply to the switch-yards as well as the main tracks of a railway company, no less than to other places within the city limits. Such an ordinance is a police regulation, and the power of a city to enact it may be implied from the power to abate nuisances and to provide for the general welfare. In this respect a railroad company occupies no better ground than an individual, but is subject to all reasonable police regulations.³ A municipal ordinance regulating the rate of speed of trains, and requiring the display of signals on moving trains at night, applies to the private switch-yards of a railroad company situated within the corporate limits.⁴

§ 4519. Engine Returning Unexpectedly to Yard and Backing Through without Signals.—It has been held that a railway company is imputable with negligence where an engine, which had left the yard and started for a certain town, returned unexpectedly to the

¹ Vol. I, § 25; *ante*, § 3772.

² *Houston &c. R. Co. v. Powell* (Tex. Civ. App.), 41 S. W. Rep. 695 (no off. rep.). One decision contains the absurd proposition that the requirement that a railroad company shall furnish reasonably safe machinery and keep its tracks and appliances in reasonably safe repair, is not applicable to the construction of tracks in a yard, which necessarily must contain numerous tracks and switches close together: *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175 (switchman on one train injured by train on adjoining

track, in broad daylight; no recovery, as he had assumed the risk).

³ *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439; s. c. 18 S. W. Rep. 1103; s. c. on second appeal, 121 Mo. 258.

⁴ *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330; s. c. 11 S. W. Rep. 736; 4 L. R. A. 776. The yard in question was unenclosed on three sides. The opinion of the court does not make it clear that the ordinance would apply to yard entirely enclosed; but such seems to be the meaning of the case.

yard upon finding the track blocked, and backed through the yard without signals, running down a watchman and yard-clerk employed in the yard.⁵

§ 4520. **Injuries to Railway Employés in Making the "Flying Switch."**—The danger to persons on the track and at highway crossings through the operation of making what is variously termed the "flying switch," or the "running switch," or of shunting or kicking cars, is emphasized by what has already been collected in these volumes.⁶ Evidence sufficient to warrant a finding of negligence by the jury in cases of this kind where the injury happened to servants of the railway company, has been discovered in the following conditions of fact:—Where a railway employé was coupling cars at night on the company's transfer-track, and eight or ten cars were put on another part of the track by another crew and kicked down the track at a high rate of speed toward the place where the servant first named was coupling, causing them to strike the cars in front of them while the coupler was between the cars thus struck and others standing on the track, whereby he was knocked down and killed, there being no proof of any effort on the part of the defendant to ascertain whether the track was clear before the cars were kicked, or that there was any means of controlling the cars thus shunted;⁷ where the trainmen of a railroad company drove a switching-train upon a dead car standing very near to where some track-repairers were at work on the main track, at a time when a train was passing along the main track, whereby one of the repairers, who had stepped behind the dead car to permit the train to pass, was injured;⁸ where steam-cars were "kicked" at a speed of more than six miles in violation of a city ordinance, with no one on or near the forward end of them to warn persons of their approach or to check their speed, whereby a track-repairer was struck, just after he had stepped from a parallel track on which he was working to avoid an approaching engine;⁹ where a car upon which an employé was riding had been "kicked" upon the track, and the remainder of the train, which had been standing upon another track, was kicked against it before it had time to get out of the way, injuring such employé;¹⁰ where a railroad company made a flying

⁵ *St. Louis &c. R. Co. v. Eggmann*, 60 Ill. App. 291; s. c. aff'd. 161 Ill. 155; 43 N. E. Rep. 620 (risk not one ordinarily incident to his dangerous employment—company liable though injury not willfully inflicted).

⁶ Vol. II, §§ 1572, 1695, 1699, 1717, 1819, 1960.

⁷ *St. Louis &c. R. Co. v. McCain*, 67 Ark. 377; s. c. 55 S. W. Rep. 165.

⁸ *Chicago &c. R. Co. v. Shannon*, 43 Ill. App. 540.

⁹ *Tobey v. Burlington &c. R. Co.*, 94 Iowa 256; s. c. 62 N. W. Rep. 761; 33 L. R. A. 496.

¹⁰ *Atchison &c. R. Co. v. Butler*, 56 Kan. 433; s. c. 43 Pac. Rep. 767.

switch at a speed of twenty miles an hour over a public crossing in a city, injuring a track-repairer who had stepped on the track to avoid a passing train on a parallel track;¹¹ under a statute, where a car-cleaner, engaged at his work inside a passenger-coach, was injured by a car being violently kicked against the coach, as explained in the footnote.¹²

§ 4521. Other Instances where the Railway Company was held Liable for Injuries to Employés in Making the Running or Flying Switch.—A recovery against a railroad company may be based on the negligence of an engineer in switching a car on to a repair-track with so great a momentum as to cause it to collide with a car standing thereon, and to injure one engaged in repairing the standing car; and a recovery therefor may be had under a count charging that it was due to the negligence of some person who was at the time in superintendence and control of the car.¹³ A conductor, and through him the railway company, is guilty of negligence in shunting an unattended freight-car down upon a branch track against cars on one of which a *car-repairer* is engaged in making repairs, to do which it is necessary for him to stand between the car he is repairing and the next one, when the conductor knows that such employé is at work there, or can see his warning-flag by looking.¹⁴ And clearly, a rail-

¹¹ *Lehigh &c. Coal Co. v. Lear* (Pa.), 9 Atl. Rep. 267 (no off. rep.).

¹² A car-cleaner engaged inside a passenger-coach, and injured by the kicking against it of another coach at a dangerous and unusual speed through the negligence of a switching-crew, is within the Minnesota statute declaring that every railroad corporation owning or operating a railroad in that State shall be liable for damages sustained by any agent or servant through the negligence of any other agent or servant. This statute is construed to apply, not to all railway employés, but only to those exposed to and injured by the dangers peculiar to the use and operation of railroads, and a car-cleaner comes within the latter class. It was also held that a car-cleaner is a fellow servant with members of a switching-crew, and can recover only by virtue of the statute: *Mitchell v. Northern Pac. R. Co.*, 70 Fed. Rep. 15. Proof that trainmen of a construction-train made a flying switch, and that a collision took place between the ten-

der of the engine, which had run in upon a side-track, but not far enough, and the caboose, which was running upon the main track, and that the engineer moved forward the engine, striking a car standing on the side-track with great force and throwing it against another on which men were loading iron, and without any notice to them of the flying switch,—is sufficient to permit the jury to infer negligence, in an action for the death of one of the men engaged in loading iron, who, not knowing of the flying switch, and there being a great deal of noise and confusion from the collision, attempted to cross over the main track and get on the platform, out of the way, and was run down by the main portion of the train, which was running eight miles an hour: *Chicago &c. R. Co. v. Kelly*, 127 Ill. 637; s. c. 21 N. E. Rep. 203.

¹³ *Louisville &c. R. Co. v. Davis*, 91 Ala. 487; s. c. 8 South. Rep. 552.

¹⁴ *Murphy v. New York &c. R. Co.*, 118 N. Y. 527; s. c. 23 N. E. Rep.

way company is liable for the negligence of its engineer in "kicking" cars so close to the main track of *another company* as to injure a brakeman riding on the ladder on the side of a car on such track.¹⁵

§ 4522. **Cases of Injuries to Employés in Making the "Flying Switch" where Negligence of the Company was Not Inferred.**—It has been held that negligence on the part of a railroad company toward an experienced section-hand, familiar with the work in a yard, cannot be predicated upon the failure of the company to have a brakeman on the end of a car which is being pushed by a switch-engine in the yard;¹⁶ nor upon the mere fact that in a railway-yard where cars are loaded and unloaded, or trains made up, such cars are permitted to move along the tracks unattended by a brakeman;¹⁷ nor upon the mere fact of the making of a "flying switch" in a railway-yard in the daytime and in the usual manner, whereby a railway employé who was familiar with the practice was killed, although a safer method might have been adopted for switching the cars, where the deceased was apprised of the fact that a flying switch was to be made by an approaching train;¹⁸ nor, where a brakeman was killed, while making a "flying switch," in consequence of the engineer running the train at an unnecessary, unusual and dangerous rate of speed, where the engineer was under the control of the brakeman at the time of the accident so far as the rate of speed was concerned, and obeyed the signals given by the brakeman;¹⁹ nor in another case noted in detail in the margin.²⁰ It is not negligence, in the absence of statute,

812; 29 N. Y. St. Rep. 941; aff'g s. c. 51 Hun (N. Y.) 242. Where a gravel-train was being backed with the caboose instead of with the engine in front, and in making a running switch, in violation of the rules of the company, the caboose was cut off, the jerk causing plaintiff, a laborer on the train, to be thrown from the train and injured as he was attempting, without warning of what was being done, and in the line of his duty, to pass to the caboose from the next car, the question as to whether there was "gross negligence" was properly submitted to the jury: Illinois & C. R. Co. v. Walters, 22 Ky. L. Rep. 137; s. c. 56 S. W. Rep. 706 (no off. rep.).

¹⁵ Martin v. Louisville & C. R. Co., 95 Ky. 612; s. c. 16 Ky. L. Rep. 150; 26 S. W. Rep. 801.

¹⁶ Loring v. Kansas City & C. R.

Co., 128 Mo. 349; s. c. 31 S. W. Rep. 6.

¹⁷ Kelley v. Chicago & C. R. Co., 53 Wis. 74. See also, Pennsylvania Co. v. Fox, 10 Ohio C. C. 72 (yard-master assigned a sufficient number of competent men to do the switching, and did not know that they were not doing their duty).

¹⁸ Hunt v. Hurd, 98 Fed. Rep. 683; s. c. 39 C. C. A. 226 (deceased, at the order of his foreman, got off the track so as to allow the flying switch to be made, but stepped back on the track after the engine and attached cars had passed, and was struck by the car that had been dropped).

¹⁹ McDermott v. Atchison & C. R. Co., 56 Kan. 319; s. c. 43 Pac. Rep. 248.

²⁰ Hallihan v. Hannibal & C. R. Co., 71 Mo. 113. In this case, the plaintiff sued for damages for the death

to *shunt* or kick cars backward without their being attended by a brakeman or lookout, in a railroad-yard where trains are being made up, and employes are aware of this practice,²¹—though there is authority to the contrary, at least as respects the rights of third persons.²²

§ 4523. **Further of Injuries in Making the Running or Flying Switch.**—Where a railroad company so constructed a side-track that all trains coming from one direction, in order to switch cars upon it, were obliged to make what is known as the “flying switch,” and a switchman employed at the station was killed, in the night-time, in attempting, when signalled, to run from the station-house to the switch in order to turn it, the company was held liable, on the ground that it had been negligent in failing to establish proper rules and regulations for making the “flying switch,” and in failing to provide the cars which were attempted to be switched with good and sufficient brakes and with the proper number of lights.²³ Where a brakeman was killed in making what is known as the “flying switch,” in consequence of the fact that a particular car had no ladder on it by which he could ascend to apply the brake, it was held that the following instruction, fairly construed, was not in conflict with the rule which exacts of the master, in the furnishing of machinery, only reasonable or ordinary care: “It was the defendant’s duty to provide cars with such appliances as are best calculated to insure the safety of employes; and if a ladder on the end of the car, or a handle as described by the witness, would be a better protection to life than the car which produced the accident, then it would be the defendant’s duty to furnish a car with such appliances.” A fair construction of this

of her husband, who was a repairer of cars and familiar with the car-yard where the accident occurred, although employed by another company. He understood that trains were constantly being made up in the yard, and knew the customary mode of doing the work. At the time of the accident, defendant’s car-repairer, as a matter of courtesy seemingly, asked deceased to look at a car standing on the transfer-track, which had just been repaired. While deceased was complying with the request, and was on the track at the end of the car, another car, switched down from an opposite direction, struck the first, sending it forward and causing it to run over deceased. The evidence showed

that the accident occurred almost at the instant when defendant’s car-repairer spoke to deceased; also, that the brakeman on the switched-off car could not have seen deceased had he been on the watch for him. It was held that plaintiff could not recover, deceased being a trespasser, and being guilty of contributory negligence, and the injury not having been inflicted on him willfully: *Hallihan v. Hannibal &c. R. Co., supra.*

²¹ *Schnaible v. Lake Shore &c. R. Co.*, 97 Mich. 318; s. c. 56 N. W. Rep. 565; 21 L. R. A. 660.

²² Vol. II, §§ 1695, 1696.

²³ *Chicago &c. R. Co. v. Taylor*, 69 Ill. 461.

language, under the circumstances of the case, did not warrant the supposition that it exacted of the defendant the highest degree of skill and the procuring of the very best appliances, but rather those appliances which were reasonably best calculated to answer the end proposed, as compared with those which the company did furnish.²⁴ It has been ruled, with obvious propriety, that a statute providing that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always on the lookout ahead, and when any person, animal, or other obstruction appears upon the road, the alarm-whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident," did not apply to the running of engines and trains about the depots and yards of railroads, nor did it have reference to the protection of the employes of a railroad when moving across the track in the discharge of their duties.²⁵

§ 4524. Driving Cars Too Hard against Bunting-Post.—If a conductor had charge of the train in distributing the cars in which an employé was injured, and the purpose was to put the cars where they were finally placed, and he carelessly directed how the engine should operate against them, and they were sent with too much force, so that the brakeman could not stop them, and that caused the injury, the accident was due to the negligence of a person in charge of a train, even though at the moment when the cars struck the post they were separated from the engine.²⁶

§ 4525. Escape of Cars Left Standing on the Track.—A railroad company has been held guilty of negligence toward a brakeman upon a freight-train handling the output of a coal mine, in placing fifteen or sixteen heavily-loaded cars upon a coal-track six hundred feet long having a descending grade of two feet seven inches, without taking any precaution to prevent their escape upon the main track except by setting the brakes on the car nearest thereto.²⁷ But a railroad company was not negligent in leaving an ordinary push-car a safe distance from the track and blocking it there in the ordinary method to prevent its moving toward the track, although some boys not connected with the company afterwards attempted to put it on the track

²⁴ *Greenleaf v. Illinois &c. R. Co.*, 29 Iowa 14.

²⁵ *Louisville &c. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276.

²⁶ *Devine v. Boston &c. R. Co.*, 159 Mass. 348; s. c. 34 N. E. Rep. 539.

²⁷ *Continental Trust Co. v. Toledo &c. R. Co.*, 87 Fed. Rep. 133; s. c. 32 C. C. A. 44; s. c. *sub nom.* *Peirce v. Delaney*, 59 U. S. App. 283.

and left it so close to the track that an employé riding on a switch-engine was injured by a collision therewith.²⁸

§ 4526. **Sudden Closing of Openings between Cars.**—It has been held that a railroad company does not owe its employés in a railroad-yard the duty of notifying them when an opening between cars, such as is usual and necessary from time to time in shifting cars in the yard, will be closed up, where the evidence shows that such openings are not left for the use of employés of the yard.²⁹

§ 4527. **Failing to have a Man on the End of a Car which is being Pushed in a Railroad Yard.**—Neglect of duty by a railroad company

²⁸ Atchison &c. R. Co. v. Slaterry, 57 Kan. 499; s. c. 46 Pac. Rep. 941 (in the opinion of the court it was not negligence to leave it unlocked, since it was a heavy, cumbersome affair, and *not attractive to children*, having no propelling appliances). Compare Harris v. Union Pac. R. Co., 4 McCrary (U. S.) 454, *infra*. A railroad company is liable to an employé for injuries caused by the escape of a freight-car from a side-track on to the main track, whereby a collision occurred, if the car was negligently allowed to *remain* without sufficient braking or blocking, though some unknown person contributed to the accident by unbraking the car; and hence an instruction exonerating the company from liability if the jury found interference by such third person is properly refused; there being evidence that the station-agent had been notified the night before that the cars had been unloaded, and that by the rules of the company it was his duty under such circumstances to see that the cars were properly braked and blocked, but that he had neglected to see whether this had been done: Galveston &c. R. Co. v. Johnson, 24 Tex. Civ. App. 180; s. c. 58 S. W. Rep. 622. Railroad employés were loading a car with lumber while the same was standing on the main track on a grade in a mountain country. The car had a brake at each end, both of which were set. When the car was almost loaded, and the employés were resting on and about it, a sudden click was heard, and the car started down the grade, and, obtaining a great speed,

collided with a hand-car on which plaintiff's intestate was riding, in the pursuit of his duties as an employé of the railroad company. After this collision an examination was made of the brake, and it was found to be in good order, except that the pawl would not catch well in the brake ratchet, but could easily be made to do so by pressing it down with the foot; but there was no evidence that it was defective before the collision, which knocked the end of the car out. It was held that there was not sufficient evidence of negligence on the part of defendant to go to the jury, and that a verdict for the defendant was properly directed: Ketterman v. Dry Fork R. Co., 48 W. Va. 606; s. c. 37 S. E. Rep. 683. Where the plaintiff was injured by reason of some one having placed a push-car on defendant's railroad-track; and the car had been left, unlocked, by the side of the track, by defendant's servants,—it was held that the question of whether negligence was imputable to the railroad company was for the jury: Harris v. Union Pac. R. Co., 4 McCrary (U. S.) 454 (counsel for plaintiff insisted that there is a well-known disposition among men to place such an article as a push-car on the track when they find it by the side of the track.—Compare Atchison &c. R. Co. v. Slaterry, 57 Kan. 499, *supra*).

²⁹ Plunkett v. Central &c. R. Co., 105 Ga. 203; s. c. 30 S. E. Rep. 728; 4 Am. Neg. Rep. 622; 13 Am. & Eng. R. Cas. (N. S.) 860 (car-sealer attempted to go between two cars, when the opening was suddenly closed up).

toward an experienced section-hand, familiar with the work of the engine and knowing the danger of crossing the track in front of moving cars, cannot be predicated of its failure to have a brakeman on the end of a car pushed by a switch-engine in the railroad-yard; nor were the servants in charge of the engine required to anticipate that such an experienced man would attempt to cross tracks in a yard without looking out for moving cars.³⁰

§ 4528. Pushing a Car in a Railway-Yard at Night without Man or Light upon it.—In a case in New York, the deceased, while returning to the tool-house at night, bearing a lantern, was struck and killed by a slowly-moving car on a switch-track, there being no light on the car and no warning given of its approach, but the absence of light and warning being usual in the yard, and the practice familiar to the deceased. It was held that he was not entitled to special protection which he might not be entitled to when engaged in other business about the yard, but was entitled to only the same protection and care on the part of the company as he was entitled to when moving about the yard performing his ordinary daily business; and the company was not required to place a light or have a man on each car moved in a switch-yard, or to give warning of its approach.³¹

§ 4529. Running into Misplaced Switches, or Switches Improperly Set.—A railroad company was held liable for injuries to an employé from the derailment of a car, where, in violation of a rule of the company that the engineer should slow up, and, if necessary, stop his engine before reaching a switch, to ascertain whether it was properly set, the person running the engine pushed the cars over the switch at a rapid rate of speed, when the switch was improperly set, and caused the derailment and the consequent injury.³² Where the person operating an engine on switch-tracks did not look to see the condition of a switch ahead, but asked another person on the engine

³⁰ *Loring v. Kansas City &c. R. Co.*, 128 Mo. 349; s. c. 31 S. W. Rep. 6 (the plaintiff, who had been at work on a switch in the yard, had left his gang to go for some water).

³¹ *Crowe v. New York &c. R. Co.*, 70 Hun (N. Y.) 37; s. c. 23 N. Y. Supp. 1100; 53 N. Y. St. Rep. 558. The defendant being the New York Central & H. R. R. Co., its habitual negligence made a standard of duty which was tantamount to the law of the land. It would be difficult to state a proposition more careless of

justice and absolutely brutal, than the proposition that a railroad company can shunt its cars along its tracks at night with no light upon them to apprise its yardmen of their approach, and with no man upon them to give warning to those who may be on the track in front of them.

³² *Louisville &c. R. Co. v. Mothershed*, 97 Ala. 261; s. c. 12 South. Rep. 714 (negligence of person in charge of an engine on a railway, under Employers' Liability Act).

if the switch was all right, and, on that person looking around as if he heard, "took it for granted" that the switch was properly set, and ran into a car on a side-track, injuring a car-cleaner, the jury were justified in finding the operator of the engine guilty of negligence, rendering the employer liable to the car-cleaner for the injury.³³

§ 4530. Running Trains or Hand-Cars over Tracks Obscured by Smoke.—It has been held that a railroad company is not guilty of negligence toward an employé killed on its track, by starting a train, in a yard where trains are moving almost constantly, while a dense smoke has settled down on the track from the locomotive of another train.³⁴ Another case holds that the foreman on a hand-car is guilty of negligence in entering at full speed a track in the company's yard, obscured by dense smoke, on which a switch-engine is accustomed to be running at all times, without regard to schedule, without sending a flagman ahead to ascertain if any train is coming on the track, in accordance with a custom regulating the running of hand-cars through smoke, and the company is liable to an employé on the car who is thereby injured.³⁵

SUBDIVISION VI. *Injuries Connected with the Loading and Unloading of Cars.*

SECTION

4533. Liability of railway company to employés for furnishing defective appliances for loading and unloading.

4534. Negligence in loading cars.

4535. Further of injuries to employés from the improper loading of cars.

SECTION

4536. Injury from negligent manner of loading and operating a logging-train.

4537. Section-men struck by coal falling from tender of passing engine.

4538. Injuries in the operation of loading and unloading railway-cars.

³³ *Jensen v. Omaha &c. R. Co.*, 115 Iowa 404; s. c. 88 N. W. Rep. 952 (under Code, § 2071). That a yard-conductor appointed to care for a switch during the temporary absence of the regular switchman did not remain *continuously* at the switch during the day did not give the company implied notice that the switch was *unattended*, so as to make it liable for injuries to a fireman on a train caused by failure to have the switch closed; since it was clearly not necessarily incumbent on the defendant to have a switchman there continuously: he might be absent at times, and still *attend*

to the switch at the proper times. The extent of the duty the defendant owed the plaintiff was only to provide a competent man during the absence of the regular switchman: *Parker v. New York &c. R. Co.*, 18 R. I. 773; s. c. 30 Atl. Rep. 849 (negligence of yard-conductor while acting as switchman was that of a fellow servant with fireman on train).

³⁴ *Moore v. Great Northern R. Co.*, 67 Minn. 394; s. c. 69 N. W. Rep. 1103.

³⁵ *Woodward Iron Co. v. Andrews*, 114 Ala. 243; s. c. 21 South. Rep. 440 (negligence of superintendent—under Employers' Liability Act).

SECTION

4539. Loading a car in which an express-guard travels.

4540. Running down workmen engaged in unloading cars.

SECTION

4541. Other injuries received in loading and unloading, not connected with railway service.

§ 4533. **Liability of Railway Company to Employés for Furnishing Defective Appliances for Loading and Unloading.**—A master—for example, a railway company—owes to his servant the duty of keeping in a reasonably safe and secure condition, a stage or platform constructed for the use of men engaged in unloading coal-cars standing on a trestle.¹ A liability on the part of the master has been predicated upon the act of a railway company in leaving, for several years, a log not bolted down, but tied with a chain in the middle, as the sole barrier at the end of a railroad-track on an elevated wooden wharf, on which coal-cars were run to be unloaded, where an employé was killed by the breaking of the barrier when cars, running slowly, became detached from the engine and struck the barrier while he was trying to set the brakes.²

§ 4534. **Negligence in Loading Cars.**—These principles have been frequently applied so as to charge railway companies with liability for damages in so negligently loading their cars³ as to injure their employés engaged thereon or thereabouts in the performance of their duties,—as where a car is so loaded that a brakeman cannot have reasonably safe access to the brakes;⁴ or where a railroad company loads a car with lumber or iron projecting over the end of it, so as to make it dangerous to brakemen engaged in coupling and uncoupling, or negligently accepts a car so loaded for transportation from another company;⁵ nor will the fact that the manner of loading cars which a railroad company has adopted is *customary* with railroads generally, relieve the company from liability for injuries to a servant received in consequence of such manner of loading where it is plainly negligent;⁶ for here, as in many other cases, a bad custom will not excuse negligence. Contrary to this, another court has held that the loading of a car with lumber extending longitudinally over its ends is not

¹ Selleck v. Langdon, 55 Hun (N. Y.) 19; s. c. 28 N. Y. St. Rep. 326; 8 N. Y. Supp. 573; Behm v. Armour, 58 Wis. 1; s. c. 15 N. W. Rep. 806.

² Norfolk & C. R. Co. v. Gilman, 88 Va. 239; s. c. 15 Va. L. J. 574; s. c. 13 S. E. Rep. 475.

³ Dougherty v. Rome & C. R. Co., 45 N. Y. St. Rep. 154; s. c. 18 N. Y. Supp. 841; Atchison & C. R. Co. v.

Seeley, 54 Kan. 21; s. c. 37 Pac. Rep. 104.

⁴ Irvine v. Flint & C. R. Co., 89 Mich. 416; s. c. 50 N. W. Rep. 1008.

⁵ Jacksonville & C. R. Co. v. Galvin, 29 Fla. 636; s. c. 16 L. R. A. 337; 11 South. Rep. 231.

⁶ Hosic v. Chicago & C. R. Co., 75 Iowa 683; s. c. 37 N. W. Rep. 963.

negligence *per se*, but, if it is negligence in a particular case, that it must be proved as a fact, in order to make it a case for a brakeman injured in making a coupling in consequence of this manner of loading.⁷ Another court, taking the same view, reasons that it must appear that the conductor or other person in charge of the train knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employé.⁸

§ 4535. **Further of Injuries to Employés from the Improper Loading of Cars.**—Railway companies have been held liable for the death or injury of their servants under the following circumstances:—For the death of an employé while loading with heavy lumber cars standing on a spur or side-track, caused by the fall of the lumber on him in consequence of a jolt produced by coupling the car in which he was at work, without notice to him;⁹ where the yardmaster, who had control of the loading of freight-cars in the yard and was required to inspect them to see that they were properly loaded and staked, discharged his duty in an improper manner, so that he broke one of the stakes, causing several heavy joists to fall on an employé of the shipper,—and this, although the loaded car had not been formally reported as ready for shipment by the shipper in accordance with a custom of the railroad company, this not conclusively showing that the yardmaster was not acting within the sphere of his employment;¹⁰ where a brakeman was killed by steel rails projecting over the end of a flat-car while he was making a coupling, where the conductor in charge of the train observed the condition of the rails thirty hours before the accident, and it was customary to side-track a car when in bad order, or adjust the rails so that they would not project beyond the end of the car,—and this although the conductor warned the brakeman to be careful

⁷ Louisville &c. R. Co. v. Gower, 85 Tenn. 465; s. c. 3 S. W. Rep. 824. To the same effect, see Dewey v. Detroit &c. R. Co., 97 Mich. 329; s. c. 56 N. W. Rep. 756; 22 L. R. A. 292; 38 Cent. L. J. 31; rev'g on rehearing, s. c. 52 N. W. Rep. 942; 16 L. R. A. 342 (no off. rep.).

⁸ Louisville &c. R. Co. v. Brice, 24 Ky. 298; s. c. 1 S. W. Rep. 483. That a railroad company is not guilty of negligence toward a brakeman ordered to remove cars from a side-track, in leaving upon such track a car loaded in the customary manner with *railroad-iron projecting over the end of the car*, was

held in Jackson v. Missouri Pac. R. Co., 104 Mo. 448; s. c. 16 S. W. Rep. 413.

⁹ Ragland v. St. Louis &c. R. Co., 49 La. An. 1166; s. c. 22 South. Rep. 366.

¹⁰ Pollard v. Maine &c. R. Co., 87 Me. 51; s. c. 32 Atl. Rep. 735. The court reasoned that the nature of the employment, the character of the service required, the character of the act done, the circumstances under which it was done, and the ends and purposes sought to be attained, were all material considerations and formed the real test of liability.

in making the coupling;¹¹ where, in loading a car with boxes of cinders, the boxes should have been placed with their backs together in the middle of the car so that the men could have tilted them by means of the handles on them, but they were placed with their backs to the edge of the car, making it necessary to use levers to move them, and rendering it necessary to drop them to the ground in order to unload them, and a section-hand was injured while attempting to get them in position for unloading,—this being deemed sufficient to show that the improper loading of the boxes was the proximate cause of the injury;¹² where a railroad company employed upon a car a decayed, rotten, dozy stake to hold the binders of lumber upon the car, in consequence of which the stake broke and the lumber projected from the car, injuring a brakeman on another train;¹³ where a brakeman was knocked off a moving car by the fall of a rail from the car, due to defects in the car and to the improper loading of the rails which were upon it.¹⁴

¹¹ *Corbin v. Winona &c. R. Co.*, 64 Minn. 185; s. c. 66 N. W. Rep. 271 (question for jury).

¹² *Devore v. St. Louis &c. R. Co.*, 86 Mo. App. 429.

¹³ *Ryan v. New York &c. R. Co.*, 88 Hun (N. Y.) 269; s. c. 68 N. Y. St. Rep. 260; 34 N. Y. Supp. 665.

¹⁴ *McCray v. Galveston &c. R. Co.*, 89 Tex. 168; s. c. 3 Am. & Eng. R. Cas. (N. S.) 276; 34 S. W. Rep. 95; rev'g s. c. 32 S. W. Rep. 548 (brakeman sitting on the side of a car in a train killed by a steel rail, part of the load of a car in front of him, falling therefrom, one end striking the ground and the other end sweeping along the side of the train and striking him; circumstances sufficient, without other proof of negligence in loading the car, to take the case to the jury, and it was error to direct verdict for defendant). A finding that cars were improperly loaded is sustained by evidence that the space in each car intended for the brakeman to stand in while handling the car was partially covered with lumber: *Irvine v. Flint &c. R. Co.*, 89 Mich. 416; s. c. 50 N. W. Rep. 1008 (coal-cars, so constructed as to leave a space of fifteen inches across the brake end of each car, were so loaded with lumber as to cover the spaces partially,

and so as to leave a space of but fifteen inches between the lumber on each car and the car coupled to it, at the top surface of the lumber). There is a seemingly untenable decision to the effect that to load a tender with coal above the level of its top is not negligence *per se*; and notice to the railroad company that its employes were in the habit of so doing, without knowledge or notice that such practice was dangerous, is not sufficient to make the company liable for an accident to a track-walker by coal falling on him resulting from such method of loading: *Schultz v. Chicago &c. R. Co.*, 67 Wis. 616. Compare, on the same question, *Croll v. Atchison &c. R. Co.*, 57 Kan. 548; rev'g s. c. *sub nom.* *Atchison &c. R. Co. v. Croll*, 3 Kan. App. 242, where the Supreme Court of Kansas, disagreeing with the Appellate Court and affirming the District Court, considered the fact that coal was piled up on the flange of the tender of a locomotive to be evidence tending to show that the tender was overloaded generally—in the center as well as on the edge, and that the chunk of coal which fell off, injuring an employe, might well be regarded as having fallen from the center of the tender.

§ 4536. **Injury from Negligent Manner of Loading and Operating a Logging-Train.**—A lumber company operating a logging railroad was not as matter of law free from negligence in operating a train on a down-grade with no brakes except the one on the engine, and in failing to have *standards* on the car on which an employé who was killed by a log rolling off was riding, and in failing to stop the train immediately upon the occurrence of the accident, which took place in plain view of the engine.¹⁵

§ 4537. **Section-Men Struck by Coal Falling from Tender of Passing Engine.**—Negligence may be predicated upon the act of a railroad company in heaping a locomotive-tender with coal several feet above the level of the top of the tender and above its flange on the outer edge, so that it is liable to fall off very easily while going over an uneven track, where it does fall off, striking and injuring a workman who is engaged in ditching by the side of the track.¹⁶ Where a piece of coal fell off a passing train and injured a section-hand who was standing near the track, the court declined to follow the argument that the company was not liable because the injury was not such a result of the company's alleged negligence in improperly loading the tender as might reasonably have been anticipated. The court said: "The question is not whether an accident of this character ever happened before, but rather, whether, under the circumstances of this case, the falling of a large lump of coal, propelled with great force by reason of the speed of the train, might reasonably be expected to strike and injure some person along the track where he had a right to be."¹⁷

§ 4538. **Injuries in the Operation of Loading and Unloading Railway-Cars.**—A railway company was chargeable with negligence in using chains to connect its cars, in the absence of a drawhead, by reason of which the cars came in contact, so that an iron rail projecting from one of them injured an employé engaged in unloading the other who had never before worked on a railroad;¹⁸ where its foreman of a section-gang engaged in loading ties upon its cars failed to adopt any extra precaution to guard against accident to a member of the

¹⁵ *Fleming v. Greenleaf-Johnson Lumber Co.*, 128 N. C. 532; s. c. 39 S. E. Rep. 43.

¹⁶ *Croll v. Atchison & C. R. Co.*, 57 Kan. 548; s. c. 46 Pac. Rep. 972; *rev'g s. c. sub nom. Atchison & C. R. Co. v. Croll*, 3 Kan. App. 242; 45

Pac. Rep. 112. Compare *Schultz v. Chicago & C. R. Co.*, 67 Wis. 616.

¹⁷ *Gulf & C. R. Co. v. Wood* (Tex. Civ. App.), 63 S. W. Rep. 164 (no off. rep.).

¹⁸ *Luco v. New York & C. R. Co.*, 87 Hun (N. Y.) 612; s. c. 68 N. Y. St. Rep. 156; 34 N. Y. Supp. 277.

gang placed in a car in such a position that, at times, he could not see what was being done by those engaged in throwing ties over the side of the car, in consequence of which he was hurt by one of the ties, provided such tie was not thrown with the regularity with which the work had theretofore proceeded.¹⁹

§ 4539. Loading a Car in which an Express Guard Travels.— The duty to furnish a safe place to work, which an express company owes to a servant employed to ride in one of its cars as a guard, extends only to the construction and equipment of the car; the loading of express-matter by the express messenger in a dangerous manner is not a breach of this duty, being within the scope of his ordinary duties as a servant, and in regard to which he and the guard are fellow servants.²⁰

§ 4540. Running Down Workmen Engaged in Unloading Cars.— A railroad company is bound to use reasonable care not to run down any of a gang of workmen who, to its knowledge, are engaged in unloading cars for an elevator company in a public place (on a public wharf), where they were left by the railroad company for the consignee of freight contained therein.²¹ In another case, the railroad

¹⁹ *Claybaugh v. Kansas City & c. R. Co.*, 56 Mo. App. 630. Where plaintiff was injured while he and three other employés of the defendant railway company were attempting to load a heavy timber on a car under the direction of a "boss," and there was no evidence that the defendant knew, or ought to have known, that the timber was too heavy to be loaded by them, or that they would attempt to load it, and plaintiff himself testified that he thought they could do it safely, the defendant cannot be considered negligent, and a nonsuit should have been granted: *Bryan v. Southern R. Co.*, 128 N. C. 387; s. c. 38 S. E. Rep. 914. Another court holds that an employer who furnishes suitable and sufficient rope to be attached to a plank used in transferring freight from a pier to a car, and boards suitable to be used at the ends of the planks if thought advisable, is not liable for an injury to an employé caused by the breaking of the rope while attempting to transfer freight over such plank, which breaking was due to the use of an old rope and the failure to

place boards at the end of the plank for the truck on which the freight was carried to run upon. Though it was the duty of the foreman to see that the plank was properly secured, his negligence was in connection with a mere *detail of the work*, and was that of a fellow servant: *Conway v. New York & c. R. Co.*, 13 Misc. (N. Y.) 53; s. c. 68 N. Y. St. Rep. 97; 34 N. Y. Supp. 113; rev'g s. c. 11 Misc. (N. Y.) 641; 66 N. Y. St. Rep. 347; 32 N. Y. Supp. 921. Contract between independent contractor and a railroad company whereby the contractor was to load cars placed at railroad company's elevator, and evidence upon which contributory negligence was imputed to the servant of the contractor who was injured by reason of cars moving down an incline behind him: *O'Leary v. Erie R. Co.*, 51 App. Div. (N. Y.) 25; s. c. 64 N. Y. Supp. 511.

²⁰ *Wells, Fargo & Co. v. Page*, 29 Tex. Civ. App. 489; s. c. 68 S. W. Rep. 528.

²¹ *Spotts v. Wabash & c. R. Co.*, 111 Mo. 380; s. c. 20 S. W. Rep. 190. The railway company, without warn-

company was exonerated where it appeared that the plaintiff, while unloading a car on a side-track, was injured by reason of a train being run in upon the side-track and striking one of two cars between which he was working; and there was evidence that the train was run on to the side-track in the usual way; that the usual signal, the ringing of the engine-bell, was given of its approach; and that the position of the plaintiff between the cars was such that no one on the train could have seen him.²²

§ 4541. Other Injuries Received in Loading and Unloading, Not Connected with Railway Service.—A number of cases collected on this point present little for special consideration. In one case, a workman, while engaged at work under a boiler, weighing from 26,000 to 28,000 pounds, which was being moved by means of chains, but without being blocked up, was killed by the breaking of the chain, and it was held that there was evidence of negligence to go to the jury. The deceased, having had nothing to do with the hoisting of the boiler, was not chargeable with the duty of inquiring as to whether the manner of supporting it was safe or not, but was entitled to rely upon the performance of this duty by his master.²³ In like manner, there was evidence to go to the jury where it appeared that the employer directed an inexperienced employé to hold one end of a plank, the other end of which rested upon a wagon, for the purpose of unloading a heavy barrel by means of it.²⁴

ing, suddenly backed cars on a track adjacent to that on which the cars being unloaded stood, which was evidence of negligence: *Spotts v. Wabash & C. R. Co.*, *supra*.

²² *McGeary v. Old Colony R. Co.*, 21 R. I. 76 (such testimony would have supported a finding that the defendant was not negligent, hence the court would not disturb a verdict for the defendant which might have been based on such a finding).

²³ *Chicago Edison Co. v. Moren*, 185 Ill. 571; s. c. 57 N. E. Rep. 773; aff'g s. c. 86 Ill. App. 152.

²⁴ *Beard v. American Car Co.*, 63 Mo. App. 382; s. c. 2 Mo. App. Repr. 872 (barrel, when rolled, struck end of plank when resting on wagon, shoved it to the ground, and fell on and broke it, thereby breaking plaintiff's wrist). A recovery of damages was had where an employé was injured, while assisting in unloading an eight-ton girder, by

the breaking of a chain which was worn and insufficient: *Vincent v. Alden*, 62 App. Div. (N. Y.) 558; s. c. 71 N. Y. Supp. 149. Case where a workman was injured in adjusting marble slabs which had been loaded edgewise on each side of the bed of a spring-wagon, and where a recovery was denied on the ground that both the plaintiff and the superintendent under whose orders the plaintiff acted, were guilty of negligence, and that the action of both of them contributed to the injury: *Motey v. Pickle Marble & C. Co.*, 74 Fed. Rep. 155; s. c. 20 C. C. A. 366; 36 U. S. App. 682. That the use of a plank, instead of a skid with hooks, on which to unload boxes from an elevator to trucks in an alley adjoining, is not, in itself, negligence,—see *Alford v. Metcalf Bros. & Co.*, 74 Mich. 369; s. c. 42 N. W. Rep. 52.

ARTICLE XVI. VARIOUS UNCLASSIFIED INJURIES TO EMPLOYEES IN RAILWAY OPERATION.

SECTION	SECTION
4543. Liability in case of miscellaneous injuries to railway employés.	4547. Operation in roundhouse.
4544. Injuries in clearing away railway wrecks.	4548. Engineer blowing off steam and scalding fireman.
4545. Circumstantial evidence of negligence in railway operation.	4549. Intoxicated brakeman falling off car.
4546. Obstructions on transfer-tracks at repair-shops.	4550. Other injuries to railway employés—Company liable.
	4551. Other injuries to railway employés—Company exonerated.

§ 4543. Liability in Case of Miscellaneous Injuries to Railway Employés.—A railway company has been held liable for injuries sustained by an employé, caused by the breaking of a cable by which a plow was drawn over cars to unload gravel therefrom while the train was standing on a curve, where additional appliances should have been employed on account of the unusual strain on the cable when used in that position;¹ and for an injury sustained by an employé whom it required to go into a pit to aid in turning its turntable, where the ties against which he was to push were not properly fastened, and gave way, injuring him.² But such a company has been exonerated from liability for an injury caused by an obstruction upon its tracks, consisting of cars which had broken loose from a train,—such injuries being ascribed to the negligence of fellow servants;³ for failing to provide planks or skids upon which to slide a box weighing two hundred and fifty pounds from one car to another car five feet away, where two able-bodied men had been detailed to perform the service;⁴ and for injuries to a section-hand caused by the breaking of a snubbing-stake, around which passed a rope to let down heavy tiling, unless the defect was one which might have been guarded against by the exercise of reasonable care and diligence.⁵

¹Cincinnati &c. R. Co. v. Roesch, 126 Ind. 445; s. c. 26 N. E. Rep. 171.

²Gulf &c. R. Co. v. Winton, 7 Tex. Civ. App. 57; s. c. 26 S. W. Rep. 770.

³Jenkins v. Richmond &c. R. Co., 39 S. C. 507; s. c. 18 S. E. Rep. 182.

⁴Gowen v. Harley, 6 C. C. A. 190; s. c. 56 Fed. Rep. 973; 56 Am. & Eng. R. Cas. 238.

⁵Nutt v. Southern Pac. R. Co., 25 Or. 291; s. c. 35 Pac. Rep. 653. That a person who, after having left the

company's service, has rightfully entered a pay-car to receive his pay on the stopping of a train to which it is attached, is entitled to a reasonable time for the transaction of his business before the train is started, and to a proper warning of the intention to start the train, to enable him to leave the car in safety,—see New York &c. R. Co. v. Coulbourn, 69 Md. 360; s. c. 18 Md. L. J. 823; 1 L. R. A. 541; 16 Atl. Rep. 208.

§ 4544. **Injuries in Clearing Away Railway Wrecks.**—According to the law of Missouri, which has the peculiarity of making a foreman of work the vice-principal of the employer, it has been held that where a railway employé, assisting in moving wrecked cars, received an injury by reason of the negligent manner and place in which the derrick-chain was fastened to a car, the fact that the business of clearing away wrecks is inherently dangerous, and that the usual method was pursued, would not prevent recovery for an injury resulting from the negligent manner of performing the details of the work, where the work was superintended by agents of the master.⁶ In West Virginia, a railroad company was not liable for an injury to a section-hand, while engaged with other section-hands in clearing away a wreck under the supervision of a section-boss and the overseer of the road, caused by the bottom falling out of an overturned tender while it was being moved farther from the track, where nothing in its appearance indicated that the bottom had been broken loose, and neither the section-boss nor the supervisor could, by ordinary diligence have discovered the fracture of the bolts which held it,—the injury being the result of an unforeseen accident.⁷

§ 4545. **Circumstantial Evidence of Negligence in Railway Operation.**—Negligence on the part of the superintendent of a railroad, towards a fireman who was killed by the falling of a locomotive through a burning trestle, is established, in the absence of explanation, by evidence that he was notified by a county road superintendent about two and a half hours before the accident occurred that a fire was raging on the road, but sent no one to notify the train, which he knew was approaching, of the danger, and did not go himself in time to reach the dangerous point until after the accident.⁸

⁶ Reed v. Missouri &c. R. Co., 94 Mo. App. 371; s. c. 68 S. W. Rep. 364.

⁷ Skidmore v. West Virginia &c. R. Co., 41 W. Va. 293; s. c. 23 S. E. Rep. 713.

⁸ Bateman v. Peninsular R. Co., 20 Wash. 133; s. c. 12 Am. & Eng. R. Cas. (N. S.) 678; 54 Pac. Rep. 996. Findings by a jury that a railroad company was negligent, and that an employé, alleged to have been killed by such negligence, was not guilty of contributory negligence, are sufficiently sustained, although there is no direct testimony as to how the accident occurred,

where the evidence tends to show that the road-bed was out of repair, and that deceased, shortly before the accident, was seen looking the train over, in the line of his duty, and was not seen again until he was found dead under circumstances indicating that he had fallen from a car after a sudden jolt sufficient to have thrown him from the car, caused by cinders, coal and rubbish on the track, which apparently caused the derailment of the car: Union Stock Yards Co. v. Conoyer, 41 Neb. 617; s. c. 59 N. W. Rep. 950; aff'g on rehearing s. c. 38 Neb. 488; 56 N. W. Rep. 1081.

§ 4546. **Obstructions on Transfer-Tracks at Repair-Shops.**—A railway company used for transferring materials from its shops to the cars a heavy transfer-table, consisting of a wood and iron frame, built on wheels, and travelling on rails in a pit. *Iron braces* connected different parts of this table a few inches from the ground, and when it was pushed by hand some of the employés usually stood within the angles formed by the braces and the sides of the frame. While the plaintiff was in such position engaged in pushing the table, his foot came in contact with a block of wood ten inches long, eight and one-half inches wide, and four and one-half inches thick lying alongside the rail, which forced his leg up into the angle formed by the brace and the table, and crushed his leg. The transfer-table was without defect in material or construction, and the coemployés were competent, and guilty of no negligence in operating the machine. It was not shown how the block came to be on the track, or that it had been there long enough to charge the company with notice, or that the company had actual notice. It was held that a verdict for the railway company was properly directed, since it was not shown to have been negligent.⁹

§ 4547. **Operation in Roundhouse.**—While the plaintiff, a locomotive-fireman, was cleaning an engine which was standing over a pit in defendant's roundhouse, other servants of the defendant, by direction of the foreman, detached the tender, and pushed it back three or four feet from the engine without notice to the plaintiff, thus reducing the length of the "deck" by about one-half. The plaintiff, in prosecuting his work in the engine-cab, stepped back to inspect his work, caught his heel under the displaced apron of the tender, and fell through the open space left by the removal of the tender, into the pit. It was held that a finding that defendant was negligent in so removing such tender without notice to plaintiff was justified.¹⁰

§ 4548. **Engineer Blowing Off Steam and Scalding Fireman.**—A railroad engineer who, without receiving any notice from his fireman, an experienced man, of his intention to go under the engine to clean out the ash-pan, such as the well-established usage among engineers and firemen requires shall be given whenever the fireman goes under the engine for any purpose, blows off the steam while the fireman is so at work under it, and scalds him, is not guilty of negligence in so doing; and consequently the company is not liable for the injury.¹¹

* *Murphy v. Great Northern R. Co.*, 68 Minn. 526; s. c. 71 N. W. Rep. 662. Tex. Civ. App. 516; s. c. 66 S. W. Rep. 219.

¹¹ *Crane v. Chicago & C. R. Co.*, 93

¹⁰ *Galveston & C. R. Co. v. Quay*, 27 Wis. 487; s. c. 67 N. W. Rep. 1132.

§ 4549. **Intoxicated Brakeman Falling Off Car.**—A railway company was not guilty of negligence in failing to take any measures to prevent an intoxicated brakeman from falling off a car or being otherwise injured as a consequence of such intoxication, where it was not shown that the employes in charge of the train had any notice or knowledge of his condition.¹²

§ 4550. **Other Injuries to Railway Employes—Company Liable.**—Railroad companies have been held liable under the following circumstances:—Where the foreman in charge of a hand-car, knowing that the men were at times in the habit of turning loose the lever on a down-grade and standing upon the car without support, suddenly applied the brakes on such a grade, without notice to them, and without looking to see whether they were holding on to the lever;¹³ where, in consequence of the failure to station a watchman to give notice of danger from the caving-in of a gravel-bank, a member of the party employed on a gravel-train was killed;¹⁴ where a railway yardmaster negligently placed a car so near an adjacent track that a switchman on a passing train was struck by it and injured;¹⁵ where, in consequence of the negligence of the servants of a railway company in leaving open the switches of a “Y” line and *spur-track*, a train passed from the main track to the “Y” and from thence to the spur-track, where it was derailed, killing a trainman;¹⁶ where an engine, after taking water, started forward more suddenly than usual, immediately upon the cover being placed over the manhole, without any signal to the fireman, leaving him to get down over the coal upon the tender,—the character, quantity and location of the coal being such as to make his position unusually perilous,—although it was a custom so to start, under such circumstances, without warning the fireman.¹⁷ A railroad company permitting another company to use a section of its main line to reach a terminal point, is liable to one of its own employes for personal injuries from the negligence of the latter company in running its train over such section.¹⁸ Where men are rightfully at work on a trestle over which a railroad is operated, with the knowledge of the officers and persons operating the road, who know that the men

¹² Parker v. Winona &c. R. Co., 83 Minn. 212; s. c. 86 N. W. Rep. 2.

¹³ Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; s. c. 11 South. Rep. 262.

¹⁴ Burlington &c. R. Co. v. Crockett, 19 Neb. 138; s. c. 26 N. W. Rep. 921.

¹⁵ Kansas City &c. R. Co. v. Bur-

ton, 97 Ala. 240; s. c. 12 South. Rep. 88; 53 Am. & Eng. R. Cas. 115.

¹⁶ Reed v. Northeastern R. Co., 37 S. C. 42; s. c. 16 S. E. Rep. 289.

¹⁷ Knott v. Dubuque &c. R. Co., 84 Iowa 462; s. c. 51 N. W. Rep. 57.

¹⁸ Central R. &c. Co. v. Passmore, 90 Ga. 203; s. c. 15 S. E. Rep. 760.

are thereby placed in great danger, it is the duty of the company to operate and run its trains with care proportionate to the danger; so that, if the company runs a train over the trestle on a foggy morning at an unusual rate of speed, and without signals, whereby an employé is killed, the company is guilty of actionable negligence.¹⁹

§ 4551. Other Injuries to Railway Employés—Company Exonerated.—On the other hand, railroad companies have been exonerated from liability to their servants under the following circumstances:—Where, a rail having broken, the section-master used diligence in sending back to warn approaching trains, but nevertheless a freight-train ran upon that part of the track and a train-hand was injured in the consequent derailment;²⁰ where a freight-train was started without warning to a brakeman and unexpectedly to him, but not suddenly or violently, in consequence of which he was thrown from the train;²¹ where the speed of a train was suddenly slackened in switching, and without notice to a brakeman, who was thereby injured,—the inference being that this was one of the ordinary risks of the employment;²² where an injury happened to an employé in consequence of cars being moved by a switch-engine slowly in a railway-yard, without sending a man in front of them to give notice of their approach, since it is the duty of those employed in a railway-yard, familiar with the continued movements of cars therein, to take reasonable precautions against their approach;²³ where a switch was left turned upon a track upon which cars were left standing in the ordinary manner, and a section-hand coming down a steep grade on a “push-car,” which was unprovided with brakes and was not intended for the transportation of section-men, jumped off the same to avoid accident through a collision, and was killed,—it appearing that the switch was not ordinarily used by push-cars, but that they were lifted from track to track; and it further appearing that the switch-target was in plain view, indicating how the switch was set.²⁴ Where a train stops at a

¹⁹ *Interstate &c. R. Co. v. Fox*, 41 Kan. 715; s. c. 21 Pac. Rep. 797.

²⁰ *Henry v. Lake Shore &c. R. Co.*, 49 Mich. 495.

²¹ *Johnston v. Canadian &c. R. Co.*, 50 Fed. Rep. 886.

²² *Rutledge v. Missouri &c. R. Co.*, 110 Mo. 312; s. c. 19 S. W. Rep. 38.

²³ *Aerkfetz v. Humphreys*, 145 U. S. 418; s. c. 12 Sup. Ct. Rep. 835.

²⁴ *York v. Kansas City &c. R. Co.*, 117 Mo. 405; s. c. 22 S. W. Rep. 1081. Circumstances under which railway company not liable for an injury to an engineer by a collision

with a flat-car which had by some means run out from a side-track upon the main track: *Hewitt v. Flint &c. R. Co.*, 67 Mich. 61; s. c. 11 West. Rep. 148; 34 N. W. Rep. 659. Non-liability of a railway company for injuries to a fireman through a collision with a car suddenly coming on the main track from a siding, in the absence of evidence that there was sufficient time to allow the engineer, in the exercise of ordinary care, to stop the motor-car before reaching it: *Telle v. Leavenworth Rapid Transit*

station where the track is at a grade, the conductor may, it has been held, go to the station in the discharge of his duties without waiting to see that a brakeman, who has been ordered to detach cars from the train, sets the brakes on the remaining cars.²⁵

ARTICLE XVII. INJURIES TO EMPLOYEES OF STREET-RAILWAY AND ELEVATED-RAILWAY COMPANIES.

SECTION

4553. Defective street-railway cars and appliances.

4554. Moving street-railway tower-wagon without notice or

SECTION

warning to men at work thereon.

4555. Elevated railroads.

§ 4553. **Defective Street-Railway Cars and Appliances.**—We have under this head decisions to the effect:—That a street-railway company is under no obligation to a conductor to supply a trail-car with a fender or lifeguard, to guard against injuries to him from being thrown under the car in case he should fall between the cars while passing from one car to the other; since the master is only bound to see that the machinery which he does employ is reasonably safe and suitable; and while the want of a fender may have enhanced the risk, it did not constitute a defect in the construction rendering it unsafe or unsuitable for the business in which it was employed;¹ that a street-railway company owes no duty to the driver of a car to keep a man to watch a switch leading toward a stable, during the daytime, during which time it is kept closed and properly secured, being used only in the morning to take out cars and in the evening to put in cars;² that a street-railway company is liable for injuries to a gripman from defective appliances upon a car of which the wrecking-crew has taken possession, and which he is ordered to remain on by the “starter,” to whose orders he is ordinarily subject as to stopping and

Co., 50 Kan. 455; s. c. 31 Pac. Rep. 1076.

²⁵ *Relyea v. Kansas City &c. R. Co.*, 112 Mo. 86; s. c. 18 L. R. A. 817; 53 Am. & Eng. R. Cas. 578; 20 S. W. Rep. 480. Liability of a railroad company for injuries to a railroad brakeman ordered by the conductor to carry goods from a freight-car across a siding to the depot, where the conductor also directs that the train be cut in two, and a portion of it backs down against cars standing on such sidings after the brakeman has started to carry the goods across it, where

such backing is unnecessary and saves no time: *Richmond &c. R. Co. v. Brown*, 89 Va. 749; s. c. 17 Va. L. J. 203; 17 S. E. Rep. 132. Circumstances under which failure to furnish brakeman with a red lantern was regarded as immaterial: *Waddington v. Newport News &c. R. Co.*, 14 Ky. L. Rep. 559; s. c. 20 S. W. Rep. 783 (no off. rep.).

¹ *Denver Tramway Co. v. Nesbit*, 22 Colo. 408; s. c. 4 Am. & Eng. R. Cas. (N. S.) 605; 45 Pac. Rep. 405.

² *Donnelly v. New York &c. R. Co.*, 3 App. Div. (N. Y.) 408; s. c. 38 N. Y. Supp. 709.

starting; since he may assume that the wrecking-crew, who are not his fellow servants, have repaired the machinery sufficiently to enable him to continue on the car in safety;³ that negligence may be imputed to a street-railway company for furnishing its employés with an electric car which starts with a lunge when the current is turned on, so that its employés and passengers have to brace themselves carefully to avoid being hurt when it starts,—by reason of which habit of the car the conductor is thrown against the controller on the rear platform and injured, while watching his trolley at a crossing.*

§ 4554. **Moving Street-Railway Tower-Wagon without Notice or Warning to Men at Work thereon.**—The plaintiff, an employé of the defendant, a railroad-construction company, was at work on top of a tower-wagon on the tracks of a street-railway company, over which its cars were running, necessitating the frequent removal of the wagon from the tracks. The wagon was moved from the track without warning to the plaintiff that it was to be done, by reason of which the plaintiff was injured. It was held that it was the duty of the construction company to use ordinary care to prevent injury to the plaintiff while at work on the tower-wagon by so protecting the wagon that it would not be necessary to remove it while he was at work, without notice or warning; since the plaintiff, from the nature of his work, could not be expected to keep a lookout for movements of the tower-wagon.⁵

§ 4555. **Elevated Railroads.**—An elevated street-railroad company is not liable for injuries resulting in the death of a workman employed on the track, merely because it allowed trains to closely follow one another, or because they were not made to follow one another at definite times or regular intervals,—such a method of operating the road being impracticable.⁶

* *West Chicago St. R. Co. v. Dwyer*, 57 Ill. App. 440.

³ *Murdock v. Oakland & C. R. Co.*, 128 Cal. 22; s. c. 60 Pac. Rep. 469. Where a competent civil engineer testified that the defendant's street-railway track, at the point where a conductor was thrown from his car and injured, for which suit was brought, was dangerously out of alignment, and three former conductors each testified that he had been thrown from his car at the same point between one and two

years before, and that he had verbally reported the occurrence to defendant's predecessor, the question of defendant's negligence was for the jury: *Coughlin v. Brooklyn Heights R. Co.*, 59 App. Div. (N. Y.) 126; s. c. 68 N. Y. Supp. 1105.

⁵ *North American Ry. Const. Co. v. Patry*, 10 Kan. App. 55; s. c. 61 Pac. Rep. 871.

⁶ *Bruen v. Uhlmann*, 44 App. Div. (N. Y.) 620; s. c. 60 N. Y. Supp. 222; denying rehearing of s. c. 30 App. Div. (N. Y.) 553; 51 N. Y.

Supp. 958. A platform two and one-half feet wide, without a guard-rail, along the tracks of an elevated railroad, over which the company's employes are compelled to pass, constitutes a reasonably safe place in which to work, so as to preclude a recovery for injuries by an employé who falls from such platform to the street below: *Nugent v. Brooklyn &c. R. Co.*, 64 App. Div. (N. Y.) 351; s. c. 72 N. Y. Supp. 67. This case was decided, perhaps, more on the theory that plaintiff had as-

sumed the risk, there being "nothing latent, hidden or concealed" about the platform, "and nothing which was not equally apparent to the servant as to the master." There was no proof that during the ten years of plaintiff's employment the platform, which was similar to all the others of the kind on the road, had ever proved insufficient or dangerous. The accident happened in broad daylight: *Nugent v. Brooklyn &c. R. Co.*, *supra*.

CHAPTER CXVII.

DECISIONS UNDER SPECIAL STATUTES.

- ART. I. Under Employers' Acts, §§ 4557-4572.
 ART. II. Under Workmen's Compensation Acts, §§ 4575-4587.
 ART. III. Under Various Factory Acts, §§ 4590-4597.
 ART. IV. Under Statutes Regulating the Employment of Children,
 §§ 4599-4601.
 ART. V. Under Various Other Statutes, §§ 4603-4606.

ARTICLE I. UNDER EMPLOYERS' LIABILITY ACTS.

SECTION	SECTION
4557. Introductory.	4566. No recovery unless defect is due to negligence of master or his representative.
4558. Action under statute or at common law.	4567. "Locomotive-engine, car, or train," what is.
4559. "Ways, works, machinery, or plant," what are.	4568. "Railroad," what is.
4560. "Ways," what are.	4569. Volunteers—Workmen using machinery or ways without necessity.
4561. "Works," what are.	4570. Servants employed by independent contractors in a mine are not "workmen" in the employ of the owners.
4562. "Defects" in ways, works, machinery, or plant, what constitute.	4571. Notice of time, place, and cause of injury.
4563. Temporary ways, works, etc., not within the meaning of these statutes.	4572. A question of pleading.
4564. Temporary or transient conditions.	
4565. What repairs are sufficient.	

§ 4557. **Introductory.**—Special statutes have been enacted in various jurisdictions,¹ designed either to define the liability of employers, or to extend greater protection to employes. These statutes have been, in many cases, construed so narrowly by the judges as to defeat, in a measure, the protection to employes which they were intended to give. We now propose to indicate briefly some of the ways in which the various Employers' Liability Acts have been applied by the courts.

¹ See *post*, § 5278, where a list of their effect on the so-called "fellow-some of these statutes is given, and servant doctrine" considered.

§ 4558. **Action under Statute or at Common Law.**—The fact that an Employers' Liability Act authorizes a recovery by an injured employé for the negligence of his master, is not, it is held, a bar to a recovery at common law, in those cases within the terms of the statute, where a recovery at common law might have been had before the passage of the statute; but in such a case the injured employé may still sue under the same conditions, and recover damages to the same extent, as if the statute had not been passed; the theory being that such statutes do not restrict, but merely enlarge, the common-law rights of employés.² Thus, an action at common law might be maintained for injuries resulting from the negligence of a head stevedore, where the plaintiff predicated his action on the fact that the head stevedore was incompetent, and unfit to perform his duties as such and to direct the work of loading a vessel, and that the employer knew of his incompetency and unfitness; and this although a recovery might have been had under the statute for the negligence of a person "engaged in superintendence."³

§ 4559. **"Ways, Works, Machinery, or Plant," What Are.**—These statutes allow a recovery to an employé for injuries resulting from defects in the ways, works, machinery, or plant connected with or used in the business of the employer, due to the negligence of the master or his representative. The statutes are evidently drawn with a solicitude to cover every species of property or appliance in respect to which a servant is required to do labor, but the courts have, in many instances, greatly curtailed their operation. A good example of the spirit in which these statutes should be construed is found in a Massachusetts case, where a stone-cutter employed in a stone-yard was injured by reason of a defect in a *derrick*, selected by the employer and erected by other workmen for *temporary use* in removing stones from cars to where the stone-cutters could work on them, but which had been in use for four weeks. The court held that the question whether the derrick was a part of the ways, works, or machinery of the yard should have been *submitted to a jury*, since, for the time being, and with respect to stone-cutters working near it, the derrick was a piece of machinery, part of the fitting up of the stone-yard, rather than an appliance to be put together and set up and moved from place to place by workmen using it.⁴ So, the following objects

² Ryalls v. Mechanics' Mills, 150 Mass. 190; s. c. 5 L. R. A. 667; 7 Rail. & Corp. L. J. 73; 41 Alb. L. J. 113; 22 N. E. Rep. 766; Clark v. Merchants &c. Transp. Co., 151 Mass. 352; s. c. 24 N. E. Rep. 49.

³ Clark v. Merchants &c. Transp. Co., 151 Mass. 352; s. c. 24 N. E. Rep. 49.

⁴ McMahon v. McHale, 174 Mass. 320; s. c. 54 N. E. Rep. 854.

have been held to come within the terms of the statute:—Loaded *freight-cars*, even though owned by other railroad companies, since the company receiving them is not bound to use them in its train if on inspection they are found to be unsafe;⁵ one of several *trucks* in constant use by a railroad company as a part of the appliances of its repair-shop, the truck consisting of axles, wheels, and a frame, all fastened together and fitted to the tracks;⁶ the *supply-pipe of a water-tank*, extending over or near a railroad-track so as to knock a brakeman off the top of a freight-car.⁷ On the other hand, the employer was not liable as for a defect in the condition of his “ways, works, or machinery,” where a board in a *pile of lumber* in a lumber dealer’s yard sank under an employé’s weight and injured him;⁸ nor where an employé of a railroad company, while attempting to align the track on a bridge by means of a *steel bar*, was thrown from the bridge and injured by reason of a defect in the bar,—on the theory that the bar, being disconnected from any other mechanical appliances, and operated by muscular strength directly applied to it, was not “machinery.”⁹ The English statute has been held not to include within the term “ways, works, machinery, or plant,” ways or works *in process of construction*, but only ways or works which are completed.¹⁰ In Massachusetts the point was raised, but not decided, as to whether an action would lie for the death of an employé caused by the caving in of a *sewer-trench*, on the ground of a defect in the condition of the “ways, works, or machinery.”¹¹

§ 4560. “Ways,” What Are.—In an action under the English statute it appeared that a workman in a large workshop, while passing from one part of the shop to another in the course of his business, fell into a catch-pit in the floor, which was generally covered with a lid, but which had been uncovered for a temporary purpose. The court held that the *floor of the shop* where the workman was passing was a “way” within the meaning of the statute, though it was *not marked out or defined*, or even though not habitually used as such,—a “way,” so far as this action was concerned, being defined as “the

⁵ *Bowers v. Connecticut River R. Co.*, 162 Mass. 312; s. c. 38 N. E. Rep. 508 (rule since established by statute: Mass. Stat. 1893, ch. 359).

⁶ *Gunn v. New York & C. R. Co.*, 171 Mass. 417; s. c. 50 N. E. Rep. 1031 (locomotive placed on truck fell and killed employé—question for jury whether due to defects in truck).

⁷ *East Tennessee & C. R. Co. v. Thompson*, 94 Ala. 636; s. c. 10 South. Rep. 280.

⁸ *Campbell v. Dearborn*, 175 Mass. 183; s. c. 55 N. E. Rep. 1042.

⁹ *Clements v. Alabama & C. R. Co.*, 127 Ala. 166; s. c. 28 South. Rep. 643.

¹⁰ *Howe v. Finch*, 17 Q. B. Div. 187.

¹¹ *Conroy v. Clinton*, 158 Mass. 318. See also, *Connolly v. Waltham*, 156 Mass. 368.

course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so.”¹² It has been held that a *public street* in a defective condition, used by an employer in connection with his business, is not a “way” used in his business, within the meaning of the Ontario statute.¹³ So, under the Massachusetts statute, a *railroad-track* owned, maintained and repaired by a manufacturing company, and used by a railroad company only under a license or invitation to deliver freight under a contract, was held not to be a part of the railroad company’s “ways.”¹⁴

§ 4561. “Works,” What Are.—In an action brought under the English statute it appeared that the defendant, a builder, was engaged in pulling down an old house. After the roof had been removed and part of the walls pulled down, he ordered the plaintiff, a laborer in his employ, to remove some of the debris of the roof which lay on the ground near one of the walls which was still left standing. While the plaintiff was carrying out the order the wall fell and injured him, owing to the neglect of the defendant to have it shored up. It was held that the dangerous condition of the wall was a “defect in the condition of the works connected with or used in the business” of the defendant within the meaning of the statute; since, the business of the defendant being to pull down walls as well as to build them up, they were just as much works connected with his business in one case as in the other.¹⁵

§ 4562. “Defects” in Ways, Works, Machinery or Plant, What Constitute.—It has been held that the *absence of a guard* to a projecting screw in a revolving spindle, used to fasten a drilling-tool into the spindle, is a “defect” in the condition of the machinery within the meaning of the Ontario statute.¹⁶ So, the failure to have

¹² Willetts v. Watt, [1892] 2 Q. B. 92 (recovery denied, however, because absence of cover was not a defect in the way, but was due merely to negligent misuser).

¹³ Stride v. Diamond Glass Co., 26 Ont. Rep. 270 (under Rev. Stat. Ont., ch. 160).

¹⁴ Engel v. New York &c. R. Co., 160 Mass. 260; s. c. 22 L. R. A. 283; 35 N. E. Rep. 547.

¹⁵ Brannigan v. Robinson, [1892] 1 Q. B. 344; distinguishing Howe v. Finch, 17 Q. B. Div. 187 (where it was held that an action would not

lie against the owner of premises for a defect in a wall in process of construction by a builder, under this clause of the statute); and disapproved in Lynch v. Allyn, 160 Mass. 248, where a bank of earth fell when undermined, on the ground that the statute applies only to ways or works of a permanent character.

¹⁶ O'Connor v. Hamilton Bridge Co., 21 Ont. App. 596; aff'g s. c. 25 Ont. Rep. 12 (under Rev. Stat. Ont., ch. 160—holding also that it is a violation of the Ontario Factories

a platform in an upraise leading into a tunnel so fixed as to prevent drills thrown down the upraise from bounding into the tunnel, by reason of which an employé was injured while passing the mouth of the upraise, constituted a "defect" in the condition of the ways or works.¹⁷ In another case the *absence of a guard* to a circular saw, provided by the owner of a saw-mill, due to its improper removal by the sawyer for his own purpose, was held to be a "defect" in the condition of the machinery within the meaning of the English statute; but, there being no evidence that it had been absent so long that the employer should have known of it personally, it was further held that he would not be liable for injuries sustained by another workman who fell against the saw unless it should be found that the sawyer who removed the guard was the representative of the master to see that it was in place.¹⁸ But the fact that several dynamite cartridges used in blasting rock remained undischarged after a blast, and subsequently exploded and injured a workman who was trying to withdraw them, did not show that the way, works, or machinery of the employer were defective,—their presence being merely a condition of the material on which the employés were working, caused by their work, and necessarily incident to the business in which they were engaged.¹⁹ Where a railway employé was injured in his eye, in consequence of a scale of iron flying from the rail of the track when struck with a *hammer*, in which hammer there was alleged to be a defect which caused the scale to fly, it was held that this was not a "defect" in the works or machinery within the meaning of the Alabama statute.²⁰ Another construction of the same statute is to the effect that the *failure to provide a temporary scaffold* or platform around a "bleeder" used for the escape of gas above an iron-furnace, on which the master mechanic could stand to repair the bleeder, did not constitute a "defect" in the ways, works, machinery, or plant, where such a scaffold was sometimes used in such a case, but repairs were also made by means of a ladder.²¹ It is said that an *unsuitableness* of "ways, works, or machinery" for the work they are intended for, and actually done by means thereof, is a "defect" within the meaning of these statutes, although they are perfect of their kind and in good repair

Act, as a defect in the "moving part of the machinery").

¹⁷ *Pender v. War Eagle Consol. Min. &c. Co.*, 7 Brit. Col. L. Rep. 162.

¹⁸ *Tate v. Latham*, [1897] 1 Q. B. 502, 509; s. c. 75 Law T. Rep. 694; 66 L. J. Q. B. (N. S.) 349; 76 Law T. Rep. 336.

¹⁹ *Welch v. Grace*, 167 Mass. 590.

²⁰ *Georgia &c. R. Co. v. Brooks*, 84 Ala. 138; s. c. 4 South. Rep. 289. So under the Georgia Code, § 3033: *Georgia R. &c. Co. v. Nelms*, 83 Ga. 70; s. c. 9 S. E. Rep. 1049; 29 Cent. L. J. 352; 39 Am. & Eng. R. Cas. 355.

²¹ *Birmingham Furnace &c. Co. v. Gross*, 97 Ala. 220; s. c. 12 South. Rep. 36.

and suitable for other kinds of work. Thus, where a pump-manufacturing company used for moving the pumps a four-wheeled truck, guided by means of a short iron handle attached to the front axle, which, with ordinary loads, was sufficient to guide the truck; but on one occasion it was used for moving an extraordinarily heavy pump, and in attempting to pass from one room to another one of the front wheels passed over the door-sill, while the other wheel stuck, and the jolt caused the axle to turn so that one wheel got under the wagon, causing the pump to fall off and injure the plaintiff, who was assisting, the handle being too short to hold the wheels straight with such a heavy load on the truck,—it was held that the company was liable.²² On the same principle it is held that a machine, though perfect within itself, is, if applied to some purpose for which it is unfitted, “defective” within the meaning of such a statute,²³—as where a screw conveyor, suitable for the purpose for which it was first used, that of conveying cement from one point in a factory to another, was afterwards used as a “mixer” by taking off a lid covering it and emptying dry cement into it from sacks; and an employé, while engaged at such work, was injured by reason of a sack catching on the screw and pulling his hand into the machine.²⁴ But a *set-screw* on a machine does not of *itself* constitute a “defect” in the “ways, works, or machinery,” where it is a common device for the purpose for which it is used.²⁵

§ 4563. **Temporary Ways, Works, etc., Not within the Meaning of these Statutes.**—These statutes, it has been held, do not apply to the case of temporary structures, such as stagings, scaffoldings, etc., used in the construction or reparation of a building,²⁶ or in the painting of a building.²⁷ It has been held that the liability of a bank of earth, upon which laborers employed by a person are at work, to fall when undermined if not shored up, is not a defect in the con-

²² *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202; s. c. 43 N. E. Rep. 85.

²³ Ont. Rev. Stat., ch. 160.

²⁴ *Wilson v. Owen Sound & Co.*, 27 Ont. App. 328.

²⁵ *Donahue v. Washburn & Co.*, 169 Mass. 574; s. c. 48 N. E. Rep. 842.

²⁶ *Regan v. Donovan*, 159 Mass. 1; s. c. 33 N. E. Rep. 702 (movable staging used in repairing building); *Burns v. Washburn*, 160 Mass. 457; s. c. 36 N. E. Rep. 199 (staging for use of masons); *Carroll v. Willcutt*, 163 Mass. 221 (similar state of facts); *Reynolds v. Barnard*, 168

Mass. 226; s. c. 46 N. E. Rep. 703 (staging erected by workmen slating roof); *Morris v. Walworth Man. Co.*, 181 Mass. 326; s. c. 63 N. E. Rep. 910 (planks laid for temporary use in building in course of erection); *Ferguson v. Galt Public School*, 27 Ont. Rep. 480; s. c. 20 Occ. N. 307 (temporary gangway used by mortar carrier).

²⁷ *Adasken v. Gilbert*, 165 Mass. 443; s. c. 43 N. E. Rep. 199; *McKay v. Hand*, 168 Mass. 270; s. c. 47 N. E. Rep. 104 (two ladders selected from suitable supply and fastened together by painters).

dition of the "ways, works, or machinery" of the employer, within the meaning of the Massachusetts statute, where the work on the bank consists simply of *levelling* it for the purpose of grading the land of a third person,—the statute being held to apply only to ways and works of a permanent character.²⁸ But where the structure or appliance is of a *quasi*-permanent character, it may properly be found to be a part of the employer's "ways, works, or machinery,"—as where a *temporary derrick*, erected by workmen in a stone-yard for the purpose of unloading stones from cars and placing them in position to be worked on by the stone-cutters, had been in use for that purpose and in one place for four weeks.²⁹ So, a *temporary staging* erected by the side of a woodpile to enable the workmen to place wood thereon and pile it higher, and which is taken down and put up from time to time in different places, and is intended to be used from four days to a week at a time in each place, is a part of the owner's "ways, works, and machinery" while in use at a particular place, within the meaning of the Massachusetts statute.³⁰ The conclusion is plain that the staging and ladders in a building in course of erection were not a part of the "ways" or "works" of a contractor for the plumbing in the building, where he neither constructed, managed, nor controlled such ladders and stagings, and would have had no power to remedy a defect in them had he discovered one.³¹

§ 4564. **Temporary or Transient Conditions.**—These statutes have been held not to apply in cases where the dangerous or defective condition of the ways, works, or machinery is temporary or transient, or incident to the prosecution of the work. Thus, the master was not liable under this clause of the statute where a bank of earth, which was being levelled for the purpose of grading the land of a third person, fell and injured one of the laborers, by reason of not being shored up;³² nor where several dynamite cartridges used in blasting rock remained unexploded after a blast, and subsequently exploded and injured a workman who was trying to withdraw them;³³ nor where a board in a pile of lumber in a lumber dealer's yard sank under the weight of an employé and injured him;³⁴ nor where a

²⁸ *Lynch v. Allyn*, 160 Mass. 248. The court disapprove the case of *Brannigan v. Robinson*, [1892] 1 Q. B. 344, where *walls* which a builder was engaged in tearing down were held to be a part of his "works."

²⁹ *McMahon v. McHale*, 174 Mass. 320; s. c. 54 N. E. Rep. 854.

³⁰ *Prendible v. Connecticut River Man. Co.*, 160 Mass. 131; s. c. 35 N. E. Rep. 675.

³¹ *Riley v. Tucker*, 179 Mass. 190; s. c. 60 N. E. Rep. 484.

³² *Lynch v. Allyn*, 160 Mass. 248. Compare *Conroy v. Clinton*, 158 Mass. 318; s. c. 33 N. E. Rep. 525 (sewer-trench).

³³ *Welch v. Grace*, 167 Mass. 590.

³⁴ *Campbell v. Dearborn*, 175 Mass. 183; s. c. 55 N. E. Rep. 1042.

ledge-stone was allowed to remain on the edge of a staging erected for the purpose of building a wall, and it fell off and injured a workman on another staging.³⁵

§ 4565. **What Repairs are Sufficient.**—It has been held that the law does not impose upon a master, upon his discovering a defect in his ways, works, or machinery, the duty of putting the same in perfect condition for working-purposes, but he discharges the duty resting on him if he *removes the source of danger* to employes, and this may be done by a *temporary device*, as well as by permanent repairs.³⁶

§ 4566. **No Recovery unless Defect is Due to Negligence of Master or his Representatives.**—Here, as in other cases, in order to a recovery, it must be shown that the defective condition of the ways, works, or machinery was due to the negligence of the master or his representative, either in causing such defect or in failing to discover and remedy it. Thus, where a switchman was injured while operating a switch, which he alleged was defective, but he failed to show that the railway company had been negligent in regard to its condition, he could not recover.³⁷ The Massachusetts statute has been held not to give a right of action against the employer for the negligence of a *fellow servant* in handling or using a machine, tool, or appliance,

³⁵ Carroll v. Willcutt, 163 Mass. 221.

³⁶ Willey v. Boston Electric Light Co., 168 Mass. 40; s. c. 37 L. R. A. 723; 46 N. E. Rep. 395. In this case it appeared that an electrical lineman, finding that electricity was leaking at a certain pole from defective insulation, which could not be repaired at that time, merely shut the current off from that pole by a switch on the pole, after the circuit on which the pole was had been cut out at the power-house, after which the current was again admitted to the circuit. A night employe, noticing that the lamp was dark, climbed up and turned on the current, as his duty required him to do in such cases, he not knowing of any trouble, and was killed. After the accident the pole was cut out by cutting the wires and joining them above the cut-off box. It was held to be a question for a jury whether the master had exercised the proper degree of diligence in the method he had first adopted of

cutting out the pole: Willey v. Boston Electric Light Co., *supra*.

³⁷ Mary Lee Coal &c. Co. v. Chambliss, 97 Ala. 171; s. c. 53 Am. & Eng. R. Cas. 254; 11 South. Rep. 897. A cause of action under the Colorado act of 1877, permitting recovery from an employer for injuries received by an employe resulting in his death, when due to the negligence of the master or certain of his servants, is shown by *evidence* that the employer was negligent in failing to exercise due care to provide safe appliances for the employe's use while in his employment, resulting in his death, or that his death was due to the negligence of the manager of the employer, when his manager was acting as vice-principal: Colorado Milling &c. Co. v. Mitchell, 26 Colo. 284; s. c. 58 Pac. Rep. 28; aff'g s. c. 12 Colo. App. 277; 55 Pac. Rep. 736 (failure of manager to use due care to provide safe and proper appliance for raising a smokestack, and his negligence in superintending the use thereof).

which was in itself in a proper condition;³⁸ and this is in accordance with the principles of the common law.³⁹ It is also clear of doubt that an action cannot be sustained, under special statutes, for furnishing "decayed, rotten, unsafe and unsuitable planks or timbers," etc., where the employer furnished an abundance of timbers to be used by the employés, who were experienced in their line of employment, and the employé receiving an injury selected a defective instead of a sound timber.⁴⁰

§ 4567. "Locomotive-Engine, Car, or Train," What Is.—Three questions arise under the clause of these statutes giving a right of action for injuries caused by the negligence of "any person in charge or control of any locomotive-engine, car, or train upon a railroad": 1. Whether the servant whose negligence caused the injuries was a person "in charge or control" within the meaning of the statute, which will be considered in another connection;⁴¹ 2. Whether the motive power of which he was in charge was a "locomotive-engine," or, if it was, whether it and the cars attached to it, or, in many cases, cars detached from it, constituted a "train" within the meaning of the statute; 3. Whether the track upon which such locomotive-engine or train ran was a "railroad" within the meaning of the statute. Upon the second question we find decisions to the effect:—That an *engine and car* constitute a "train," where a car-cleaner is at work in the car, and a locomotive is coupled to it to remove it to another track, and a brakeman stands on the front platform while it is being pushed;⁴² that a *locomotive and one or more cars* connected together and run upon a railroad constitute a "train";⁴³ that *cars detached from the train* while the engineer takes another car to a different place continue to be a part of the train, so as to render the company liable for injuries caused by one of such cars breaking away and running down an incline because improperly secured or "scotched" by the person in charge of the cars;⁴⁴ that a *number of cars* coupled together, forming one connected whole, and moving from one point to another on a railroad in the ordinary course of traffic, set in motion by a loco-

³⁸ Ashley v. Hart, 147 Mass. 573; Allen v. Smith Iron Co., 160 Mass. 557; s. c. 36 N. E. Rep. 581.

³⁹ Ante, §§ 3760, 3999, et seq.; post, § 4852.

⁴⁰ Conroy v. Clinton, 158 Mass. 318; s. c. 33 N. E. Rep. 525.

⁴¹ Post, § 5285.

⁴² Shea v. New York &c. R. Co., 173 Mass. 177; s. c. 6 Am. Neg. Rep. 82; 53 N. E. Rep. 396 (collision with cars on the other track, due to neg-

ligence of either the brakeman or the engineer, either of whom was "in charge" of the train so as to render the company liable).

⁴³ Dacey v. Old Colony R. Co., 153 Mass. 112; s. c. 26 N. E. Rep. 437.

⁴⁴ McCord v. Cammell, [1896] A. C. 57; s. c. 65 L. J. Q. B. (N. S.) 202; 73 Law T. Rep. 634 (the court further holding that either the engineer, or the fireman left with the cars, was "in charge" of the cars).

tive which has just been detached, constitute a "train";⁴⁵ that a *hand-car* is a "car."⁴⁶ It has been held that, under the Massachusetts statute, an *electric car on a street-railroad*, operated by electricity in the usual manner, is not a "locomotive-engine or train upon a railroad"—the theory of the court being that the Legislature undoubtedly intended these words to mean a railroad and locomotive-engines and trains operated and run, or at least originally intended to be operated and run, in some manner and to some extent by steam.⁴⁷

§ 4568. "Railroad," What Is.—Upon the question when a car, train, or locomotive is "upon a railroad" within the meaning of these statutes, it has been held, on the one hand, that a short railway-track, intended for temporary use by a city in transporting gravel, is a "railroad" as between the city and its employés.⁴⁸ On the other hand, it has been held that a locomotive stalled in a *roundhouse* for repairs is not "upon a railroad," so as to render the company liable to a machinist making repairs on the locomotive, caused by the engineer's "blowing down" the engine into the ash-pit in which such machinist was at work;⁴⁹ and that the *tracks of a street-railroad* operated by electricity in the usual manner are not a "railroad."⁵⁰

§ 4569. Volunteers—Workman Using Machinery or Ways without Necessity.—It has been held that, in order to recover for injuries caused by defective ways, works or machinery, the plaintiff must show that it was reasonably and practicably necessary for him to use such ways, works or machinery. Thus, where the plaintiff used a "skip," or ore-hoist, to ascend a mine, and it appeared that there was another and safer passageway by means of ladders, and that he knew the safety-appliances had been removed from the "skip," it was held that he could not recover.⁵¹

⁴⁵ *Caron v. Boston &c. R. Co.*, 164 Mass. 523; s. c. 42 N. E. Rep. 112. It is to be noticed that the Massachusetts statute now defines a train as "one or more cars which are in motion, whether attached to an engine or not."

⁴⁶ *Kansas City &c. R. Co. v. Crocker*, 95 Ala. 412; s. c. 11 South. Rep. 262; *Richmond &c. R. Co. v. Hammond*, 93 Ala. 181; s. c. 9 South. Rep. 577.

⁴⁷ *Fallon v. West End St. R. Co.*, 171 Mass. 249; s. c. 50 N. E. Rep. 536. Compare *Snell v. Toronto R. Co.*, 27 Ont. App. 151; s. c. 20 Occ. N. 224 (where the contrary was held

under the Ontario statute—*Ont. Rev. Stat.*, ch. 160).

⁴⁸ *Coughlan v. Cambridge*, 166 Mass. 268; s. c. 44 N. E. Rep. 218.

⁴⁹ *Perry v. Old Colony R. Co.*, 164 Mass. 296; s. c. 41 N. E. Rep. 289.

⁵⁰ *Fallon v. West End St. R. Co.*, 171 Mass. 249; s. c. 50 N. E. Rep. 536.

⁵¹ *Davies v. LeRoi Min. &c. Co.*, 7 Brit. Col. L. Rep. 6. In another case it appeared that the plaintiff, a workman, in going to his work in the defendant's factory, passed as usual through a long passage, twelve feet wide, well lighted, and with which he was well acquainted;

§ 4570. **Servants Employed by Independent Contractor in a Mine are Not "Workmen" in the Employ of the Owners.**—It has been held that the control given to a mine-owner by the English Coal Mines Regulation Act of 1887, and rules thereunder, over persons working in the mine, for the purpose of carrying on the mining operations without danger, does not make "sinkers" employed by an *independent contractor*, to sink a shaft in a coal mine, "workmen" in the employ of the owners, within the meaning of the English Employers' Liability Act, so as to render the owners liable for injuries to the "sinkers."⁵²

§ 4571. **Notice of Time, Place, and Cause of Injury.**—The Employers' Liability Act of Massachusetts provides that no action for injury or death under the act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within thirty days from the accident. It has been held that such a notice is not defective because it alleges *different causes* for the injury, where each cause is adequately stated.⁵³ And where an employé was injured by the falling of a bank of earth, owing to the negligence of the employer's superintendent, it was held that a notice setting forth the cause of the injury to be "the falling of a bank of earth," was suffi-

but instead of going straight to his work he turned out of his way to look at some repairs that were being made on an elevator on the opposite side of the passage from where he should have been and from where he usually walked, and fell into the unguarded hole. It was held that, as toward such employé, there was no defect in the condition of the "way" within the meaning of the Ontario statute, for which the defendant was responsible: *Headford v. McClary Man. Co.*, 21 Ont. App. 164; aff'g s. c. 23 Ont. Rep. 335 (where nonsuit was granted on ground of *contributory negligence*).

⁵²*Marrow v. Flimby & Co.*, [1898] 2 Q. B. 588; s. c. 67 L. J. Q. B. (N. S.) 976.

⁵³*Coughlan v. Cambridge*, 166 Mass. 268; s. c. 44 N. E. Rep. 218 (notice alleged injury was due to negligence of persons for whose negligence employer was responsible, and also due to defects in train, track, and switch). Where the declaration in an action under the Massachusetts statute for the death of an employé contained two counts,—one under § 1, cl. 1, of the statute,

for defects in appliances; the other under § 1, cl. 2, for negligence of a person exercising superintendence, and the evidence showed that there was no defect in the appliance,—a notice to the employer of the injury, describing a defect in the ways, works and machinery, and charging negligence on the part of a person entrusted with and exercising superintendence, in the language of clauses 1 and 2, and particularly stating that the deceased was killed by a stone being precipitated upon him from the defendant's derrick, as the result of the negligence of the defendant, and the negligence of some person for whose negligence he was liable, sufficiently described the cause of injury as applied to the second count; the evidence showing that the superintendent negligently ordered the stone to be raised before it was properly prepared, and that no warning was given to the deceased that the stone was to be raised; and the notice substantially stating this: *Beauregard v. Webb Granite & Co.*, 160 Mass. 201; s. c. 35 N. E. Rep. 555.

cient although it did not refer to the superintendent or his conduct, since it is not necessary to state the *cause of the cause* of an injury.⁵⁴ It has been held that notice of an injury to a brakeman, given to a freight-agent, who forwarded it to the attorney of his employer, which had made no objection to the receipt of such notices by the freight-agent for five years, was a sufficient compliance with the statute, requiring notice to be "given to the employer."⁵⁵

§ 4572. **A Question of Pleading.**—It has been held, under the clause of the Alabama statute authorizing a recovery for injuries to an employé caused by any defect in the ways, works, or machinery of the employer, that a complaint by a section-hand, ascribing his injuries to defective appliances for controlling the speed of a push-car, which collided with the plaintiff, knocking him from a high trestle, etc., stated a cause of action.⁵⁶

⁵⁴ *Lynch v. Allyn*, 160 Mass. 248; s. c. 35 N. E. Rep. 550.

⁵⁵ *De Forge v. New York &c. R. Co.*, 178 Mass. 59; s. c. 59 N. E. Rep. 669 (so held without deciding whether, in general, notice to freight-agent or attorney would be notice to employer). A notice to an employer of the time, place and cause of personal injuries sustained by an employé, signed "C. & P., attorneys for C. D.," purports to be signed "in behalf" of C. D., in accordance with a statute requiring the notice to be signed by the person injured or "some one in his behalf,"—the words "attorneys for C. D." not being merely *descriptio personarum*: *Dolan v. Alley*, 153 Mass. 380; s. c. 26 N. E. Rep. 989. It has been held that the notice required by the Massachusetts statute is a *condition precedent* to the right of action for an injury, and is not within the meaning of the phrase "lawful processes in any action or proceeding," which refers to process emanating from a court, or by the authority of a court. Hence, such a notice, served by an employé of a foreign corporation upon the Commissioner of Corporations, who sends a copy of it, within thirty days of the happening of the acci-

dent, to the foreign corporation, which has made him its attorney upon whom *all lawful processes in any action or proceeding* may be served, as provided by Stat. 1884, ch. 330, is not notice to the corporation within the meaning of the Employers' Liability Act. And the act of the Commissioner in sending the notice is not done as the agent of either party, but as a public officer, acting in the discharge of a supposed statutory duty; and for this reason the plaintiff cannot ratify the action of the Commissioner as his own or hold the defendant as though it were its act: *Healey v. George F. Blake Man. Co.*, 180 Mass. 270; s. c. 62 N. E. Rep. 270. In an action under the Ontario statute it is not sufficient to *state in the defense* that notice of the accident has not been given, and that the defendants intend to rely on that defense: formal notice of the objection must be given seven days before the hearing of the action, in accordance with the provisions of § 14: *Cavanagh v. Park*, 23 Ont. App. 715; *Wilson v. Owen Sound &c. Co.*, 27 Ont. App. 328.

⁵⁶ *Central &c. R. Co. v. Lamb*, 124 Ala. 172; s. c. 26 South. Rep. 969.

ARTICLE II. UNDER WORKMEN'S COMPENSATION ACTS.

SECTION	SECTION
4575. Accident "arising out of and in the course of" the employment.	4582. Employment "on, in, or about" a factory.
4576. Workman unloading ship to a dock.	4583. "Factory," what constitutes.
4577. Volunteers.	4584. Employment "on, in, or about" a dock.
4578. Workmen using forbidden route.	4585. Employment on buildings exceeding thirty feet in height.
4579. Workmen going to work along railroad-track.	4586. "Construction" or "repair," what constitutes.
4580. "On, in, or about," meaning of.	4587. Right to weekly compensation as affected by wage-earning capacity.
4581. Employment "on, in, or about" an engineering work.	

§ 4575. **Accident "Arising Out of and in the Course of" the Employment.**—Some of the acts called "Workmen's Compensation Acts" are substantially the same in their operation as the Employers' Liability Acts,¹ but the Workmen's Compensation Acts to which we wish to be understood as referring in this connection, are the English Workmen's Compensation Act, 1897, and those acts modeled after it, allowing a recovery to a workman who is injured by an accident "arising out of and in the course of his employment," without reference to whether such accident is caused by negligence or not. The determination of whether an accident does so arise is complicated in England by the fact that the act must be construed in connection with the Factory Acts, and the Factory and Workshop Acts.

§ 4576. **Workman Unloading Ship to a Dock.**—Thus, section 1 of the English Workmen's Compensation Act provides that the act shall apply to employment in a "factory." Section 7, subsection 2, of the same act, provides that "factory" shall include, among other things, "any quay, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895"; and section 23, subsection 1, of the Factory and Workshop Act applies certain provisions of the Factory Acts to "every * * * quay, * * * and, so far as relates to the process of loading, or unloading, therefrom or thereto, all machinery and plant used in that process." So, where a workman, employed by the owners of a ship in unloading it to a dock by means

¹ See, for instance, the Workmen's Compensation for Injuries Act of Ontario—Ont. Rev. Stat., ch. 160.

of a crane on the quay, hired by the owners, was killed by the accidental explosion of a case of percussion-caps, while placing it in a basket attached to the chain of the crane for the purpose of hoisting it from the ship, it was held that the accident arose out of and in the course of his employment on or about machinery used in the process of unloading to a quay, so as to render the owners liable.²

§ 4577. **Volunteers.**—In one case it appeared that a servant was employed at a railway-station as a ticket-collector, and after he had taken up all the tickets, and the train had started, he stepped on the foot-board to speak to a woman passenger, for his own pleasure and not for any object of his employment, and was injured in getting off. It was held that the accident did not “arise out of” his employment.³ The conclusion was the same where a person employed in a factory to do purely unskilled labor, and expressly forbidden to touch any of the machinery, was injured while attempting, in violation of such orders, to clean a machine.⁴

§ 4578. **Workmen Using Forbidden Route.**—But a fatal accident to a workman was deemed to have occurred in the course of his employment, notwithstanding the fact that, at the time thereof, he was going from one place of his employment to another by a forbidden route, which was more dangerous than another route which was available to him.⁵ In another case a fireman in a coal-pit, part of whose duty it was to report to the colliery office the condition of the mine, rode toward the office, though in disobedience of the rule of the colliery, on a laden tram drawn by a horse. The horse ran away and he jumped off the tram to stop it, and while so doing he fell and was run over by the tram. It was held that the accident arose out of and in the course of his employment,—the court holding that an accident happening to a workman who while in his master’s employ, and on his master’s work, does in an emergency an act *in the interests of his*

² Woodham v. Atlantic Transport Co., [1899] 1 Q. B. 15; s. c. 68 L. J. Q. B. (N. S.) 17.

³ Smith v. Lancashire &c. R. Co., [1899] 1 Q. B. 141; s. c. 68 L. J. Q. B. (N. S.) 51.

⁴ Lowe v. Pearson, [1899] 1 Q. B. 261; s. c. 68 L. J. Q. B. (N. S.) 122 (boy employed in a pottery, whose duty was to make balls of clay and hand them to the operator of a machine, attempted to clean

machine while operator was temporarily absent).

⁵ McNicholas v. Dawson, [1899] 1 Q. B. 773; s. c. 68 L. J. Q. B. (N. S.) 470 (crawled under a revolving shaft in order to leave engine-shed by a small door, instead of going out of main door and walking around the shed to a mortar-pan outside, which it was his duty to attend to when not engaged with the engine).

master outside the scope of his employment, and is injured while so doing, is within the purview of the act.⁶

§ 4579. **Workmen Going to Work along Railroad-Track.**—In a case under the English statute, it was held that the death of an employé of railroad contractors engaged in ballasting a railroad-siding, from being struck by a train about seven minutes before the hour for commencing work, at a point about 150 yards from the work, as he was proceeding along the main track for the purpose of going to work, did not arise out of and in the course of his employment, notwithstanding that the contractors had advised employés, with the authority of the railroad company, to take such route to reach their work, where there was no contract that the employment should include the time taken in getting to and from the work.⁷

§ 4580. **"On, In, or About," Meaning of.**—It has been held that an employé is not employed "on, in or about" the work of his employer unless he is employed in close propinquity thereto, it not being sufficient that he is engaged in work relating to the business of the employer.⁸

§ 4581. **Employment "On, In, or About" an Engineering Work.**—Thus, where an action was brought under the clause of the statute allowing a recovery for an accident occurring in the course of an "engineering work," it appeared that a workman was employed on a steam-dredger used for dredging a harbor, it being part of his duty to go to sea with the hoppers, into which the mud from harbor was discharged by the steam-dredger, and empty them outside the harbor at sea. The workman was accidentally drowned in the course of emptying one of the hoppers about one and one-half miles outside the harbor at sea. It was held that notwithstanding the dredging of the harbor constituted engineering work, and that he was at times employed on the dredger, there could be no recovery for his death. The court held that the expression "engineering work" points to locality, and not to

⁶ *Rees v. Thomas*, [1899] 1 Q. B. 1015; s. c. 68 L. J. Q. B. (N. S.) 539 (and since he was found not to have been guilty of serious or willful misconduct in riding on the tram in violation of orders, that feature was dismissed from consideration on appeal).

⁷ *Holness v. Mackay*, [1899] 2 Q. B. 319; s. c. 68 L. J. Q. B. (N. S.) 724.

⁸ *Lowth v. Ibbotson*, [1899] 1 Q. B. 1003; s. c. 68 L. J. Q. B. (N. S.) 465 (carter injured while unloading goods from a cart of his employers at a distance of a mile and a half from the factory—no recovery); *Chambers v. Whitehaven Harbour Com'rs*, [1899] 2 Q. B. 132; s. c. 68 L. J. Q. B. (N. S.) 740; 80 Law T. (N. S.) 586; 47 Wkly. Rep. 533.

the nature of the work, and that, in order to bring a particular case within the purview of the Act, the employment must be "on, in, or about" the named locality at the time of the accident.⁹

§ 4582. **Employment "On, In, or About" a Factory.**—Where a carter, in the employ of the defendants, was injured while engaged in loading timber on to one of the defendant's carts, which was standing in the street close to the entrance to the defendants' timber factory, it was held that loading the timber on the carts was part of the business of the factory, and that the accident happened to the carter while employed "about" the factory.¹⁰ But it does not follow from this that an accident occurs "about" a factory merely because it arises out of an employment *relating to the business* of the factory. For instance, where a carter was injured while unloading goods from a cart of his employer, at a distance of a mile and a half from the factory, it was held that he was not entitled to compensation for the injury.¹¹

§ 4583. **"Factory," What Constitutes.**—It has been held that a *steam-engine in a shed* about twenty yards from a building in course of erection, which engine is temporarily used for mixing mortar to be used on the building, is a "factory" within the meaning of that clause of the English statute which provides that the word "factory" as used in that Act includes any machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, where the latter act provides that the provisions thereof "shall have effect as if any premises on which machinery worked by steam * * * is temporarily used for the purpose of the construction of a building," were included in the word "factory".¹² On the other hand, it is held that a *wharf* on which no machinery is used is not a "factory" within the meaning of the Act, unless some provision of the Factory Acts is applied to the wharf by the Factory and Workshop Act,—the Workmen's Compensation Act including within the word "factory" any wharf to which any of such provisions are applied.¹³

⁹ *Chambers v. Whitehaven Harbour Com'rs*, [1899] 2 Q. B. 132; s. c. 68 L. J. Q. B. (N. S.) 740; 80 Law T. (N. S.) 586; 47 Wkly. Rep. 533.

¹⁰ *Powell v. Brown*, [1899] 1 Q. B. 157; s. c. 68 L. J. Q. B. (N. S.) 151; 79 Law T. (N. S.) 631; 47 Wkly. Rep. 145.

¹¹ *Lowth v. Ibbotson*, [1899] 1 Q. B. 1003; s. c. 68 L. J. Q. B. (N. S.) 465.

¹² *McNicholas v. Dawson*, [1899] 1

Q. B. 773; s. c. 68 L. J. Q. B. (N. S.) 470.

¹³ *Hall v. Snowden*, [1899] 2 Q. B. 136; s. c. 68 L. J. Q. B. (N. S.) 645. The court said, by way of illustration, that if any orders made under the Factory Acts on such matters as inspection, notice of accidents, etc., were applicable to a particular wharf, then that wharf might be said to be a "factory" within the meaning of these Acts.

§ 4584. **Employment "On, In, or About" a Dock.**—A workman employed upon a vessel alongside a dock is not employed "on, in, or about" the dock within the meaning of the statute, providing that the Act shall apply to employment on, in or about a "factory," even though such dock may be a factory within the meaning of the statute.¹⁴

§ 4585. **Employment on Buildings Exceeding Thirty Feet in Height.**—The English statute provides that the Act shall apply, among other things, only to employment "on or in or about * * * any building which exceeds thirty feet in height, and is either being constructed and repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof." In an action brought under this clause of the statute the court held the true construction of this clause to be that the words "which exceeds thirty feet in height" are to be read only with the words "and is either being constructed and repaired by means of a scaffolding, or being demolished"; and that the antecedent to the subsequent words is simply the word "building"; and that, hence, a building, in the construction, repair or demolition of which machinery driven by steam, water, or other mechanical power is being used, need not exceed thirty feet in height in order to make the Act apply.¹⁵ Another case holds that an accident to a workman employed on, in or about a building in the course of construction, which does not at the time exceed thirty feet in height, although it is intended that when completed it shall exceed such height, is not within the English statute.¹⁶

§ 4586. **"Construction" or "Repair," What Constitutes.**—Under the clause of the English Act quoted in the preceding paragraph, it has been held that a slight *alteration* in a completed part of a building, made for the purpose of giving additional strength to the building, is neither construction, repair, nor demolition of the building, and that

¹⁴ *Flowers v. Chambers*, [1899] 2 Q. B. 142; s. c. 68 L. J. Q. B. (N. S.) 648; 80 Law T. (N. S.) 834; 47 Wkly. Rep. 513.

¹⁵ *Mellor v. Tomkinson*, [1899] 1 Q. B. 374; s. c. 68 L. J. Q. B. (N. S.) 214.

¹⁶ *Billings v. Holloway*, [1899] 1 Q. B. 70; s. c. 68 L. J. Q. B. (N. S.) 16. It is said that in determining whether a building being constructed or repaired by means of a scaffolding is more than thirty feet

high, the distance is to be measured from the ground to the top of the roof, instead of to the top of the walls; but that it is not necessary that the workman injured should be working at a height of thirty feet or more from the ground: *Hoddinott v. Newton*, [1899] 1 Q. B. 1018; s. c. 68 L. J. Q. B. (N. S.) 495.

a workman injured in the course of such employment cannot recover under that Act;¹⁷ and so in the case of the mere *painting* of the outside of a building.¹⁸

§ 4587. Right to Weekly Compensation as Affected by Wage-Earning Capacity.—A workman who was so injured as to necessitate the amputation of a thumb, on returning to work for the same employers was engaged on a different class of work, but was paid the *same amount of wages* a week as he had received before the accident. It was held that there was no evidence of partial incapacity for work to justify an award for any weekly payment to him under the English Act,—the sole test of his right to a weekly payment, in respect to his partial incapacity for work, being held to be his *wage-earning capacity* after the accident.¹⁹

ARTICLE III. UNDER VARIOUS FACTORY ACTS.

SECTION

4590. Under the Factory Acts and the Factory and Workshop Acts of England.

4591. Under the Massachusetts statute.

4592. Under the Minnesota statute.

4593. Under the Missouri statute.

SECTION

4594. Under the New York statute.

4595. Under the Ontario Factories Act.

4596. Under the Quebec Factories Act.

4597. Under the Wisconsin statute.

§ 4590. Under the Factory Acts and the Factory and Workshop Acts of England.—By an act of the British Parliament, it was provided: “Every fly-wheel directly connected with the steam-engine, or water-wheel, or other mechanical power, whether in the engine-house or not, and every part of a steam-engine, and water-wheel, and every hoist or teagle, near to which children or young persons are liable to pass or be employed, and all parts of the mill-gearing in a factory, shall be securely fenced; and every wheel-race, not otherwise secured, shall be fenced close to the edge of the wheel-race; and the said pro-

¹⁷ *Hoddinott v. Newton*, [1899] 1 Q. B. 1018; s. c. 68 L. J. Q. B. (N. S.) 495.

¹⁸ *Wood v. Walsh*, [1899] 1 Q. B. 1009; s. c. 68 L. J. Q. B. (N. S.) 492.

¹⁹ *Irons v. Davis*, [1899] 2 Q. B. 330; s. c. 68 L. J. Q. B. (N. S.) 673; 80 Law T. (N. S.) 673; 47 Wkly. Rep. 616. But since, under another clause of the Act, a weekly payment once awarded may be reviewed at the request of either party, counsel

for the defendant agreed to the court's suggestion that the weekly payment awarded be reduced to a nominal sum, so as to preserve to the plaintiff the right to have the award reviewed in case it should *afterward appear* that he was incapacitated by reason of such injury from entering upon more remunerative employment: *Irons v. Davis*, *supra*.

tection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine, water-wheel, or other mechanical power for any manufacturing process.”¹ A declaration under this statute was held bad in arrest of judgment, for not showing that at the time of the accident the machinery was in motion *for some manufacturing process*.² On a subsequent trial of this case, on an amended declaration, it appeared that the injury occurred while the shafting in the particular room of the factory, though in motion, had been unfenced for the purpose of making repairs, and while no manufacturing process was going on in the particular room, though such operations were going on in other rooms. It was held that the action could not be maintained. In the opinion of the court, the intention of the legislature was, to give full protection to children and young persons who were engaged in attending to their duties about the machinery put in motion in the rooms or on the floors where such manufacturing processes were going on, and that the protection of the statute was to be confined to the periods of time when such processes were there taking place.³ Although a shafting was unfenced in violation of the statute, yet if the plaintiff, contrary to the commands of the proprietor, took hold of it and set it in motion, whereby he was injured, he could not recover damages.⁴ But a mere knowledge on the part of the servant that such machinery was unfenced, and his continuing to work about it in this condition, would not, in case he should be killed thereby, bar a recovery of damages.⁵ In an action for an injury, founded on the statute, a plea that the shaft in question was not near to where children or young persons were liable to pass or be employed, and was so placed and situated in the said factory that there did not exist any such liability to injury from the same as to require it to be fenced while in motion, and that all such liability was sufficiently guarded against by the position and situation of said shaft, was held a bad plea. A contrary construction, Lord Campbell thought, would operate to repeal the act. The act did not merely provide that machinery should be fenced where it was dangerous. *All* mill-gearing, while in motion for manufacturing purposes, was to be fenced. The legislature did not intend to leave it to the proprietor to decide, under the circumstances of each case, whether he should fence the machinery

¹ 7 Vict., c. 15, § 21.

² *Coe v. Platt*, 7 Exch. 460; s. c. 16 Jur. 174; 21 L. J. (Exch.) 146; aff’g s. c. 6 Exch. 752; 2 L. M. & P. 488; 15 Jur. 732; 20 L. J. (Exch.) 407; s. c., again, in 7 Exch. 923; 22 L. J. (Exch.) 164.

³ *Coe v. Platt*, 7 Exch. 923; s. c. 22 L. J. (Exch.) 164.

⁴ *Caswell v. Worth*, 5 El. & Bl. 848; s. c. 2 Jur. (N. S.) 116; 25 L. J. (Q. B.) 121.

⁵ *Holmes v. Clarke*, 6 Hurl. & N. 349; s. c. 30 L. J. (Exch.) 135; s. c. aff’d, 7 Hurl. & N. 937; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 953.

or not.⁶ In an action for the recovery of a fine for a violation of the clause of the Factory and Workshop Acts requiring "all dangerous parts of the machinery" in a factory to be securely fenced or otherwise rendered safe, it was held that shuttles of cotton-looms which occasionally flew out from their beds under circumstances rendering them dangerous to any persons in the line of flight, because of negligence of the weaver in charge, or of a foreign substance accidentally getting into the shuttle-race, or of a defect in the yarn, were within the meaning of the statute, if any of the causes of their flying out were likely to occur with any degree of frequency, though they may not have been in themselves defective, or dangerous in the ordinary course of careful working.⁷ It is provided by section 83 of the Factory and Workshop Act, 1878, that a factory-owner shall be liable to a fine where a young person is employed during the hours allowed for meals, contrary to the provisions of the act, and section 94 provides that a young person who works in a factory or workshop, whether for wages or not, in cleaning or oiling any part of the machinery, shall be deemed to be "employed" within the meaning of the act. Where, therefore, a young person employed in a spinning-mill, during the time allowed for a meal oils part of the machinery, though it is no part of his duty, and he does it contrary to orders and for his own amusement, the employer is liable to a fine,—the theory of the court being that if he *works* during prohibited hours, he is *employed*, it not being necessary that he be *employed by the master*, and that to clear himself the employer must show that he has used all due diligence to enforce the execution of the act, and that the offence has really been committed by some other person; failing in which, he must trust to the mercy and discretion of the magistrates in inflicting a fine and in dealing with the costs.⁸

§ 4591. **Under the Massachusetts Statute.**—An employer of labor is not liable to an action, either criminal or by an employé, for a violation of the Massachusetts statute⁹ relating to the guarding of dangerous machinery, until the *notice* required by another section of the same statute¹⁰ has been given to him by an inspector of buildings.¹¹

⁶ Doel v. Shepherd, 5 El. & Bl. 856; s. c. 2 Jur. (N. S.) 218; 25 L. J. (Q. B.) 124.

⁷ Hindle v. Birtwistle, [1897] 1 Q. B. 192; s. c. 76 Law T. Rep. 159.

⁸ Prior v. Slaithwaite Spinning Co., [1898] 1 Q. B. 881; s. c. 78 Law T. Rep. 532; 67 L. J. Q. B. (N. S.) 615.

⁹ Mass. Pub. Stat., ch. 104, § 13; Mass. Rev. Laws 1902, ch. 104, § 41.

¹⁰ Mass Pub. Stat., ch. 104, § 22 (§ 50, Rev. Laws 1902).

¹¹ Foley v. Pettie Machine Works, 149 Mass. 294; s. c. 4 L. R. A. 51; 21 N. E. Rep. 304.

§ 4592. **Under the Minnesota Statute.**—It is provided by statute in Minnesota that all dangerous machinery in any factory, mill, or shop shall be so guarded, if practicable, as to protect the workmen or employes, whether actually engaged in operating the machinery or in the discharge of any of their duties, from liability to injury therefrom.¹² It is held that where an employer charged with the duty of so guarding such machinery omits to do so, he is chargeable with negligence, and is liable to any employé injured thereby, though he could not reasonably have anticipated injury in the precise way in which it actually occurs.¹³

§ 4593. **Under the Missouri Statute.**—The Missouri statute requires that all belting, shafting, gearing, and drums in manufacturing establishments, shall be safely and securely guarded when possible, and when not possible, that notice of the danger shall be conspicuously posted.¹⁴ It has been said that this statute does not make the master an insurer of the safety of the servant, but is intended to increase the degree of care required by the common law; that the master is not required to guard against the negligence of the servant, nor against such dangers or accidents as no human knowledge or experience could anticipate; but that he is only required to provide such guards as will protect the servant, using ordinary care, against all dangers that can be foreseen by ordinary human foresight; and that, further, his failure to guard his machinery to this extent is negligence *per se*.¹⁵

§ 4594. **Under the New York Statute.**—Under a statute of New York providing that “shafting, set-screws and machinery of every description shall be properly guarded” by the owners of factories where machinery is used,¹⁶ and declaring that the term “factory” shall be construed to include also a “mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor,”¹⁷—it has been held that a commercial ice-house, which is ex-

¹² Minn Gen. Stat. 1894, § 2248.

¹³ *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25; s. c. 85 N. W. Rep. 826 (plaintiff accidentally lost his balance and fell against unguarded saw which it would have been practicable to guard so as to prevent the injury).

¹⁴ Mo. Rev. Stat. 1899, § 6433; Mo. Sess. Acts 1891, p. 160, § 3.

¹⁵ *Colliott v. American Man. Co.*, 71 Mo. App. 163. It is to be noted

that the statute was construed in this case *by request of counsel*. The judgment of the trial court was reversed for error in submitting improper issues to the jury.

¹⁶ *Cummings & G. N. Y. Gen. Laws* 1901, p. 2071, § 81; *Laws* 1899, ch. 192, § 81; amending *Laws* 1897, ch. 415, § 81.

¹⁷ *Cummings & G. N. Y. Gen. Laws* 1901, p. 2046, § 2, cl. 3.

tensively equipped with machinery, and in which numerous operators are employed, is a "factory" within the meaning of this statute.¹⁸

§ 4595. Under the Ontario Factories Act.—The Ontario Factories Act, in its original form, provided that "all belting, shafting, gearing, flywheels, drums, and other moving parts" of machinery should be guarded.¹⁹ It was held in an action under this statute that the word "moving" was used in its transitive sense, and signified "propelling," referring only to parts used for a like purpose as shafting, belting, etc., and not to the tools moved; and, hence, that no duty was imposed on the owners of sawmills to guard the saws, which are propelled by the moving parts of the machinery.²⁰ Under this theory a revolving spindle used to hold a drilling-tool was deemed a "moving part of the machinery," so that the master was liable for the absence of a guard to a projecting set-screw therein, by means of which the drilling-tool was fastened.²¹ But the act was afterward amended, and the word "moving" omitted;²² after which the act was held to apply to an unguarded screw conveyor propelled by other machinery.²³

§ 4596. Under the Quebec Factories Act.—Under a similar provision of the Quebec Factories Act,²⁴ it is held that an employer is bound to maintain all machinery of every description, and all shafting and apparatus in connection therewith, in the best possible condition for the safety of operatives. Hence, an employer was held liable for injuries to a girl employed in his factory from her hair being caught on an unguarded revolving shaft under the table at which she was at work, upon her stooping to pick up a comb which fell while she was combing her hair,—on the theory that, while operatives were not required to be under the table, they might at any moment be called upon to get under it if they should drop any article or material used in the business.²⁵ But in another case brought under the same section

¹⁸ *Rabe v. Consolidated Ice Co.*, 113 Fed. Rep. 905; s. c. 51 C. C. A. 535. It has been held that section 6 of N. Y. Laws 1889, ch. 560, requiring all cogs to be "properly guarded," devolves no greater duty upon the master than was required of him at common law, and is satisfied where the cogs are so guarded as to meet the demands or requirements of reasonable care: *Spaulding v. Tucker & Co. Cordage Co.*, 13 Misc. (N. Y.) 398.

¹⁹ Ont. Rev. Stat. 1887, ch. 208, § 15, subs. 1.

²⁰ *Hamilton v. Groesbeck*, 19 Ont. Rep. 76.

²¹ *O'Connor v. Hamilton Bridge Co.*, 21 Ont. App. 596; aff'g s. c. 25 Ont. Rep. 12.

²² Ont. Rev. Stat. 1897, ch. 256, § 20, (1), (a); 58 Vict., ch. 50, § 3.

²³ *Wilson v. Owen Sound & Co.*, 27 Ont. App. 328.

²⁴ Quebec Rev. Stat. 1888, art. 3024, cl. 1.

²⁵ *Bergeron v. Tooke*, Rap. Jud. Que. 9 C. S. 506 (but damages reduced because she had previously been told not to comb her hair until after quitting-time).

of the statute, it was held that the duties imposed upon employers by the Factories Act are *police regulations* only, and that the civil responsibility of employers toward their employés is to be determined by the provisions of that section of the Civil Code²⁶ declaring that every person "is responsible for the damages caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill,"—it appearing that the Factory Act itself, in another place,²⁷ declares that it does not modify or change the provisions of the Civil Code concerning the responsibility of employers toward their employés. Hence, the mere fact that a flywheel and belt were not securely protected, in violation of the provisions of the Factories Act, will not necessarily render the employer liable to an employé for injuries caused thereby, but it must be shown that such failure to guard or fence the machinery was due to the "positive act, imprudence, neglect or want of skill" of the employer.²⁸

§ 4597. Under the Wisconsin Statute.—The statute of this State providing that all gearing, etc., "so located as to be dangerous to employés when engaged in their ordinary duties, shall be securely guarded or fenced so as to be safe to persons employed in any such place of employment,"²⁹ is held to apply to employés engaged in work upon the gears themselves, as well as to others.³⁰ *Contributory negligence* is held to be a defense under the statute.³¹

ARTICLE IV. UNDER STATUTES REGULATING THE EMPLOYMENT OF CHILDREN.

SECTION	SECTION
4599. Doctrine that violation of such statutes is negligence <i>per se</i> .	such statutes is not negligence <i>per se</i> .
4600. Doctrine that violation of	4601. Doctrine that violation of such statutes is evidence of negligence.

§ 4599. Doctrine that Violation of such Statutes is Negligence Per Se.—Under a statute of Tennessee,¹ providing that it shall be unlawful to employ any child less than twelve years old in a factory, and that a violation of the act shall be a misdemeanor, it is held that

²⁶ Quebec Rev. Stat. 1888, art. 1053.

²⁷ Quebec Rev. Stat. 1888, art. 3053.

²⁸ Montreal Rolling Mills Co. v. Corcoran, 26 Can. S. C. 595.

²⁹ San. & B. Ann. Wis. Stat., § 1636f.

³⁰ Thompson v. Edward P. Allis Co., 89 Wis. 523.

³¹ Thompson v. Edward P. Allis Co., *supra*.

¹ Shannon's Tenn. Code 1896, §§ 4434-4436; Acts 1893, ch. 159.

employment of a child in violation of the Act constitutes negligence *per se*, and will make the employer liable for all injuries sustained by the infant, whether in the course of his employment or not,—as where an infant was *playing* with certain iron panels, which fell and injured him.²

§ 4600. Doctrine that Violation of such Statutes is Not Negligence Per Se.—Some of the courts proceed upon the theory that the employment of children in mines, factories, etc., in violation of statutes, is not negligence, unless it is shown to be the direct or proximate cause of the injuries received by such children while so employed. Thus, where a boy under twelve years of age was employed in a factory in violation of a statute, and the employer provided him with a safe and suitable place to work, and the boy voluntarily went about the factory and exposed himself to dangerous machinery, in consequence of which he was injured, he being old enough and experienced enough to appreciate the danger, it was held that the employer was not guilty of negligence rendering him liable for the injury.³ The conclusion was the same where a child under twelve years old, employed in a factory in violation of a statute, was injured while playing with an unguarded machine, with which his employment was not connected,—such injury not being the natural and probable consequence of the employment, or of the employer's negligence in failing to guard the machine.⁴

§ 4601. Doctrine that Violation of such Statutes is Evidence of Negligence.—Other courts take the view that the violation of such statutes is *prima facie* evidence of negligence, and that the burden is on the employer to show that his violation of the statute was not the proximate cause of the accident. Thus, where a boy twelve years old, employed as a messenger in a factory office, was directed by his master to work at a machine in the factory, in violation of a statute prohibiting the employment of children under fourteen years of age in any factory, and the boy was injured while so engaged, it was held that there was sufficient evidence of the master's negligence to take the case to the jury,—the violation of the statute being evidence of negligence, and the master's wrongful act in placing the child at work

² Iron &c. Co. v. Green, 108 Tenn. 161; s. c. 65 S. W. Rep. 399 [following Queen v. Dayton Coal &c. Co., 95 Tenn. 458; s. c. 32 S. W. Rep. 460; 30 L. R. A. 82; 49 Am. St. Rep. 335 (where a similar act relating

to employment in *mines* was so construed)].

³ Evans v. American Iron &c. Co., 42 Fed. Rep. 519; s. c. 24 Ohio L. J. 140 (under Ohio statute).

⁴ Belles v. Jackson, 4 Pa. Dist. Rep. 194.

in the factory being the *proximate cause* of the injury, since if he had not been so employed the injury would not have happened.⁵

ARTICLE V. UNDER VARIOUS OTHER STATUTES.

SECTION	SECTION
4603. Under the English Fatal Accidents Act.	4605. Under Massachusetts statute giving right of action for injuries resulting in death.
4604. Under the Kentucky statute as to killing through "willful neglect."	4606. Under Wisconsin statute giving right of action for injuries causing death.

§ 4603. **Under the English Fatal Accidents' Act.**—In an action under the English Fatal Accidents Act of 1846, to recover damages at common law for the death of a workman who had been killed while descending from an elevated tramway on which he had been working for the defendants, his employers, the jury found that the defendants did not exercise due care to have the tramway in a proper condition so as to protect their servants working upon it against unnecessary risk; that it was dangerous to descend from the tramway without the means of a ladder; that the deceased had the same means of knowing that it was dangerous as the defendants had; that he knew that it was dangerous; and that he had not been guilty of contributory negligence. It was held that the mere knowledge on the part of the deceased of the risk of the defect—the want of the ladder—did not necessarily involve his consent to undertake it; and in the absence of any finding by the jury that he had so consented, the plaintiff was entitled to judgment upon the findings of the jury.¹

§ 4604. **Under the Kentucky Statute as to Killing through "Willful Neglect."**—This statute reads as follows: "If the life of any person is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."² The construction of this statute

⁵ *Marino v. Lehmaier*, 62 App. Div. (N. Y.) 43; s. c. 70 N. Y. St. Rep. 760. It is said that a master cannot set up his own violation of a statute, intended to protect minors, as a *defense* to his own negligence, in an action by a minor for negli-

gence: *Dion v. Richmond Man. Co.*, 24 R. I. 187; s. c. 52 Atl. Rep. 889.

¹ *Williams v. Birmingham Battery & Co.*, [1899] 2 Q. B. 338; s. c. 68 L. J. Q. B. (N. S.) 918; 81 Law T. (N. S.) 62; 47 Wkly. Rep. 680.

² 2 Stanton's Rev. Stat. Ky. 510, § 3.

will be noticed in a general way in the discussion of *Injuries Resulting in Death*.³ We do not perceive any thing in the decisions under it substantially changing the rules which the Supreme Court of Kentucky apply, where death does not result from the injury, in so far as those rules are peculiar to the relation of master and servant. In the cases which have arisen under it, the court have cited and applied their previous decisions in cases where death did not result from the injury, and where the statute was, hence, not involved; and they have also cited and applied the language of text-writers and the decisions of other courts on the general doctrines of negligence.⁴ The somewhat exceptional view of the Kentucky court as to who are to be deemed fellow servants engaged in the same common employment, does not seem to owe its origin, in any degree, to a consideration of the terms of this statute.⁵ If the person killed was an employé of a railway company, and not a stranger to it, in order to a recovery under the statute the misconduct of the company or its agents or servants must have been so gross as to imply actual malice, or anti-social recklessness.⁶ But if the person killed was a stranger to the railway company, then, under another section of the same statute,⁷ while *punitive* damages cannot be recovered unless the jury should find that the company, its agents or servants, had been guilty of willful neglect, yet there can be a recovery of *compensatory damages* if the killing was the result of want of ordinary care on the part of the defendant.⁸ When the grade of negligence denominated "willful neglect" is established, the court has generally ruled that the master must pay damages, no matter how negligently the person killed may have acted.⁹ But in one case¹⁰ a recovery was denied on the ground of contributory negligence in the deceased; and the opinion proceeded on the idea that such negligence on the part of the servant as is implied from a voluntary assumption of risks of accident which may flow from visible dangers which are the result of the master's negligence will operate to bar a recovery under the statute. On the other hand, if the killing was by a railway company, then, under the provision of the statute last quoted, as ordinary negligence on the part of the company will authorize a recovery, so ordinary negli-

³ *Post*, Vol. VI.

⁴ See, for instance, *Sullivan v. Louisville &c. Bridge Co.*, 9 Bush (Ky.) 81, and *Louisville &c. R. Co. v. Filburn*, 6 Bush (Ky.) 574.

⁵ *Post*, § 5297.

⁶ *Claxton v. Lexington &c. R. Co.*, 13 Bush (Ky.) 636; *Jacobs v. Louisville &c. R. Co.*, 10 Bush (Ky.) 263, 273.

⁷ *Stanton's Rev. Stat. Ky.* 510, § 1.

⁸ *Jacobs v. Louisville &c. R. Co.*,

10 Bush (Ky.) 263; *Claxton v. Lexington &c. R. Co.*, 13 Bush (Ky.) 636.

⁹ *Claxton v. Lexington &c. R. Co.*, 13 Bush (Ky.) 636; *Louisville &c. R. Co. v. Mahony*, 7 Bush (Ky.) 235, 239; *Digby v. Kenton Iron Co.*, 8 Bush (Ky.) 167; *Jacobs v. Louisville &c. R. Co.*, 10 Bush (Ky.) 263.

¹⁰ *Sullivan v. Louisville &c. Bridge Co.*, 9 Bush (Ky.) 81.

gence on the part of the deceased, contributing to the accident, will be a bar to it.¹¹ Where a case was put to the jury under instructions which, in effect, declared the defendant, a railway company, answerable *in any event* for the death of an employé, in consequence of a tree having fallen across its track, the judgment was, of course, reversed.¹²

§ 4605. **Under Massachusetts Statute Giving Right of Action for Injuries Resulting in Death.**—A statute of Massachusetts provides that in certain cases of death occasioned by the negligence of a corporation, etc., the damages shall be “assessed with reference to the degree of culpability of the corporation or its agents or servants.”¹³ It is held that a corporation is not rendered liable under this statute by showing that it had assumed a contractual or *quasi*-contractual responsibility for third persons who were not its servants, but the servants of a third party, through whose negligence the injury happened.¹⁴

§ 4606. **Under Wisconsin Statute Giving Right of Action for Injuries Causing Death.**—It is held that a recovery can be had under the statute of Wisconsin making one who negligently causes the death of another liable to an action for damages if the person killed could have recovered if death had not ensued,¹⁵ for the death of a railroad employé caused by the negligence of other employés for which the deceased could have maintained an action under the Fellow-Servant Act of that State¹⁶ if the injury had not been fatal.¹⁷

¹¹ *Jacobs v. Louisville &c. R. Co.*, 10 Bush (Ky.) 263; *Claxton v. Lexington &c. R. Co.*, 13 Bush (Ky.) 636.

¹² *Louisville &c. R. Co. v. Filburn*, 6 Bush (Ky.) 574.

¹³ Mass. Rev. Laws 1902, ch. 171, § 2; Mass. Pub. Stat., ch. 112, § 212.

¹⁴ *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478; s. c. 2 L. R. A. 502; 20 N. E. Rep. 103. In this case the defendant was operating a road owned by the Commonwealth, under an agreement by which the Commonwealth was to maintain the road-bed. The train was derailed by reason of a defect in the road-bed, due to the negligence of the

Commonwealth, killing the children of the plaintiff, who was employed by the Commonwealth, and, with his children, was riding on a free pass: *Littlejohn v. Fitchburg R. Co.*, *supra*.

¹⁵ Wis. Stat. 1898, § 4255.

¹⁶ Wis. Stat. 1898, § 1816; Laws 1893, ch. 220.

¹⁷ *Ean v. Chicago &c. R. Co.*, 95 Wis. 69; s. c. 69 N. W. Rep. 997. As to when an employé of a railway company can recover under the Wisconsin Fellow-Servant Act for injuries sustained through the negligence of fellow servants,—see *post*, § 5309.

PART II.

ASSUMPTION OF RISK BY THE SERVANT.

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4635. Contracts exonerating master from liability in consideration of allowing servant to participate in railway relief fund, hospital fund, sick benefits, accident and death benefits, etc.
4636. Rules of employer, putting the risks of the service upon the employé.

§ 4608. **A Comprehensive Statement of the Doctrine of Accepting the Risk.**—If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, having regard to his age and experience, he can discover, that the building, premises, machine, appliance, or fellow servant, in connection with which or with whom he is to labor, is unsafe or unfit in any particular, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint,—he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him.¹

¹Hayden v. Smithville Man. Co., 29 Conn. 548; McGorty v. Southern

§ 4609. **Special Statements of the Doctrine.**—This doctrine is so plain that it could hardly be made plainer by multiplying special

&c. Teleph. Co., 69 Conn. 635; s. c. 38 Atl. Rep. 359; 61 Am. St. Rep. 62; Western &c. R. Co. v. Bishop, 50 Ga. 465 (assumption of risk under special contract); Johnson v. Western &c. R. Co., 55 Ga. 133; Central R. &c. Co. v. Kenney, 58 Ga. 485 [compare Central R. &c. Co. v. Kelly, 58 Ga. 107]; Chicago &c. R. Co. v. Jackson, 55 Ill. 492; s. c. 8 Am. Rep. 661; Camp Point Man. Co. v. Bal-lou, 71 Ill. 417; St. Louis &c. R. Co. v. Britz, 72 Ill. 256; Chicago &c. R. Co. v. Munroe, 85 Ill. 25; Morris v. Gleason, 1 Bradw. (Ill.) 510; Toledo &c. R. Co. v. Asbury, 84 Ill. 429; Chicago &c. R. Co. v. Ward, 61 Ill. 130; Indianapolis &c. R. Co. v. Flan-igan, 77 Ill. 365; Moss v. Johnson, 22 Ill. 633; Pioneer Fireproof Const. Co. v. Howell, 90 Ill. App. 122; s. c. aff'd, 189 Ill. 123; 59 N. E. Rep. 535; Lumley v. Caswell, 47 Iowa 159; s. c. 7 Rep. 559; St. Louis &c. R. Co. v. Irwin, 37 Kan. 701; s. c. 16 Pac. Rep. 146; 1 Am. St. Rep. 266; Wal-ker v. Scott (Kan.), 64 Pac. Rep. 615 (no off. rep.); rev'g s. c. 10 Kan. App. 413; 61 Pac. Rep. 1091; Sullivan v. Louisville Bridge Co., 9 Bush (Ky.) 81; Tillotson v. Texas &c. R. Co., 44 La. An. 95; s. c. 10 South. Rep. 400 (where he continues in the service with knowledge that the proper precau-tions have not been taken for his safety); Buzzell v. Laconia Man. Co., 48 Me. 113; s. c. 77 Am. Dec. 212; Wormell v. Maine &c. R. Co., 79 Me. 397; s. c. 1 Am. St. Rep. 321; 4 N. Eng. Rep. 692; 10 Atl. Rep. 49; Hanrathy v. Northern &c. R. Co., 46 Md. 280; Ladd v. New Bedford R. Co., 119 Mass. 412; s. c. 20 Am. Rep. 331; Lovejoy v. Boston &c. R. Corp., 125 Mass. 79; s. c. 28 Am. Rep. 206; Goodnow v. Walpole Em-ery Mills, 146 Mass. 261; s. c. 15 N. E. Rep. 576; Scanlon v. Boston &c. R. Co., 147 Mass. 484; s. c. 9 Am. St. Rep. 732; 18 N. E. Rep. 209; Myers v. Hudson Iron Co., 150 Mass. 125; s. c. 15 Am. St. Rep. 176; 22 N. E. Rep. 631; Lothrop v. Fitchburg R. Co., 150 Mass. 423; s. c. 23 N. E. Rep. 227; Gleason v. New York &c. R. Co., 159 Mass. 68; s. c. 34 N. E. Rep. 79; Goldthwait v. Haverhill &c. St. R. Co., 160 Mass. 554; s. c. 36 N. E. Rep. 486; Goodes v. Boston &c. R. Co., 162 Mass. 287; s. c. 38 N. E. Rep. 500; French v. Columbia Spinning Co., 169 Mass. 531; s. c. 48 N. E. Rep. 269; Davis v. Detroit &c. R. Co., 20 Mich. 195; s. c. 4 Am. Rep. 364; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Woods v. St. Paul &c. R. Co., 39 Minn. 435; s. c. 40 N. W. Rep. 510; Le Clair v. First Division &c. R. Co., 20 Minn. 9; Devitt v. Pacific R. Co., 50 Mo. 302 [compare Dale v. St. Louis &c. R. Co., 63 Mo. 455]; Malm v. Thelin, 47 Neb. 686; s. c. 66 N. W. Rep. 650 (by voluntarily entering into or con-tinuing in the employment, where the risks are known to him or ob-vious to persons of his experience and understanding); Allen v. Bos-ton &c. R. Co., 69 N. H. 271; s. c. 39 Atl. Rep. 978; Durand v. New York &c. R. Co., 65 N. J. L. 656; s. c. 48 Atl. Rep. 1013; Atha &c. Co. v. Costello, 63 N. J. L. 27; s. c. 42 Atl. Rep. 766; De Graff v. New York &c. R. Co., 3 Thomp. & C. (N. Y.) 255; s. c. on second appeal, 76 N. Y. 125; 19 Alb. L. J. 134; Laning v. New York &c. R. Co., 49 N. Y. 521; s. c. 10 Am. Rep. 417; 2 Thomp. Neg. (1st ed.), p. 932; Gibson v. Erie R. Co., 63 N. Y. 449; s. c. 20 Am. Rep. 552; rev'g s. c. 5 Hun (N. Y.) 31; Haskin v. New York &c. R. Co., 65 Barb. (N. Y.) 129; s. c. aff'd *sub nom.* Haskins v. New York &c. R. Co., 56 N. Y. 608; Wright v. New York &c. R. Co., 25 N. Y. 562; rev'g s. c. 28 Barb. (N. Y.) 80; Jones v. Roach, 9 Jones & Sp. (N. Y.) 248; Ryan v. Porter Man. Co., 57 Hun (N. Y.) 253; s. c. 32 N. Y. St. Rep. 621; 10 N. Y. Supp. 774; Coyle v. Mangan, 3 Misc. (N. Y.) 11; s. c. 21 N. Y. Supp. 773; 50 N. Y. St. Rep. 567; Recka v. Ocean S. S. Co., 3 Misc. (N. Y.) 526; s. c. 52 N. Y. St. Rep. 417; 23 N. Y. Supp. 3; Crutch-field v. Richmond &c. R. Co., 78 N. C. 300; s. c. 76 N. C. 320; Fricker v. Penn Bridge Co., 197 Pa. St. 442; s. c. 47 Atl. Rep. 354; Ortlip v. Phil-adelphia &c. Traction Co., 9 Pa. Dist. Rep. 291; Kelly v. Baltimore &c. R. Co. (Pa.), 11 Atl. Rep. 659 (no off. rep.); Rooney v. Carson, 161 Pa. St. 26; s. c. 28 Atl. Rep. 996 (employé laid off until new mill should be

statements and explanations. On the one hand, as already seen,² the master is bound to use reasonable care to the end of seeing that the place wherein the servant is put to work, and that the tools, machinery and appliances with which he is put to work, and that the fellow servants with whom he is required to work, are reasonably safe and—in the case of fellow servants—reasonably careful and competent. The rule under consideration does not contradict the rule which imposes this duty upon the master, but qualifies it. The meaning is that if the master fails in the performance of this duty, but if, notwithstanding his failure, the servant, being fully advised of the dangers of the employment, whether springing from the negligence of the master or not, voluntarily goes into the service or continues therein, he takes the risk of such dangers as are known to him, as are obvious to ordinary observation or to such an inspection as he has a reasonable opportunity to make, or such as would be discovered by the exercise of reasonable care and attention for the promotion of his own safety. A statement of the doctrine in this language may not be found in any one case, but it is the result of a concurrence or consensus of nearly all the cases.³ The meaning also is that it is lawful for an employer

started up, and then put to work in moving machinery and making alterations in the new mill, assumes the increased risk incident to such work); *Frazier v. Pennsylvania R. Co.*, 32 Pa. St. 104; s. c. 80 Am. Dec. 467; *Oak Bridge Coal Co. v. Reed*, 5 W. N. C. (Pa.) 3; s. c. 6 Cent. L. J. 275; *Kelley v. Silver Spring & Co.*, 12 R. I. 112; s. c. 34 Am. Rep. 615; 7 Rep. 60; *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47; s. c. 65 N. W. Rep. 419; *Robinson v. Houston & C. R. Co.*, 46 Tex. 540; *International & C. R. Co. v. Doyle*, 49 Tex. 190; *Jones v. Shaw*, 16 Tex. Civ. App. 290; s. c. 41 S. W. Rep. 690; *Galveston & C. R. Co. v. Arispe*, 81 Tex. 517; s. c. 17 S. W. Rep. 47; 48 Am. & Eng. R. Cas. 350 (railway track-hand employed on construction-train assumes risk of injury from propelling the train from the rear); *Chesapeake & C. R. Co. v. Lee*, 84 Va. 642; s. c. 5 S. E. Rep. 679; *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583; *Kielley v. Belcher & C. Min. Co.*, 3 Sawy. (U. S.) 500; *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S.) 319; *Jones v. Yeager*, 2 Dill. (U. S.) 64; *Bohn Man. Co. v. Erickson*, 55 Fed. Rep. 943; s. c. 5 C. C. A. 341; 12 U. S. App. 260; *Kohn v. McNulta*,

147 U. S. 238; s. c. 37 L. ed. 150; 13 Sup. Ct. Rep. 298; *Assop v. Yates*, 2 Hurl. & N. 768; *Griffiths v. Gidlow*, 3 Hurl. & N. 648; *Skipp v. Eastern Counties R. Co.*, 9 Exch. 223; s. c. 3 L. J. (Exch.) 23; *Woodley v. Metropolitan Dist. R. Co.*, 2 Exch. Div. 384; *Ogden v. Rummens*, 3 Post. & Fin. 751. Compare *Seymour v. Maddox*, 16 Q. B. 326; *Dynen v. Leach*, 26 L. J. (N. S.) (Exch.) 221; *Britton v. Great Western Cotton Co., L. R.* 7 Exch. 130 (must know the danger and appreciate the risk); *Holmes v. Clarke*, 6 Hurl. & N. 349; s. c. aff'd, *sub nom. Clarke v. Holmes*, 7 Hurl. & N. 937; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 953; *post*, §§ 46 7, 4707.

² *Ante*, § 4608.

³ *Strattner v. Wilmington City Elec. Co.*, 3 Pen. (Del.) 245; s. c. 50 Atl. Rep. 57; *Pioneer Fireproof Const. Co. v. Howell*, 90 Ill. App. 122; s. c. aff'd, 189 Ill. 123; 59 N. E. Rep. 535; *Cleveland & C. R. Co. v. Carr*, 95 Ill. App. 576 (risk of loading rails on a moving car); *Southern Ind. R. Co. v. Moore*, 29 Ind. App. 52; s. c. 63 N. E. Rep. 863; *Bryce v. Chicago & C. R. Co.*, 103 Iowa 665; s. c. 72 N. W. Rep. 783; 9 Am. & Eng. R. Cas. (N. S.) 832

to direct the manner in which his work shall be performed, and that he may employ men to work with dangerous implements and in unsafe places, without incurring liability for injuries sustained by workmen who know or ought to know the hazards of the service.⁴ Stated somewhat differently, the rule is that where the employé is not placed by his employer in a position of *undisclosed danger*, but he is a mature man, doing the ordinary work which he has engaged to do, and whose risks are obvious to any one, he assumes the risk of the employment, and no negligence can be imputed to the employer for an accident to him therefrom.⁵ Again, it is said that an employé does not assume the risk of a latent hazard of which he is ignorant, and which he would not know by the use of proper diligence or reasonable observation, but which is known to the employer; but he does assume the risk of an extraordinary hazard so open and obvious as plainly to appear to and be observed by him without effort.⁶ He assumes all the risks ordinarily incident to the employment, but he has a right to rely upon the master's implied promise to furnish safe machinery, and it is not his duty to inspect the appliances furnished him; but he takes the risk of such secret defects as cannot be discovered by ordinary observation and diligence, and no more.⁷ It may be collected from another decision that an employé who contracts for the performance

(such dangers as he knows and appreciates, and also such as by the exercise of ordinary diligence he ought to know and appreciate; brakeman on side-ladder of freight-car struck by bolts on bridge projecting to within fifteen inches of the car); *Choctaw & C. R. Co. v. Holloway*, 114 Fed. Rep. 458; s. c. 52 C. C. A. 260. Another case states the rule to be that a servant assumes the usual and obvious risks of his employment, and also risks consequent upon special dangers known to him, or which he could discover with ordinary care, but not the negligence of his employer: *Christensen v. Lambert*, 67 N. J. L. 341; s. c. 51 Atl. Rep. 702; aff'g s. c. 66 N. J. L. 531; 49 Atl. Rep. 577; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42; s. c. 40 S. E. Rep. 368; 55 L. R. A. 908; *Huda v. American Glucose Co.*, 154 N. Y. 474; s. c. 40 L. R. A. 411; 48 N. E. Rep. 897; aff'g s. c. 12 App. Div. (N. Y.) 624 (assumes risk of method known to and acquiesced in by him, if not in violation of any statute,—as, screwing down windows adjoining a fire-escape); *Webb v. Gulf & C. R.*

Co., 27 Tex. Civ. App. 75; s. c. 65 S. W. Rep. 684 (risk to experienced man of unloading ties from *moving train*, as he had often done before).

⁴ *McGorty v. Southern & C. Teleph. Co.*, 69 Conn. 635, 643; s. c. 38 Atl. Rep. 359.

⁵ *Kohn v. McNulta*, 147 U. S. 238; s. c. 37 L. ed. 150; 13 Sup. Ct. Rep. 298. But it is said that the doctrine of obvious risks does not include the danger resulting from inadequate or defective machinery and appliances, where the defects are known to the master and he fails to remedy them, where the business is not hazardous and the defects are not obvious; since the servant may rely upon the master's duty to furnish him reasonably safe and suitable appliances: *Meehan v. Judson*, 43 App. Div. (N. Y.) 46; s. c. 59 N. Y. Supp. 578.

⁶ *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47; s. c. 65 N. W. Rep. 419.

⁷ *Jones v. Shaw*, 16 Tex. Civ. App. 290, 295; s. c. 41 S. W. Rep. 690. In many cases it is his duty to inspect the appliances furnished him: *Post*, § 4649.

of hazardous duties, assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which causes he has an opportunity to ascertain; and that if he chooses to accept employment, or to continue in it, with knowledge of the danger, he must abide the consequences so far as any claim against his employer is concerned.⁸ Another way of stating the doctrine is to say that if the employé does not ask for further safeguards, but conducts himself so as to assure his employer that he is content with the machinery and appliances which have been furnished him, and will himself assume the risk of injury from them,—he cannot put upon his employer the risk of such injuries and recover damages from him for that reason.⁹ It has been stated that where a master employs one to enter into his service there is an implied contract that the master will exercise ordinary care to protect the servant from all danger except such as is obvious and *necessary*, and that the doctrine of assumption of the risk by the employé does not lessen the master's duty.¹⁰

§ 4610. Reason of the Rule Relating to Acceptance of the Risk.—

The rule that it is the duty of the master to use reasonable care to the end of providing his servants with reasonably safe places in which to work, with reasonably safe tools and appliances with which to work, and with reasonably careful, skillful and competent servants with whom to work, is not an absolute rule, but is qualified and limited by another rule, which is that the servant assumes all the ordinary risks incidental to the service, in so far as those risks are known to him at the time of his entering upon the service,¹¹ or should be readily dis-

⁸ Chesapeake &c. R. Co. v. Lee, 84 Va. 642, 645; s. c. 5 S. E. Rep. 679. Compare Walker v. Scott (Kan.), 64 Pac. Rep. 615 (no off. rep.); rev'g s. c. 10 Kan. App. 413; 61 Pac. Rep. 1091 (circumstances under which plaintiff assumed risk of cave-in as matter of law). See *post*, §§ 4615, 4703.

⁹ Jones v. Manufacturing &c. Co., 92 Me. 565; s. c. 43 Atl. Rep. 512. One court has reasoned that an assumption of the risk by the servant is matter of affirmative defense, analogous to the defense of contributory negligence in some jurisdictions. Under this theory, it is not enough to show that the employé continued in the employment, knowing the danger, but it must be shown, in addition to this, that he voluntarily assumed the risk, which presents a *question of fact for the*

jury: Lloyd v. Hanes, 126 N. C. 359; s. c. 35 S. E. Rep. 611. See Epperson v. Postal &c. Co., 155 Mo. 346.

¹⁰ Faulkner v. Mammoth Min. Co., 23 Utah 437; s. c. 66 Pac. Rep. 799.

¹¹ That the rule includes risks which *subsequently arise in the service*, see *post*, § 4657, *et seq.* In an action calling for the application of this principle, the court, at the request of the plaintiff, instructed the jury that the "servant assumes no risks, except such as existed at the beginning of the employment, and such as are incidental to the business." It was held that the court should have added words equivalent to "or which existed during the course of the employment, of which the employé had knowledge, or was bound to have knowledge": Sowden v. Idaho &c. Min. Co., 55 Cal. 443.

cernible by a person of his age and capacity, in the exercise of ordinary or reasonable care for his own safety, whether the business is dangerous or not, and whether such risks were the result of the negligence of the master or not.¹² It is said that the rule does not deprive the master of the right to manage and conduct his business according to his own judgment, even though other methods may be safer; and, where the place provided by him for the servant to work is free from dangers which are latent or not obvious, or where he has instructed the servant, upon entering the service, expressly as to such dangers, if they exist, he has fulfilled his duty in the premises.¹³ Another statement of the same doctrine is to say that the servant assumes the risks which are incidental to the employment, which are obvious to him, or which are discoverable by the exercise of ordinary or reasonable care on his part, notwithstanding such risks may have been created by the negligence of the master;¹⁴ though he does not assume the risk of danger from subsequent *special or unforeseen negligence* of the master.¹⁵ The assumption by the servant of the ordinary risks of the employment is deemed to be a part of the contract of service; it is deemed to be implied in the contract that the servant will assume such risks; and therefore where the servant is injured in consequence of such a risk the master is not, in general, liable to him in damages, because the master has not violated any legal duty in failing to protect him from those dangers and risks which he agreed to assume.¹⁶ The doctrine is based upon the consideration that the servant has *voluntarily* accepted the risk and incurred the danger, and that he has taken it upon himself to use due care to avoid injury from it.¹⁷ It applies only where the risk is understood and appreciated by the servant, and is not assumed under such circumstances as deprive the act of its voluntary character.¹⁸ If he has full knowledge, or the means of knowledge, of the perils of the particular service, he may

Compare Pittsburgh &c. R. Co. v. Ackworth, 10 Ohio C. C. 583; s. c. 3 Ohio Dec. 456.

¹² Bethlehem Iron Co. v. Weiss, 40 C. C. A. 270; s. c. 100 Fed. Rep. 45 (statement of the text enlarged from this and other decisions).

¹³ Bethlehem Iron Co. v. Weiss, 40 C. C. A. 270; s. c. 100 Fed. Rep. 45.

¹⁴ Regan v. Palo, 62 N. J. L. 30; s. c. 5 Am. Neg. Rep. 63; 41 Atl. Rep. 364; Sanderson v. Panther Lumber Co., 50 W. Va. 42; s. c. 40 S. E. Rep. 368; 55 L. R. A. 908.

¹⁵ Post, § 4618.

¹⁶ Narramore v. Cleveland &c. R.

Co., 96 Fed. Rep. 298; s. c. 37 C. C. A. 499; 48 L. R. A. 68.

¹⁷ Dempsey v. Sawyer, 95 Me. 295; s. c. 49 Atl. Rep. 1035 (but such assumption is his *voluntary* act, not his *legal* duty, while contributory negligence is a breach of his legal duty to use due care). The doctrine is said to be that the risk of injury to a servant from defective machinery is *primarily on the master*, and remains on him unless the servant voluntarily assumes it: Dempsey v. Sawyer, *supra*.

¹⁸ Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; s. c. 42 N. E. Rep. 501.

decline to engage in it, or may require that it shall first be made safe; but if, without making this requirement, he does engage in it, he must assume the risk and bear the consequences.¹⁹ Therefore, an employé who is injured by defects in the premises or instrumentalities of the business of his employer, must show, in order to recover damages from his employer, that such defects were not obvious or known to him, or that they were not discoverable by him by the exercise of ordinary or reasonable care, having regard to his situation and the time and means available to him for inspection; and, on the other hand, that they were known, or might have been known to his employer by such an inspection as he ought to have made in the exercise of reasonable care for the safety of his servant; or, if the defects were obvious, that the danger arose from what was not fully appreciated by the employé for want of time for consideration.²⁰

§ 4611. Distinction between Acceptance of the Risk and Contributory Negligence.—Many of the earlier and some of the later decisions confuse the two subjects of an acceptance by the servant of the risk of employment, and his contributory negligence. The two subjects lie close to each other and in some cases blend; but in other cases they are distinct subjects. Nevertheless, the judges frequently use the words “contributory negligence” where they really mean an acceptance of the risk. In other instances they use the words “an acceptance of the risk” where they really mean contributory negligence. Let us illustrate this by the every-day accident connected with coupling cars. In order to make a coupling the cars must be thrust together either by a locomotive, or by a propulsion called “kicking,” or “shunting,” or by gravity. There is consequently always danger to the brakeman in the operation. If, in making a coupling, he accidentally, and without negligence, slips and falls and passes under a wheel, his injury is ascribed to one of the ordinary risks of employment, which risk he has accepted, and no damages can be recovered for it. But if, instead of

¹⁹ *Pennsylvania &c. Co. v. Lynch*, 90 Ill. 333.

²⁰ *Reichla v. Gruensfelder*, 52 Mo. App. 43. In a jurisdiction where legal doctrines are influenced by the principles of the civil law, the sound doctrine is tersely expressed by saying that fault or knowledge on the part of the master, and innocence of fault or ignorance of danger on the part of the servant, are essential to enable the latter to maintain an action for personal injuries against the former: *Carey v. Sellers*, 41 La.

An. 500; s. c. 6 South. Rep. 813. Courts are sometimes called upon to decide such truisms as that a servant cannot hold his master responsible for an injury received in the course of the employment, where the master has not increased the risk assumed by the servant, and there are no defects in any of the appliances provided for the performance of the servant's duty: *Dandie v. Southern &c. R. Co.*, 42 La. An. 886; s. c. 7 South. Rep. 792.

using the coupling-stick furnished him by the railway company, he undertakes to make the coupling with his hands and in the operation gets his hand crushed, this is contributory negligence, and consequently no damages can be recovered.' The distinction between the two cases is that in the former case the brakeman was not guilty of negligence at all; consequently the expression "contributory negligence" could not be properly applied to his act, but what he suffered was from a mere accident attending the known danger, the risk of which he had assumed; whereas in the latter case his own negligence and rashness brought upon him the injury which he suffered.²¹

§ 4612. **Application of the Maxim Volenti Non Fit Injuria.**—This maxim has frequently been applied in defining what is commonly called "accepting the risk." The meaning is that if persons are induced to engage in the employment, in ignorance of the neglect of the master to provide the best machinery or the most competent men, or otherwise to take the best measures to insure the safety of the employé, or if, in ignorance of such neglect, they are injured in consequence, they should receive compensation, provided their ignorance is not culpable. But if they are advised of the danger, although the existence of it may be a consequence of the negligence of the employer, they assume the risk, and if they are injured in consequence of it, they are not entitled to compensation. They contract with reference to things as they are known to be, and no contract is violated and no

²¹ The distinction between accepting the risk and contributory negligence may be further pursued by an examination of the following among many other modern cases: *Quinn v. Chicago & C. R. Co.*, 107 Iowa 710; s. c. 77 N. W. Rep. 464; *Hattaway v. Atlanta Steel & C. Co.*, 155 Ind. 507; s. c. 58 N. E. Rep. 718, 721; *Lake Erie & C. R. Co. v. Wilson*, 189 Ill. 89; *Forbes v. Boone Val. Coal & C. Co.*, 113 Iowa 94; s. c. 84 N. W. Rep. 970; *Littlefield v. Allis*, 177 Mass. 151; s. c. 58 N. E. Rep. 692; *Bodie v. Charleston & C. R. Co.*, 61 S. C. 468; s. c. 39 S. E. Rep. 715, 718; *Dempsey v. Sawyer*, 95 Maine 295; s. c. 49 Atl. Rep. 1035. One decision offers the suggestion that absolute knowledge on the part of a servant of an obvious defect in an appliance with or about which he is required to work may put upon him an assumption of the risk, and will not merely cast upon him the obli-

gation of using greater care to the end of avoiding injury from such appliance: *Peirce v. Clavin*, 82 Fed. Rep. 550; s. c. 53 U. S. App. 492; 27 C. C. A. 227. Another case holds that the neglect of the master to furnish a servant reasonably safe appliances with which to work, though with the servant's knowledge of a neglect to do so in the past, does not convert the master's negligence into an *assumed risk* of the employment; but in such a case the servant's knowledge of the condition is a fact to be considered under the plea of *contributory negligence*; and when the defense is based on that, it precludes a recovery only when the danger is so glaring that an ordinarily prudent man would, under like circumstances, refuse to continue in the employment: *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; s. c. 65 S. W. Rep. 737.

wrong is done if they suffer from a neglect the risk of which they assumed.²²

§ 4613. **Servant Assumes Risks Ordinarily Incident to the Employment.**—The barest statement of the doctrine under this head is that the servant assumes all the risks which are ordinarily incident to the employment.²³

²² Bliss, J., in *Devitt v. Pacific Railroad*, 50 Mo. 302.

²³ *Lopez v. Central Ariz. Min. Co.*, 1 Ariz. 464; s. c. 2 Pac. Rep. 748; *Fort Smith Oil Co. v. Slover*, 58 Ark. 168; s. c. 24 S. W. Rep. 106 (doctrine applied to a volunteer who undertakes to perform special service in another department of the general business); *Chielinsky v. Hoopes & Co.*, 1 Marv. (Del.) 273; s. c. 40 Atl. Rep. 1127 (as well as the risks, whether patent or latent, which are within his knowledge); *Williams v. Walton & Co.*, 9 Houst. (Del.) 322; s. c. 32 Atl. Rep. 726 (and that are apparent to his senses); *Crocker v. Pusey & Co.*, 3 Pen. (Del.) 1; s. c. 50 Atl. Rep. 61 (same holding); *Strattner v. Wilmington City Electric Co.*, 3 Pen. (Del.) 245; s. c. 50 Atl. Rep. 57 (same holding); *Worlds v. Georgia R. Co.*, 99 Ga. 283; s. c. 25 S. E. Rep. 646; 5 Am. & Eng. R. Cas. (N. S.) 514 (and is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which the employment relates, and if he fails to do so he cannot recover for an injury resulting therefrom); *Noble v. Jones*, 103 Ga. 584; s. c. 4 Am. Neg. Rep. 252; 30 S. E. Rep. 535; *Minty v. Union Pac. R. Co.*, 2 Idaho 437; s. c. 4 L. R. A. 409; 21 Pac. Rep. 660 (travelling auditor of a railroad company); *Colson v. Craver*, 80 Ill. App. 99 (assumes only the risks ordinarily incident to his employer's business and to the employer's known manner of having it performed); *Illinois & C. R. Co. v. Swisher*, 74 Ill. App. 164; *Mattson v. Qualey Const. Co.*, 90 Ill. App. 260 (subject to the implied undertaking of the master that he will use reasonable care to furnish safe premises, machinery, and appliances, and to employ competent and prudent co-employees); *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 45 Ill. App. 317; s. c.

aff'd, 148 Ill. 573; 36 N. E. Rep. 572 (employé takes upon himself the ordinary hazards of the business as conducted under the system adopted by his employer); *Doolittle v. Pfaff*, 92 Ill. App. 301 (where a servant has sufficient capacity to appreciate the danger of the service, or has acquired the knowledge otherwise than by instruction from the master); *Dolese & Co. v. Schultz*, 101 Ill. App. 569; *Baltimore & C. R. Co. v. Amos*, 20 Ind. App. 378; s. c. 49 N. E. Rep. 854 (and if he is injured without want of due care on his part, yet without any failure of the master to furnish him with safe tools, the injury will be regarded as one the risk of which he assumed); *Linton Coal & C. Co. v. Persons*, 15 Ind. App. 69; s. c. 43 N. E. Rep. 651 (assumes the danger which naturally arises from the nature of the work to be performed, whether visible or invisible, known or unknown); *Brown v. Chicago & C. R. Co.*, 64 Iowa 652; s. c. 21 N. W. Rep. 193 (presumed to contract with reference to the dangers); *Louisville & C. R. Co. v. Coniff*, 90 Ky. 560; s. c. 12 Ky. L. Rep. 545; 14 S. W. Rep. 543; *Daniels v. Covington & C. El. R. & C. Co.*, 23 Ky. L. Rep. 1800; s. c. 66 S. W. Rep. 187 (no off. rep.) (bridge-builder engaged in repairing bridge); *Paland v. Chicago & C. R. Co.*, 44 La. An. 1003; s. c. 11 South. Rep. 707 (of which he had notice before voluntarily exposing himself); *Dandie v. Southern Pac. R. Co.*, 42 La. An. 686; s. c. 7 South. Rep. 792; *Moffet v. Koch*, 106 La. 371; s. c. 31 South. Rep. 40 (experienced carpenter injured by fall of improperly-braced truss, condition of which was plainly apparent); *Jones v. Manufacturing & C. Co.*, 92 Me. 565; s. c. 43 Atl. Rep. 512; 69 Am. St. Rep. 535 (an employé of mature years, and ordinary mental capacity and intelligence); *Kenney v. Shaw*, 133 Mass. 501 (and his master is not re-

§ 4614. **Servant Accepting the Risk of Master's Negligence.**—
Upon this subject there are two theories. One of them substantially

sponsible for an injury sustained by his obeying an order of another workman who was superintending the work); *Swanson v. Great Northern R. Co.*, 68 Minn. 184; s. c. 70 N. W. Rep. 978 (assumes risk of exposing himself to ordinary operation of familiar natural laws, of which he is bound to take notice); *Alcorn v. Chicago & C. R. Co.*, 108 Mo. 81; s. c. 18 S. W. Rep. 188; *Schroeder v. Chicago & C. R. Co.*, 108 Mo. 322; s. c. 18 L. R. A. 827; 18 S. W. Rep. 1094; *Jackson v. Missouri & C. R. Co.*, 104 Mo. 448; s. c. 16 S. W. Rep. 413; *Schaub v. Hannibal & C. R. Co.*, 106 Mo. 74; s. c. 16 S. W. Rep. 924 (negligence of fellow servants); *Henry v. Wabash & C. R. Co.*, 109 Mo. 488; s. c. 19 S. W. Rep. 239; *Watson v. Kansas & C. Coal Co.*, 52 Mo. App. 366; *Fugler v. Bothe*, 117 Mo. 475; s. c. 22 S. W. Rep. 1113 (unsafe place to work—danger obvious); *Renfro v. Chicago & C. R. Co.*, 86 Mo. 302; *Chicago & C. R. Co. v. Soderberg*, 50 Neb. 674; s. c. 70 N. W. Rep. 230; *Fremont Brewing Co. v. Hansen*, 65 Neb. 456, 462; s. c. 91 N. W. Rep. 279; 93 N. W. Rep. 211 (so far as known to him or could be known by use of ordinary care); *Foley v. Jersey City Electric Light Co.*, 54 N. J. L. 411; s. c. 24 Atl. Rep. 487 (and special risks that are plain and obvious); *Kennedy v. Manhattan R. Co.*, 33 Hun (N. Y.) 457; s. c. aff'd, 102 N. Y. 742 (*mem.*) (workman employed by a railroad company to stand in a dangerous place to signal trains); *Vilas v. Vanderbilt*, 20 Misc. (N. Y.) 51; s. c. 44 N. Y. Supp. 267 (ordinary dangers attending use of dangerous machine, but not latent dangers of which the master knew or ought to have known and did not warn servant); *Hudson v. Ocean S. S. Co.*, 110 N. Y. 625; s. c. 17 N. E. Rep. 342; 16 N. Y. St. Rep. 416; 2 Silv. C. A. (N. Y.) 75 (where the master furnishes adequate, safe and usual appliances for the use of his servant); *Gordon v. Reynolds' Card Man. Co.*, 47 Hun (N. Y.) 278; s. c. 14 N. Y. St. Rep. 394; 28 Wkly. Dig. (N. Y.) 238; *O'Connell v. Thompson-Starrett Co.*, 72 App. Div. (N. Y.) 47; s. c. 76 N. Y. Supp.

296 (unsafe place but safe as nature of work will allow); *Roth v. Northern Pac. Lumbering Co.*, 18 Or. 205; s. c. 22 Pac. Rep. 842; *Bemisch v. Roberts*, 143 Pa. St. 1; s. c. 28 W. N. C. (Pa.) 169; 22 Pitts. L. J. (N. S.) 1; 48 Phila. Leg. Int. 305; 21 Atl. Rep. 998; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464 (accident from unforeseen cause not discoverable in advance, no defect being visible or known to the men using the machinery or to the employer); *Couch v. Charlotte & C. R. Co.*, 22 S. C. 557 (section-hand while pushing a hand-car under orders from the foreman, fell into an uncovered water-way, of which he was not specially warned, but which was properly constructed); *Corbett v. Smith*, 101 Tenn. 368; s. c. 47 S. W. Rep. 694 (including an increased risk arising during the performance of the work, where he is fully aware thereof, and does not rely upon a promise to remedy the danger); *Louisville & C. R. Co. v. Gower*, 85 Tenn. 465; s. c. 3 S. W. Rep. 824 (risk of injury from lumber so loaded that the ends projected over the end of the car); *Record v. Cooperage Co.*, 108 Tenn. 657; s. c. 69 S. W. Rep. 334 (assumes all the risks of his occupation and of running a machine if it is in proper repair and the employer has exercised reasonable care to keep it so); *International & C. R. Co. v. Hester*, 64 Tex. 401 (railroad section-hand cannot complain of being ordered out to work on a foggy day, but assumes risk); *Gulf & C. R. Co. v. Kizziah*, 86 Tex. 81; s. c. 22 S. W. Rep. 300; 23 S. W. Rep. 578; rev'g s. c. 4 Tex. Civ. App. 356; 22 S. W. Rep. 110; 26 S. W. Rep. 242 (assumes not only the risks which are necessarily incident to the business he has undertaken to perform, but also such as commonly attend it); *Texas & C. R. Co. v. King*, 14 Tex. Civ. App. 290; s. c. 37 S. W. Rep. 34 (assumes all the risks incident to the employment, and not merely the risk of such secret defects as could not be discovered by the employer by ordinary diligence and those which were open to common observation); *H. S. Hopkins Bridge Co. v. Burnett*, 85 Tex. 16; s. c. 19

is, that the servant does not accept the risk from dangers which arise from the negligence of the master, although the servant knows of the dangerous conditions and continues in the employment notwithstanding such knowledge. According to this theory the ordinary risks of the service are such, and such only, as remain after the employer has used all reasonable means to prevent them; and he is hence liable to the employé for injuries resulting to the employé from risks arising alone from the master's negligence.²⁴ The other theory substantially is, that the servant accepts the risk of dangerous conditions which are known, or open, or obvious, or which might be discovered by such care

S. W. Rep. 886 (injury from the chipping of a hammer, all such hammers being liable to chip); *Mayton v. Sonnefeld* (Tex. Civ. App.), 48 S. W. Rep. 608 (no off. rep.) (only assumes such risks as are naturally and necessarily incident to the work in which he is engaged); *Missouri & C. R. Co. v. Somers*, 78 Tex. 439; s. c. 14 S. W. Rep. 779 (employé knowingly using defective machinery assumes risk of being injured by it); *Reese v. Wheeling & C. R. Co.*, 42 W. Va. 333; s. c. 26 S. E. Rep. 204 (assumes risk whether the employment be dangerous or safe); *Davis v. Nuttallsburg Coal & C. Co.*, 34 W. Va. 500; s. c. 12 S. E. Rep. 539 (assumes all the ordinary risks of his employment, whether it is dangerous or not); *Oliver v. Ohio River R. Co.*, 42 W. Va. 703; s. c. 26 S. E. Rep. 444 (and if he willfully encounters dangers that are known to him or are notorious, the master is not responsible for an injury occasioned thereby); *Johnson v. Chesapeake & C. R. Co.*, 36 W. Va. 73; s. c. 14 S. E. Rep. 432 (where the master is guilty of no negligence in allowing the danger to exist); *Knight v. Cooper*, 36 W. Va. 232; s. c. 14 S. E. Rep. 999 (assumes all the ordinary risks of his employment, though it be dangerous in its nature); *Hoffman v. Dickinson*, 31 W. Va. 142; s. c. 6 S. E. Rep. 53 (same holding); *Red River Line v. Cheatham*, 60 Fed. Rep. 517; s. c. 9 C. C. A. 124; 23 U. S. App. 19; rev'g s. c. 56 Fed. Rep. 248 (risk of bow of steamboat being held against shore by revolutions of wheel, instead of by tying, while delivering small quantities of freight); *Texas & C. R. Co. v. Minnick*, 57 Fed. Rep. 362; s. c. 13 U. S. App. 520; 6 C. C. A. 387 (where there is no defect of

machinery or unknown hazard); *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; s. c. 17 Wash. L. Rep. 630; 6 Rail. & Corp. L. J. 327. It has been held that while the employé assumes the known risks of his employment, he assumes them with all their qualifications, such as the exercise by the employer of the usual precautions to obviate or minimize the danger: *Rockport Granite Co. v. Bjornholm*, 115 Fed. Rep. 947.

²⁴ *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280; s. c. 25 N. E. Rep. 373; 33 N. Y. St. Rep. 416; rev'g s. c. 53 Hun (N. Y.) 635; 6 N. Y. Supp. 838. See also, *Frye v. Bath Gas & C. Co.*, 94 Me. 17; s. c. 46 Atl. Rep. 804 (servant does not assume the risk from defects in the plant itself, which the master is bound to make and keep reasonably safe); *Rhoades v. Varney*, 91 Me. 222; s. c. 39 Atl. Rep. 552; *Himrod Coal Co. v. Clark*, 197 Ill. 514; s. c. 64 N. E. Rep. 282; aff'g s. c. 99 Ill. App. 332 (does not assume risk from failure of master to exercise reasonable care in furnishing him a reasonably safe place to work); *Swensen v. Bender*, 114 Fed. Rep. 1; s. c. 51 C. C. A. 627 (same holding); *Chapman v. Southern Pac. Co.*, 12 Utah 30; s. c. 41 Pac. Rep. 551 (does not assume risk from failure of master to exercise ordinary care to furnish reasonably safe machinery and a reasonably safe place to work, where such failure is unknown to the servant and not discoverable by exercise of ordinary care); *Seley v. Southern Pac. Co.*, 6 Utah 319; s. c. 23 Pac. Rep. 751 (failure to use safety frogs not an ordinary risk of railway employé's employment).

for his own safety as his situation allows him to take, whether such dangerous conditions arise from the negligence of the master or not, and whether they are, or are not, preventable by the master in the exercise of ordinary care. In the line of this theory it has been held that a servant of a master who conducts his business in a way more hazardous than other ways adopted by other employers, assumes the risk of the more hazardous method, when he knows the danger attendant upon such manner of prosecuting the work.^{24a}

§ 4615. **Risks of Employments Involving Unusual or Extraordinary Hazards.**^a—It is a part of the doctrine of the assumption of risk that a servant assumes the risk of dangers ordinarily incident to the employment, although they may involve unusual or extraordinary hazards.²⁵ A good illustration of this would be presented by the risk assumed by a person who consents to work in a *powder-mill* or about premises where *dangerous explosives* are kept or used. Here, as elsewhere, the premise which puts the assumption of the risk upon the servant is his understanding of the dangers or his opportunity to understand them in the exercise of reasonable care for his own safety. Let us suppose, for example, that a servant is at work near a kettle which contains molten lead; that he is thoroughly familiar with the process of lead-melting; that he has repeatedly seen molten lead splash out of that particular kettle; but that he has, nevertheless, elected to remain in the employment and to expose himself to the risk without complaint, objection, or remonstrance. If, while at work in this situation, the molten lead splashes out of the kettle, and, to avoid being struck and burned by it, he jumps from the platform on which he is at work and is injured, he cannot recover damages from the master, because he is injured by a risk of the employment which he has knowingly and voluntarily accepted.²⁶ So, a servant who has worked for four years with a day gang and for four years with a night gang in an uncovered coal-yard at shovelling coal, and who is thoroughly familiar with all the surroundings, assumes the risk of injury from the falling down of a frozen crust of soft coal overhanging the coal-

^{24a} *Reed v. Stockmeyer*, 74 Fed. Rep. 186; s. c. 34 U. S. App. 727; 20 C. C. A. 381. In line with the doctrine of the text we may cite a decision where an employé sued his master for injuries alleged to have been sustained by reason of the master's negligence, and the evidence showed that, if the master was negligent at all, the plaintiff knew of such negligence, and hence

took the resulting risk, and it was held not error to grant a nonsuit: *Porter v. Ocean S. S. Co.*, 113 Ga. 1007; s. c. 39 S. E. Rep. 470.

^a See *post*, §§ 4628, 4703.

²⁵ *Watson v. Kansas &c. Coal Co.*, 52 Mo. App. 366.

²⁶ *Farrell v. Tatham*, 36 App. Div. (N. Y.) 319; s. c. 5 Am. Neg. Rep. 213; 55 N. Y. Supp. 199.

bank while he is at work there shovelling coal in the night-time.²⁷ This doctrine also extends to the use of implements or appliances which are of such a character, known to or discoverable by the servant, as to involve extraordinary hazards to him. Thus, it has been held that an intelligent man, with full knowledge of the character and quality of an implement furnished for him to use, and all of the facts and physical laws which render its use dangerous, after having voluntarily accepted employment in a hazardous business, involving the use of such implements, cannot be heard to say that he did not know it was dangerous, but he assumes the risk of injury from its use, as a hazard of the employment.²⁸

§ 4616. **Accepts Risks of Danger from Defect in Something for the Condition of which He Himself is Responsible.**—An employé cannot recover damages from his employer for an injury proceeding from a defect in something for the safe condition of which the employé himself was responsible.²⁹ This rule applies where the servant himself undertakes with the master to see to the safety of the premises or appliances about which or with which he works;³⁰ or where he undertakes to construct or prepare such appliances himself;³¹ or where reasonably safe materials or appliances are furnished by the master,

²⁷ *Casey v. Grand Trunk R. Co.*, 68 N. H. 162; s. c. 16 Am. & Eng. R. Cas. (N. S.) 361; 44 Atl. Rep. 92.

²⁸ *King v. Morgan*, 109 Fed. Rep. 446; s. c. 48 C. C. A. 507.

²⁹ *Stroble v. Chicago & C. R. Co.*, 70 Iowa 555; *Smart v. Louisville Electric-Light Co.*, 47 La. An. 869; s. c. 17 South. Rep. 346 (injury from defective gloves worn by an electric lineman); *Piper v. Cambria Iron Co.*, 78 Md. 249; s. c. 27 Atl. Rep. 939 (injury from want of a light, it being the duty of the injured servant and his companions to light the place when necessary); *Truman v. Rudolph*, 22 Ont. App. 250 (orders given by master to servant to the end of correcting a defect known to both, not carried out by servant).

³⁰ *Wright v. Pacific Coast Oil Co.* (Cal.), 53 Pac. Rep. 1086 (no off. rep.); *Drum v. New England Cotton Yarn Co.*, 180 Mass. 113; s. c. 61 N. E. Rep. 812 (breaking of step-ladder which injured employé was charged with duty of keeping in repair); *Krimmel v. Edison Illuminating Co.*, 130 Mich. 613; s. c. 90 N. W. Rep. 336 (experienced lineman

failed to inspect pole before going on it, he being required by his employment to make such inspection); *Moon-Anchor Consol. Gold Mines v. Hopkins*, 111 Fed. Rep. 298; s. c. 49 C. C. A. 347 (whether place originally became dangerous through the negligence of the master or not). But where a miner was making excavations preparatory to the placing of supporting timbers by other workmen, it was held that he was not engaged in making a dangerous place safe, so as to work an assumption of the risk: *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; s. c. 66 Pac. Rep. 799.

³¹ *Callan v. Bull*, 113 Cal. 593; s. c. 45 Pac. Rep. 1017; *Donovan v. Harlan & Co.*, 2 Pen. (Del.) 190; s. c. 44 Atl. Rep. 619 (and even if one uses such an appliance constructed by a fellow workman, he is still bound to see that it is safe before using it, and if he does not it is his own negligence); *Ausley v. American Tobacco Co.*, 130 N. C. 34; s. c. 40 S. E. Rep. 819 (employé injured by unguarded cog-wheel in machinery which he had helped to erect and was engaged in operating).

and the servant undertakes to *select* from them and to use them at will;³² or where the master leaves the *method* by which a given task is to be performed to the selection of the servant, who selects a dangerous method and is thereby injured;³³ or where the master furnishes a safe and suitable appliance to be used by the servant for a particular purpose, and the servant undertakes to use it for *another purpose*, and in an improper manner, in consequence of which he is injured;³⁴ or where the servant is injured in consequence of dangerous conditions created by himself, or—where the “fellow-servant doctrine” prevails—by a fellow workman;³⁵ or where, under any circumstances,

³² *Maloney v. United States Rubber Co.*, 169 Mass. 347; s. c. 47 S. E. Rep. 1012 (selected defective joist for use in connection with a machine from a supply of good ones); *Shanke v. United States Heater Co.*, 125 Mich. 346; s. c. 84 N. W. Rep. 283; 7 Det. Leg. N. 530; *McCone v. Gallagher*, 16 App. Div. (N. Y.) 272; s. c. 44 N. Y. Supp. 697 (defective piece of timber used in a *scaffold*, where sufficient timber of a proper kind was furnished for its construction); *Parento v. Taylor*, 26 App. Div. (N. Y.) 518; s. c. 50 N. Y. Supp. 518 (selected obviously defective appliance from adequate supply of appliances in good condition); *Tully v. New York & C. S. S. Co.*, 10 App. Div. (N. Y.) 463; s. c. 42 N. Y. Supp. 29 (where the servant knows of such supply, or the master has made suitable regulations to advise his employes thereof); *Cassey v. Chicago & C. R. Co.*, 90 Wis. 113; s. c. 62 N. W. Rep. 624 (defective wheelbarrow selected by servant from a pile of wheelbarrows containing good ones). A master is not bound, as such, to see that a piece of timber constituting a part of the structure which is the object of the work, chosen by one gang of employes from a supply suitable for the purpose, is sufficient, or is properly placed to support another portion of the structure temporarily suspended from it, and upon which a member of another gang employed by him is directed to work: *Callan v. Bull*, 113 Cal. 593; s. c. 45 Pac. Rep. 1017. State of facts under which it was held to be the duty of the master to ascertain the condition of a *derrick* by making tests to see that it was reasonably safe—had not been transferred to the

servant: *Jarvis v. Northern New York Marble Co.*, 67 N. Y. Supp. 78; s. c. 55 App. Div. (N. Y.) 272.

³³ *Karr Supply Co. v. Kroenig*, 167 Ill. 560; s. c. 47 N. E. Rep. 1051; rev'g s. c. 63 Ill. App. 219; *Norton v. Sczpurak*, 70 Ill. App. 686; s. c. 2 Chic. L. J. Wkly. 515 (removed work with her fingers when she might have used a *stick* for the purpose); *Hathaway v. Illinois & C. R. Co.*, 92 Iowa 337; s. c. 60 N. W. Rep. 651 (accident due to the use of appliance without blocks, which were available at any time); *Peffer v. Cutler*, 83 Wis. 281; s. c. 53 N. W. Rep. 308 (scaffold).

³⁴ *Illinois & C. R. Co. v. Daniels*, 73 Miss. 258; s. c. 19 South. Rep. 830. Somewhat in line with this doctrine, it has been held that an employer is not liable for personal injuries received by an employé in taking off a towel from the projecting end of a shaft upon which he has hung it solely for his own convenience, where his service is not connected with such shaft in any manner, although the injuries are due to the defective condition of the shaft: *Kauffman v. Maier*, 94 Cal. 269; s. c. 29 Pac. Rep. 481.

³⁵ *Foley v. Brooklyn Gaslight Co.*, 9 App. Div. (N. Y.) 91; s. c. 41 N. Y. Supp. 66; 75 N. Y. St. Rep. 526; *Miller v. Thomas*, 15 App. Div. (N. Y.) 105; s. c. 44 N. Y. Supp. 277 (as where laborers, in shovelling coal, leave an overhanging frozen crust of coal which falls and injures one of them); *McGoldrick v. Metcalf*, 37 N. Y. St. Rep. 611; s. c. 14 N. Y. Supp. 269; *Murphy v. American Rubber Co.*, 159 Mass. 266; *Coal Co. v. Estievenard*, 53 Ohio St. 43; s. c. 33 Ohio L. J. 277; 2 Ohio Leg. N. 510; 40 N. E. Rep. 725 (roof which

the injury which the servant receives is properly ascribed either to the contributory negligence of the servant, or—what is nearly the same thing—to his acceptance of the risk, or taking the chances of injury to himself from the particular act, omission, or condition.³⁶ For example, the rule that a master is under the duty of providing a safe place and safe appliances to his employé does not apply where the master provides *suitable materials* to a gang of carpenters with which to erect a temporary scaffold, and they erect one which is dangerous, and which falls, injuring one of them.³⁷ In short, the duty of a master to see to it that the machinery furnished for the use of his servants is reasonably safe, does not extend so far as to require him to attend to the proper regulations of those parts which necessarily have to be adjusted in the course of use with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine.³⁸

miner propped fell, injuring him—master not liable); *Bunt v. Sierra &c. Min. Co.*, 24 Fed. Rep. 847 (roof of mining tunnel, fixed by miner in his own way, fell, injuring him—employer not liable).

³⁶ *Ruane v. Lake Shore &c. R. Co.*, 64 Ill. App. 359 (railway flagman, relying on the observance of a statute requiring the ringing of bells upon a train approaching a crossing, neglected to watch for the train, and was struck by it); *Jones v. Louisville &c. R. Co.*, 95 Ky. 576; s. c. 26 S. W. Rep. 590; 16 Ky. L. Rep. 132 (section-hand struck by lever of handcar and knocked off while stooping to remove some loose tools placed on the floor of the car by the section-boss—negligence of the company not the proximate cause of the injury); *McQuirk v. Shattuck*, 160 Mass. 45; s. c. 35 N. E. Rep. 110 (employé injured in consequence of the failure of her employer to provide sufficient accommodations for conveying her to her place of work, where the lack of such accommodations is obvious, and she rides in an unsafe position); *McGoldrick v. Metcalf*, 144 N. Y. 630; s. c. 37 N. Y. St. Rep. 611; 14 N. Y. Supp. 269 (employé injured while attempting to move a heavy casting without calling for assistance); *Diehl v. Lehigh Iron Co.*, 140 Pa. St. 487; s. c. 27 W. N. C.

(Pa.) 552; 21 Atl. Rep. 430; 48 Phila. Leg. Int. 321 (employé injured by placing a dynamite cartridge in a hole drilled by him in a mass of hot iron, cinders and refuse, knowing the danger); *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52; s. c. 20 L. R. A. 338; 32 Pac. Rep. 1012 (employé injured in consequence of attempting to ride on the extreme outer edge of the brake-beam in front of an engine with no cars attached, through a narrow and dark tunnel, to get his pay, on a day when he is not at work, and getting his knee struck by a projecting rock). It is needless to add that a servant cannot make his master responsible for an injury resulting to the servant from his own unskillfulness, of which his master has not been informed: *Whittaker v. Coombs*, 14 Ill. App. 498.

³⁷ *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338; s. c. 1 Repr. (Ind.) 492; 52 N. E. Rep. 462; *Peffer v. Cutler*, 83 Wis. 281; s. c. 53 N. W. Rep. 308. See *ante*, §§ 3760, 3954; *post*, § 4852; and note that, as to scaffolds, this rule has been abrogated in New York by statute: *Ante*, § 3959.

³⁸ *Eicheler v. Hanggi*, 40 Minn. 263; s. c. *sub nom.* *Eicheler v. St. Paul Furniture Co.*, 41 N. W. Rep. 975.

§ 4617. Injury from Defects which the Servant is Employed to Repair.—From the foregoing it may easily be concluded that an employé assumes the risk of injury from defects in premises, machinery, mechanical contrivances, or appliances which he is employed to repair, or which it is his duty, in the course of his employment, to repair.³⁹

§ 4618. Risks of the Special or Unforeseen Negligence of the Master, or his Representative.—The servant does not accept the risk of dangers proceeding from the special or unforeseen negligence of the master, or of those for whose conduct the master is responsible, or of the negligences of the master which are unknown to him, such dangers not being ordinarily incident to the business.⁴⁰ Within this

³⁹ *Smart v. Louisiana Electric Light Co.*, 47 La. An. 869; s. c. 17 South. Rep. 346; *Broderick v. St. Paul City R. Co.*, 74 Minn. 163; s. c. 77 N. W. Rep. 28; *Gulf & C. R. Co. v. Jackson*, 27 U. S. App. 519; s. c. 65 Fed. Rep. 48; 12 C. C. A. 507; *Clark v. Liston*, 54 Ill. App. 578 (work of destroying a building); *Kanz v. Page*, 168 Mass. 217; s. c. 46 N. E. Rep. 620; *Skidmore v. West Virginia & C. Co.*, 41 W. Va. 293; s. c. 23 S. E. Rep. 713; *Wahlquist v. Maple Grove Coal & C. Co.*, 116 Iowa 720; s. c. 89 N. W. Rep. 98. Compare *Horner v. Nicholson*, 56 Mo. 220.

⁴⁰ *Mobile & C. R. Co. v. George*, 94 Ala. 199; s. c. 11 Rail. & Corp. L. J. 26; 10 South. Rep. 145 (negligence of the *yardmaster* is not one of the ordinary risks incident to his employment, assumed by a railroad employé, in uncoupling an engine from a car at the command of the *yardmaster*); *St. Louis & C. R. Co. v. Tuohey*, 67 Ark. 209; s. c. 54 S. W. Rep. 577; *Ide v. Fratcher*, 96 Ill. App. 549; s. c. aff'd, 194 Ill. 552; 62 N. E. Rep. 814; *Street's Western Stable Car Line v. Bonander*, 196 Ill. 15; s. c. 63 N. E. Rep. 688; aff'g s. c. 97 Ill. App. 601 (assumes risks incident to the usual method of performing work, but not increased hazard arising from foreman's negligence); *Mallen v. Waldowski*, 101 Ill. App. 367; *John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394; s. c. aff'd, 182 Ill. 218; 54 N. E. Rep. 1002 (danger, to an employé in unloading lumber from a vessel, of the fall of a pile of lumber placed upon the dock, not assumed); *Nail v.*

Louisville & C. R. Co., 129 Ind. 268; s. c. 48 Am. & Eng. R. Cas. 315; 28 N. E. Rep. 611 (the assumption by an employé of apparent risks includes only such as exist at the time or may reasonably be apprehended, and not risks arising from acts of his employer enhancing the dangers or exposing him to new and unsuspected perils); *Baltimore & C. R. Co. v. Peterson*, 156 Ind. 364; s. c. 59 N. E. Rep. 1044 (does not assume the risk resulting from the non-observance of a city ordinance); *Pittsburgh & C. R. Co. v. Moore*, 152 Ind. 345; s. c. 53 N. E. Rep. 290; 44 L. R. A. 638; 1 Repr. (Ind.) 842; 14 Am. & Eng. R. Cas. (N. S.) 678 (same as the preceding); *Rogers v. Leyden*, 127 Ind. 50; s. c. 26 N. E. Rep. 210 (similar to the preceding); *Taylor v. Evansville & C. R. Co.*, 121 Ind. 124; s. c. 22 N. E. Rep. 876; 6 L. R. A. 584; 7 Rail. & Corp. L. J. 125; 41 Alb. L. J. 173; 41 Am. & Eng. R. Cas. 437 (does not accept the risk of an injury through a negligent act done by a vice-principal of the master); *Rhoades v. Varney*, 91 Me. 222; s. c. 39 Atl. Rep. 552 (does not assume risk of dangers preventable by master by exercise of ordinary care); *Malcolm v. Fuller*, 152 Mass. 160; s. c. 25 N. E. Rep. 83; *Gregg v. Chicago & C. R. Co.*, 91 Mich. 624; s. c. 52 N. W. Rep. 62; *Harding v. Railway Transfer Co.*, 80 Minn. 504; s. c. 83 N. W. Rep. 395 (employé injured by slipping on icy steps caused by water dripping from roof, did not assume risk where he worked only at night and therefore did not know of the condition of the steps); *Irmer v. St. Louis Brew. Co.*, 69 Mo.

statement of doctrine is included the proposition that, within the limits already indicated, an employ   does not assume the risk of injury from the neglect of his employer to exercise reasonable dili-

App. 17; *O'Neill v. Chicago &c. R. Co.*, 62 Neb. 358; s. c. 86 N. W. Rep. 1098 (negligence of the employer, of which the employ   is ignorant); *Alexander Dye Works v. Roufosse*, 57 N. J. L. 700; s. c. 32 Atl. Rep. 373 (giving way of a railing under ordinary pressure owing to conditions which inspection and repair would have remedied); *Comben v. Belleville Stone Co.*, 59 N. J. L. 226; s. c. 36 Atl. Rep. 473; *Freeman v. Glens Falls Paper Mill Co.*, 61 Hun (N. Y.) 125; s. c. 39 N. Y. St. Rep. 621; 15 N. Y. Supp. 657 (risk of loose barrels left without knowledge of injured employ   on the floor of a building in such a position as to be loosened by the vibrations of machinery and precipitated into an elevator well); *Felice v. New York &c. R. Co.*, 14 App. Div. (N. Y.) 345; s. c. 43 N. Y. Supp. 922; *Missouri &c. R. Co. v. Walden*, 27 Tex. Civ. App. 567; s. c. 66 S. W. Rep. 584 (foreman ordered servants to pull on rope attached to prop under a building while plaintiff, at his direction, was trying to raise prop over an obstruction); *San Antonio &c. R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324; s. c. 62 S. W. Rep. 561 (does not assume any risk arising by reason of the company's negligence, unless he knows); *Gulf &c. R. Co. v. Silliphant*, 70 Tex. 623; s. c. 8 S. W. Rep. 673; *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340; s. c. 9 S. W. Rep. 262; *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677; s. c. 41 S. W. Rep. 488; *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487; s. c. 3 Chic. L. J. Wkly. 99; 43 S. W. Rep. 1090; *Gulf &c. R. Co. v. Brentford*, 79 Tex. 619; s. c. 15 S. W. Rep. 561 (affirmative wrongful act of master or his representative); *Galveston &c. R. Co. v. Pitts* (Tex. Civ. App.), 42 S. W. Rep. 255 (no off. rep.); *American Cotton Co. v. Smith*, 29 Tex. Civ. App. 425; s. c. 69 S. W. Rep. 443 (servant working on ground struck by fall of piece of heavy timber sawed off by servant working above him under supervision of foreman, though injured servant knew it was being sawed off without being se-

cured by a rope—risk not assumed as matter of law); *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah 468 (does not agree to take extraordinary risks arising from the negligence of the employer, which have not been called to his attention); *Houston v. Brush*, 66 Vt. 331; s. c. 29 Atl. Rep. 380; *Nelson v. Shaw*, 102 Wis. 274; s. c. 5 Am. Neg. Rep. 743; 78 N. W. Rep. 417 (a teamster employed in hauling bark over his employer's private roadway may rely upon the latter's express promise to repair a defect in such roadway before he returned with such load); *Jensen v. Hudson Sawmill Co.*, 98 Wis. 73; s. c. 73 N. W. Rep. 434 (citing *Chicago Drop-Forge &c. Co. v. Van Dam*, 149 Ill. 337) (holding that it is a *question of fact* for the jury as to whether a defect in machinery is so serious, or the danger so great, that a servant is not justified in continuing at his employment upon the master's promise to promptly remedy the defect); *Albrecht v. Chicago &c. R. Co.*, 108 Wis. 530; s. c. 84 N. W. Rep. 882 (holding that a locomotive-engineer assumed a risk, as a reasonable time within which a repair of his engine could be made expired when the trip commenced); *Stephenson v. Duncan*, 73 Wis. 404; s. c. 41 N. W. Rep. 337; *Parody v. Chicago &c. R. Co.*, 15 Fed. Rep. 205; *Lehigh Valley Coal Co. v. Warreck*, 84 Fed. Rep. 866; s. c. 55 U. S. App. 437; 28 C. C. A. 540; *Homestake Min. Co. v. Fullerton*, 69 Fed. Rep. 923; s. c. 16 C. C. A. 545; 2 Am. & Eng. Corp. Cas. (N. S.) 596; 36 U. S. App. 32; *Hough v. Texas &c. R. Co.*, 100 U. S. 213; *Grace &c. Co. v. Kennedy*, 40 C. C. A. 69; s. c. 99 Fed. Rep. 679 (risk of employer's neglect to furnish protection against danger of injury in consequence of passing vehicles coming into contact with guy-ropes extending from the place where the servant is working out into and across the street); *Anglin v. Texas &c. R. Co.*, 60 Fed. Rep. 553; s. c. 23 U. S. App. 62 (increased dangers caused by the negligence of the employer not to be deemed incident to the business).

gence to ascertain and remedy defects and dangers in premises and appliances used by the employé in the performance of his duty.⁴¹ He does not, for example, assume the risk of injury in consequence of the failure of his master to provide proper rules, regulations, or other precautionary measures to protect him from dangers which are not necessarily incident to his employment.⁴² But this doctrine of the non-assumption of risk of dangers proceeding from the special and unforeseen negligence of the master does not, of course, apply to a permanent condition created by the previous negligence of the master of which the servant has knowledge.⁴³

§ 4619. Risk of Injury from the Negligence of Persons Creating Conditions for which the Master is Responsible.—If the conditions referred to in the caption are created by the negligence of a fellow servant, the risk of injury from which is regarded as incident to the service, under a doctrine elsewhere considered,⁴⁴ the master is not liable therefor; because the risk of such an injury is one of the risks which the servant assumes,⁴⁵ save in those jurisdictions where the common-law rule has been abolished by statute; and, as elsewhere seen, in many cases where the negligence of the fellow servant relates to a primary or absolute duty which the law casts upon the master, then the master will be responsible for its non-performance without reference to the grade of the servant to whom he has committed it.⁴⁶ On the other hand, while one who engages in a hazardous employment assumes all the risks ordinarily incident thereto, he is not bound to anticipate such dangers connected therewith as arise solely from the negligence of others not in law his fellow servants, and he may recover damages for injuries resulting therefrom.⁴⁷

§ 4620. Doctrine that Risk of Injury from Non-Compliance with Statutes is Assumed and Protection of the Statute Waived by the Servant.—Under a variety of statutes which have been enacted for the protection of working people, the question has frequently arisen

⁴¹ *Van Tassel v. New York & C. R. Co.*, 1 Misc. (N. Y.) 299; 48 N. Y. St. Rep. 767; 20 N. Y. Supp. 708; s. c. aff'd, 142 N. Y. 634.

⁴² *Wild v. Oregon & C. R. Co.*, 21 Or. 159; s. c. 27 Pac. Rep. 954.

⁴³ *Pitrowsky v. Reedy Elevator Man. Co.*, 54 Ill. App. 253; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42; s. c. 40 S. E. Rep. 368; 55 L. R. A. 908 (assumes risk of accident from master's negligence if he ac-

cepts or continues in the service after knowledge thereof).

⁴⁴ *Post*, §§ 4846-4848.

⁴⁵ *Donnelly v. New York & C. R. Co.*, 3 App. Div. (N. Y.) 408; s. c. 38 N. Y. Supp. 709.

⁴⁶ *Musick v. Jacob Dold Packing Co.*, 58 Mo. App. 322.

⁴⁷ *Cleveland & C. R. Co. v. Ker-nochan*, 55 Ohio St. 306; s. c. 36 Ohio L. J. 334; 45 N. E. Rep. 531.

whether, in case the master neglects the precautions prescribed by the statute, and the servant knows of such neglect, he thereby waives the protection of the statute and assumes the risk of injury from the unlawful conduct of his master. It cannot escape attention that to hold that he does assume such risks is, in effect, a judicial repeal of the statute; since it places the servant in substantially the same position which he occupied at common law, and puts upon him, and not upon the master, the risk of injury from the unlawful act or omission of the master. Yet a very considerable number of the courts have held that the servant does waive the protection of the statute and impliedly agrees with the master to assume the risk of injury from the master's unlawful conduct, where the circumstances are such that the servant would be deemed to accept the risk if the statute were not in existence.⁴⁸

§ 4621. **Contrary Doctrine that the Servant does Not Accept the Risk and Waive the Protection of the Statute by Remaining in the Service.**—Other courts, proceeding on better views of public policy, hold that the employé does not waive the protection of the statute and accept the risk of injury from the unlawful act or omission of the master, by the mere fact of remaining in his service with knowledge that he has not complied with the statute.⁴⁹ Under such a statute the

⁴⁸ *Fitzgerald v. Elsas Paper Co.*, 62 N. Y. Supp. 597; s. c. 30 Misc. (N. Y.) 438; *Swift v. Fue*, 66 Ill. App. 651 (ordinance); *Chicago Packing & Co. v. Rohan*, 47 Ill. App. 640; *Knisley v. Pratt*, 148 N. Y. 372; s. c. 32 L. R. A. 367; 42 N. E. Rep. 986. The court in this last case holds that the rule that in such case the servant assumes the obvious risk of an injury from *unguarded cogwheels*, left unguarded by the master in violation of the statute, and that the servant thus waives the protection of the statute, is not in violation of public policy: *Knisley v. Pratt*, *supra*. But it is submitted that the legislature, and not the courts, is the best judge of what is public policy. Other cases holding that the servant waives the benefit of such statutes are: *De Young v. Irving*, 5 App. Div. (N. Y.) 499; s. c. 38 N. Y. Supp. 1089; *Spiva v. Osage Coal & Co.*, 88 Mo. 68; *O'Malley v. South Boston Gaslight Co.*, 158 Mass. 135; s. c. 32 N. E. Rep. 1119 (defect in ways); *Cassaday v. Boston & C. R. Co.*, 164 Mass. 168; s.

c. 41 N. E. Rep. 129 (holding that, upon the question of assumed risk on the part of the servant, there is no difference whether the action is brought at common law or under Mass. Stat. 1887, chap. 270); *Birmingham R. & Co. v. Allen*, 99 Ala. 359; s. c. 20 L. R. A. 457; 13 South. Rep. 8 (holding that the Alabama statute, which is a substantial copy of the English Act of 1880, does not change the rule as to assumption of the risk). Compare Vol. I, § 10, *et seq.*

⁴⁹ *Haight v. Wartman & Co.*, 24 Ont. Rep. 618 (unless he fully appreciates the risk); *Himrod Coal Co. v. Adack*, 94 Ill. App. 1; *Boyd v. Brazil Block Coal Co.*, 152 Ind. 543; s. c. 50 N. E. Rep. 368 (holding that the maxim *volenti non fit injuria*, or the doctrine of assumption of risk, does not apply in the case of an injury visited upon the servant by the breach of a statutory duty imposed upon the master, such as the protection of operatives by mine-owners) [*distinguishing Victor Coal Co. v. Muir*, 20 Colo.

doctrine of assumption of the risk cannot be upheld on the theory of contract, as the same would be against public policy.⁵⁰ Such statutes, when construed as preventing an employé from assuming the risk by contract, are not void as depriving the employé of his right of contract; the same being an exercise of the police power for the protection of the poor and helpless.⁵¹

§ 4622. **Effect of such Statutes upon the Contributory Negligence of the Servant.**—It is not to be concluded from the foregoing that statutes of this kind operate to cut off the defense of contributory negligence, unless they say so in express terms. Disobedience of such a statute on the part of the master does not exonerate the servant from the duty of taking reasonable care for his own safety; nor can he, un-

320; s. c. 26 L. R. A. 435; 38 Pac. Rep. 378]; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479; s. c. 63 N. E. Rep. 239 (though servant is in full possession of his faculties, and understands fully the dangerous nature of the machine and that it is without guards, he does not assume risk of master's violation of statute requiring guards to be placed on the machine); *Murphy v. City Coal Co.*, 172 Mass. 324; s. c. 52 N. E. Rep. 503 (holding that the rule that an employé cannot recover for injuries caused by an obvious risk does not apply where the accident was caused by the negligent act of the employer's superintendent,—in view of the Massachusetts statute) [compare Massachusetts cases cited in the preceding section]; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25; s. c. 85 N. W. Rep. 826 (employé fell upon a saw left unguarded in violation of a statute); *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; *Lore v. American Man. Co.*, 160 Mo. 608; s. c. 61 S. W. Rep. 678 (defective guard); *Coley v. North Carolina R. Co.*, 128 N. C. 534; s. c. 39 S. E. Rep. 43; rehearing denied, 129 N. C. 407; s. c. 40 S. E. Rep. 195 (injury to an engineer in consequence of the failure of the railway to perform the statutory duty of affixing handholds to the tender); *Simpson v. New York Rubber Co.*, 80 Hun (N. Y.) 415; 62 N. Y. St. Rep. 93; 30 N. Y. Supp. 339 (overruled by New York cases cited in the preceding section); *Marino v. Lehmaier*, 62 App. Div. (N. Y.) 43; s. c. 70 N. Y. St. Rep. 790 (act

of child in working in a factory not a waiver of the protection of a statute prohibiting the employment of children, etc.); *Quackenbush v. Wisconsin & C. R. Co.*, 62 Wis. 411 (injury from derailment of a train by coming in contact with a steer on the track by reason of failure to erect the statutory fence). Where there was a statute requiring all gearing in manufacturing establishments to be safely guarded, and the rods which had been erected to protect the gearing had been bent by former employés so as to produce an opening, and the plaintiff, in the discharge of her duty, while passing around the machinery, slipped on the floor, which had been rendered slippery by the spraying of oil from the machinery, and involuntarily thrust her hand through the opening, whereby her hand was crushed in the cogwheels,—it was held that the plaintiff was not chargeable with the consequences of the negligence of the former employés under the fellow-servant rule, but that the master was liable: *Lore v. American Man. Co.*, 160 Mo. 608; s. c. 61 S. W. Rep. 678; *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288; s. c. 52 Atl. Rep. 531 (switchman injured while using ladder on the side of a car, maintained by the company contrary to the prohibition of a statute,—could not be said to have assumed the risk).

⁵⁰ *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288; s. c. 52 Atl. Rep. 531.

⁵¹ *Kilpatrick v. Grand Trunk R. Co.*, *supra*.

der such circumstances, recover damages from the master for an injury brought about by his own negligence, folly or rashness. For example, although a railway company has neglected to comply with an Act of Congress requiring such companies to put "grab-irons" on cars, and although the statute provides that servants remaining in the employment of a railroad company, knowing that such irons are not on the cars, shall not be deemed to assume the risk arising from the want of them,—yet this does not justify a servant in going between two cars, knowing that such irons are absent, at a time when such conduct is obviously dangerous.⁵² So, although an employer has failed to guard a rapidly-revolving shaft in compliance with a statute, yet where the unguarded shaft is situated eighteen inches from the place of work of a servant, and where a movement on the part of a servant directly toward the shaft is guarded against by a large pile of stones intervening, and the only way by which the servant can reach the shaft is by stepping outside of his path and upon the pile of stones, which he is not required to do in the prosecution of his work; and the end of a rope which the servant is coiling around his wrist is blown by the wind against the shaft, around which it wraps and draws the servant against the shaft before he can disentangle himself, and injures him,—he will be precluded from recovering damages of the master, notwithstanding the master's violation of the statute.⁵³ So a statute, modelled after a statute of England, rendering a master or employer liable to his servant or employé for an injury "caused by reason of any defect in the construction of the ways, works, machinery or plant connected with, or used in the business of the master or employer," does not prevent the master or employer from setting up as a defense that there was contributory negligence on the part of the servant or employé,—such contributory negligence being really, in this case, what is usually described by the words "acceptance of the risk."⁵⁴ But contributory negligence cannot be imputed to the injured employé in consequence of such a statute merely because of his continuing in the service after discovering the defect, though it may increase the risk of his being injured, unless he fails to give information within a reasonable time after acquiring knowledge of the danger or defect, or un-

⁵² *Cleveland &c. R. Co. v. Baker*, 91 Fed. Rep. 224; s. c. 63 U. S. App. 553; 33 C. C. A. 468; *Victor Coal Co. v. Muir*, 20 Colo. 320; s. c. 26 L. R. A. 435; 38 Pac. Rep. 378 (miner neglecting to prop up rock which he has tested and knows is unsafe, and continuing to work under it).

⁵³ *Powalske v. Cream City Brick*

Co., 110 Wis. 461; s. c. 86 N. W. Rep. 153. This decision is put on the ground of mere accident, but it seems to have been one of the very accidents which the statute was intended to guard against).

⁵⁴ *Southern R. Co. v. Harbin*, 110 Ga. 808; s. c. 36 S. E. Rep. 218 (defective condition of a guard-rail on a trestle known to the employé).

less the danger is so imminent and impending that a prudent man would not continue in the service under like circumstances.⁵⁵ Nor can it be imputed to him where the negligence of the master is deemed to be *willful*, under a principle already considered;⁵⁶ and such it was held by one court to be, where, contrary to the mandate of a statute, the owner of a mine neglected to have the cages covered in which he conveyed the miners in and out of the mine, in consequence of which one of them was injured by a falling object; but in such a case the injured miner, or his widow in case of his death, was entitled to recover damages notwithstanding the miner himself may have been guilty of negligence.⁵⁷

§ 4623. Operation of Other Statutes upon the Question of Servant Accepting the Risk.—The fact that a duty is imposed upon an employer by statute, does not of itself change the rules of law relating to contributory negligence, or the assumption of risks by his employes.⁵⁸ Therefore, a brakeman on a freight-train, knowing that other trains are run at a speed in excess of that provided by a city ordinance, and not protesting or objecting, assumes the risk of danger arising from that source.⁵⁹ Especially is it true that a statute which imposes no obligation beyond those imposed by the common law, but which is merely declaratory of that law, does not alter the rule as to contributory negligence or assumption of the risk.⁶⁰ But, of course, this rule does not obtain where the Constitution or the Legislature says it shall not. Thus, where the Constitution of a State recited that “knowledge * * * of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense, * * * except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them,”⁶¹ it was held that the defense of accepting the risk could not be set up to defeat an action by a section-master against the railroad company for personal injuries arising from the failure of the company to furnish a sufficient number of persons to perform the required work,—the court holding that the word “appliances” should be construed so as to include “human instrumentalities.”⁶² Under a statute providing that

⁵⁵ *Highland &c. R. Co. v. Walters*, 91 Ala. 435; s. c. 8 South. Rep. 357.

⁵⁶ Vol. I, §§ 206-208; *Catlett v. Young*, 143 Ill. 74; s. c. 32 N. E. Rep. 447.

⁵⁷ *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

⁵⁸ *Anderson v. C. N. Nelson Lumber Co.*, 67 Minn. 79; s. c. 69 N. W. Rep. 630.

⁵⁹ *Martin v. Chicago &c. R. Co.* (Iowa), 87 N. W. Rep. 654 (no off. rep.).

⁶⁰ *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135; s. c. 70 N. W. Rep. 1078.

⁶¹ Const. S. C., art. 9, § 15.

⁶² *Bodie v. Charleston &c. R. Co.*, 61 S. C. 468; s. c. 39 S. E. Rep. 715.

any employé of a railroad company, who shall suffer injury in the course of his employment by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company, and that any contract, express or *implied*, to waive the benefit of the statute, shall be void,—the railroad company is deprived of the defense of assumption of risk, whether resting in contract, express or implied, and whether pleaded directly or under the doctrine of fellow servant; but the defense of *contributory negligence* remains,—as where the plaintiff uses machinery obviously defective, and the apparent danger is so great that its use amounts to a reckless indifference to consequences.⁶³

§ 4624. **Servant Proceeding in Violation of Known Rules Accepts Risks.**—This subject is more aptly classified under the head of contributory negligence; but we meet with many decisions which formulate the proposition that where a servant proceeds in violation of known rules, intended and promulgated by the master for the servants' safety, he takes upon himself the risk of so proceeding and cannot make his own hardihood or improper conduct the basis of recovering damages against his master.⁶⁴ It must be kept in mind that the servant enters the employment subject to the right of the master to make and enforce reasonable⁶⁵ rules for the conduct of his business; and that such rules, when adopted by the master and made known to the servant, hence, impliedly, form a part of the contract of service.⁶⁶

⁶³Coley v. North Carolina R. Co., 129 N. C. 407; s. c. 40 S. E. Rep. 195; denying rehearing of s. c. 128 N. C. 534; 39 S. E. Rep. 43; Thomas v. Raleigh &c. R. Co., 129 N. C. 392; s. c. 40 N. E. Rep. 201; Cogdell v. Southern R. Co., 129 N. C. 398; s. c. 40 S. E. Rep. 202.

⁶⁴Chattanooga &c. R. Co. v. Myers, 112 Ga. 237; s. c. 37 S. E. Rep. 439 (trainman killed by a derailment while riding on the engine in violation of his duty—no recovery, although servant and others of his class had been in the habit of riding on the engine); East Tennessee &c. R. Co. v. Kane, 92 Ga. 187; s. c. 22 L. R. A. 315; 18 S. E. Rep. 18 (no recovery for the death of an engineer due to a collision caused by his violation of the rules in running his train at an excessive speed) [compare Louisville &c. R. Co. v. Hiltner, 22 Ky. L. Rep. 1141; s. c. 60 S. W. Rep. 2 (no off. rep.); rev'g s. c. 21 Ky. L. Rep. 1826; 56 S. W. Rep.

654 (no off. rep.)]; The John B. Lyon, 33 Fed. Rep. 184 (seaman placed in the wheelhouse of a steam-barge to await orders, unlashed the wheel without orders and was thereby injured); Houston &c. R. Co. v. Bolling, 59 Ark. 395; s. c. 27 S. W. Rep. 492 (injury to a child (not an employé) riding on a hand-car contrary to the rules of the company, and not in accordance with any custom acquiesced in by its officers).

⁶⁵Although a rule may be unreasonable in the sense that it cannot be complied with under all circumstances,—such as a rule requiring a railway brakeman to examine the brakes which he is called upon to use,—yet in order to make himself blameless, he must comply with it as far as the circumstances of the case and the occasion will permit: Pittsburg &c. R. Co. v. Ackworth, 10 Ohio C. C. 583; s. c. 3 Ohio Dec. 456.

⁶⁶Pennsylvania Co. v. Whitcomb,

The servant must, of course, receive notice of the rules,⁶⁷ and his violation of them must cause or contribute to his injury;⁶⁸ and if he enters into a written contract that he will obey certain rules and regulations, and such other rules and regulations as the superintendent may afterwards make, in order to impute blame to him for not obeying the new regulations, the knowledge of them must be communicated to him.⁶⁹ Subject to this qualification, the law undoubtedly is that an employé who, at the time of being injured, is acting in violation of a reasonable rule or regulation made for the government of employés, cannot recover damages for the injury if such violation contributed to it, although the condition may have been created by the negligence of the employer.⁷⁰

§ 4625. Risk of Injury in Consequence of Defective Rules or the Absence of Rules.—A servant accepts the risk of injury from rules established by the master which are made known to him, where he enters the service with full knowledge that such rules are in force and makes no objection thereto.⁷¹ For example, a railway employé who, without objection or protest, takes service under rules which do not provide for notice to employés upon trains of the movement of other trains, assumes the risk and dangers, on the theory that every employé who operates a train must beware of trains moving in the other direction, without notice of their whereabouts, and assumes the risks

111 Ind. 212; s. c. 9 West. Rep. 826; 12 N. E. Rep. 380; Pottsville Iron & Co. v. Good, 116 Pa. St. 385; s. c. 8 Cent. Rep. 505; 9 Atl. Rep. 497; 19 W. N. C. (Pa.) 465.

⁶⁷ International & C. R. Co. v. Moore (Tex. Civ. App.), 22 S. W. Rep. 272 (no off. rep.); Missouri & C. R. Co. v. Follin, 29 Tex. Civ. App. 512; s. c. 68 S. W. Rep. 810 (that engineer of train did not have his train under control at the time of an accident, in violation of a rule requiring him to have it under control at the particular place, did not, as matter of law, charge the fireman with having assumed the risk, where he did not know of any such rule).

⁶⁸ International & C. R. Co. v. Moore (Tex. Civ. App.), 22 S. W. Rep. 272 (no off. rep.); Central R. Co. v. Mitchell, 63 Ga. 173 (engineer had in the cab with him another engineer, contrary to a rule of the company, when an embankment fell on the engine).

⁶⁹ Lehigh Valley R. Co. v. Snyder, 56 N. J. L. 326; s. c. 28 Atl. Rep. 376.

⁷⁰ International & C. R. Co. v. Moore (Tex. Civ. App.), 22 S. W. Rep. 272 (no off. rep.). State of case in which it was not error to refuse to instruct the jury that under the rules of the company, it was the duty of the deceased engineer to inspect the engine before using it: Galveston & C. R. Co. v. Smith, 24 Tex. Civ. App. 127; s. c. 57 S. W. Rep. 999. Compare Cole v. Warren Man. Co., 63 N. J. L. 626; s. c. 44 Atl. Rep. 647; Watson v. Duncan, 47 App. Div. (N. Y.) 640; s. c. 62 N. Y. Supp. 257. Notice on railway grounds warning all persons to keep off the tracks at their peril, not applicable to servants of the railway company: Illinois & C. R. Co. v. Frelka, 110 Ill. 498.

⁷¹ Diamond State Iron Co. v. Bell, 2 Marv. (Del.) 303; s. c. 43 Atl. Rep. 161.

and dangers of a system of rules which is based upon that theory.⁷² If the master has adopted no rules for the protection of his servants, a servant who knows that fact assumes the risk incidental to such failure.⁷³

§ 4626. **Risk of Injury from Failing to Obey Rules which have been Abandoned or Revoked.**—With respect to rules which have been abandoned by a course of conduct, the authorities do not seem to be quite clear. It has been held that evidence that a rule of a railway company limiting the speed of its trains has been habitually disregarded, is admissible;⁷⁴ but evidence of occasional violations of a rule is not sufficient to prove that it has been abandoned or revoked, in the absence of evidence that the superior officers of the company knew of such violations.⁷⁵ And quite clearly, evidence that it was the custom of engineers, *seven years before the time under investigation*, to disregard a rule of the railroad company limiting the speed of trains, was not admissible to prove that the rule had been abandoned or revoked.⁷⁶

§ 4627. **Does Not Assume Risk of Danger which is Questionable or Debatable, etc.**—The rule that a servant assumes all the risks of dangers that are apparent to him when he enters the employment, is held not to apply when the danger is questionable or debatable, or when it is apparent only to those possessing peculiar skill and knowledge in such matters.⁷⁷

§ 4628. **Assumes Risk of an Unusual and Extra-Hazardous Method of Performing Work.**^a—In like manner, a servant assumes the risk of an unusual and extra-hazardous method of performing the work in which he engages, if the danger is obvious, and from his experience in the work he has full knowledge of the nature and extent of the risk.⁷⁸ So, where an employé was injured in loading rails on a

⁷² Little Rock &c. R. Co. v. Barry, 84 Fed. Rep. 944; s. c. 56 U. S. App. 37; 28 C. C. A. 644.

⁷³ Gulf &c. R. Co. v. Williams (Tex.), 39 S. W. Rep. 967 (no off. rep.). Compare Smith v. Lidgerwood Man. Co., 67 N. Y. Supp. 533; s. c. 56 App. Div. (N. Y.) 528, where a contrary conclusion was reached.

⁷⁴ Louisville &c. R. Co. v. Hiltner, 22 Ky. L. Rep. 1141; s. c. 60 S. W. Rep. 2 (no off. rep.); rev'g s. c. 21 Ky. L. Rep. 1826; 56 S. W. Rep. 654 (no off. rep.).

⁷⁵ Louisville &c. R. Co. v. Scanlon, 22 Ky. L. Rep. 1400; s. c. 60 S. W. Rep. 643 (no off. rep.).

⁷⁶ Louisville &c. R. Co. v. Scanlon, 22 Ky. L. Rep. 1400; s. c. 60 S. W. Rep. 643 (no off. rep.).

⁷⁷ Eddy v. Aurora Iron Co., 81 Mich. 548; s. c. 46 N. W. Rep. 17.

^a See *ante*, § 3808. Compare *ante*, § 4615.

⁷⁸ Claybaugh v. Kansas City &c. R. Co., 56 Mo. App. 630; Huda v. American Glucose Co., 154 N. Y. 474; s. c. 40 L. R. A. 411; 48 N. E. Rep.

moving car, it was held that he could not recover on the ground that the mode adopted was more perilous than loading rails on a stationary car, where he knew the mode adopted when he entered the service, as he assumed the risk.⁷⁹ Similarly, an experienced section-foreman who was injured while helping to unload ties from a moving train under the immediate direction of the division superintendent, was held to have assumed the risk, where he had often performed the same work before and knew the danger.⁸⁰ Where an employé was ordered by the master to make an incision in a steel beam by "chipping," instead of "blocking," as he had been doing, and it appeared that he had had experience in chipping castings, and was familiar with the danger from flying chips,—it was held that he assumed the risk of injury from chips striking him in the eye upon proceeding to "chip" the beam.⁸¹

§ 4629. Assumes Risk of Injury from Voluntarily Adopting a Dangerous instead of a Safe Method.—The servant who voluntarily elects to put himself in a dangerous position in the performance of his duty, when a safe place or safe method has been provided for him, assumes the risk of injury from the method which he chooses to employ.⁸² The meaning of this is that if the servant has the choice of two or more methods and chooses the more dangerous method, in consequence of which he is injured, whereas, if he had chosen the safer method, he would probably have escaped injury, his voluntary act in taking the more dangerous course, whether it be called acceptance of the risk or contributory negligence, prevents him from recovering damages from the master. For example, if a railroad yardman, in the performance of his duty of shifting and handling cars in a railroad-

897; aff'g s. c. 12 App. Div. (N. Y.) 624 (methods known to and acquiesced in by him, if they do not violate any statute—in this case, screwing down windows adjoining a fire-escape).

⁷⁹ *Cleveland & C. R. Co. v. Carr*, 95 Ill. App. 576 (his foot slipped under the wheel and was crushed).

⁸⁰ *Webb v. Gulf & C. R. Co.*, 27 Tex. Civ. App. 75; s. c. 65 S. W. Rep. 684.

⁸¹ *Smith v. Wilmington & C. R. Co.*, 129 N. C. 173; s. c. 39 S. E. Rep. 805. See also, *Beichert v. Reed*, 20 App. Div. (N. Y.) 635; s. c. 47 N. Y. Supp. 119 (employer failed to furnish tongs or other appliances proper and convenient for removing iron rails—employé assumed risk of injury from the rebounding of a rail when thrown upon other rails).

⁸² *Wabash R. Co. v. Propst*, 92 Ill. App. 485; *Morris v. Duluth & C. R. Co.*, 108 Fed. Rep. 747; s. c. 47 C. C. A. 661; *Deering v. Canfield & C. Co.*, 126 Mich. 373; s. c. 85 N. W. Rep. 874; 8 Det. Leg. N. 48 (new hand undertook to push out splinters with a stick instead of stopping the saw or removing the table,—assumed the risk of the stick breaking and of a consequent injury from the saw); *Hurst v. Kansas City & C. R. Co.*, 163 Mo. 309; s. c. 63 S. W. Rep. 695 (brakeman switching in yard started train forward and then attempted to mount it while it was moving slowly, instead of holding it stationary until he had boarded it,—and this although the unsafe condition of the yard caused him to slip).

yard, elects to ride upon the pilot of an engine, which is evidently not constructed for that purpose, and falls from that perch and is injured, he cannot complain that the slats of the pilot were not sufficient to afford him a reasonably safe footing.⁸³ So, although the master does not provide the safest appliances with which to do a given piece of work, if the servant nevertheless proceeds to do it in a manner which is less safe, he is thereby deemed (in one court at least) to accept the risk, it being open and obvious.⁸⁴

§ 4630. **Assumption of Risk where the Servant is Ordered to Perform a Dangerous Duty.**^a—The doctrine under this head,—more fully discussed hereafter when treating of the contributory negligence of the servant,⁸⁵—is, in substance, that if the servant is ordered by his master or by the vice-principal of his master to perform a dangerous duty, and if the servant sees nothing, or in the exercise of ordinary care for his own safety could see nothing, which indicates that it is dangerous, the law will not impute to him the assumption of the risk, but will hold him blameless, on the ground of his right to rely upon the exercise of ordinary care for his safety on the part of his master;⁸⁶ but that he is deemed to undertake the risk of a dangerous work, although ordered thereto by his master or by the representative of his master, if the danger is so obvious and apparent that an ordinarily prudent man under like circumstances would refuse to obey.⁸⁷ Upon

⁸³ Young v. Boston &c. R. Co., 69 N. H. 634; s. c. 41 Atl. Rep. 268.

⁸⁴ McLaughlin v. Camden Iron Works, 60 N. J. L. 557; s. c. 38 Atl. Rep. 677 (undertook to raise a large frame by hand, without a rigger with derrick and appliances). See also, McGoldrick v. Metcalf, 44 N. Y. St. Rep. 476; s. c. 18 N. Y. Supp. 169 (attempted to remove rough places from an iron cylinder weighing 1250 pounds without calling for assistance, which he might have had, to help him move the cylinder up an incline to enable him to do the work more conveniently,—took the risk of the breaking of a stick or rung used to hold the cylinder in place). Compare Wolf v. Great Northern R. Co., 72 Minn. 435; s. c. 75 N. W. Rep. 702; 4 Am. Neg. Rep. 413; 12 Am. & Eng. R. Cas. (N. S.) 619 (tore down a stone wall by commencing at the bottom first). See also, Lehman v. Bagley, 82 Ill. App. 197 (employé undertook, in connection with a fellow servant, without directions from the em-

ployer, to lower a stone by means of a derrick in a manner essentially different from that which had been invariably used before, knowing that the accustomed manner had proved to be safe, and being ignorant of the probable consequences of the new experiment,—assumed the risk of the new method adopted); Mayott v. Norcross, 24 R. I. 187; s. c. 52 Atl. Rep. 894 (experienced employé undertook to perform without assistance work which he knew was dangerous when so done, there being no emergency requiring him to do so).

^a Compare *post*, § 4663.

⁸⁵ Vol. V.

⁸⁶ Eichholz v. Niagara Falls Hydraulic &c. Co., 66 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; s. c. *aff'd*, 174 N. Y. 519 (*mem.*); Frank v. Bullion Beck &c. Co., 19 Utah 35; s. c. 5 Am. Neg. Rep. 733; 56 Pac. Rep. 419; *post*, § 4654.

⁸⁷ Christianson v. Pacific Bridge Co., 27 Wash. 582; s. c. 63 Pac. Rep. 191.

this question it has been well reasoned that where a servant is commanded, by one having the right to give him orders, to do an act obviously attended with danger, he has the right to assume that his master or his master's representative has exercised reasonable care to make the act reasonably safe, and that it is not attended with hidden perils of which the master has notice and of which the servant has no knowledge or reasonable means of knowledge.⁸⁸ The master, it has been reasoned, should, to a reasonable extent, watch for and find that which is not necessarily obvious, while the servant cannot overlook that which is apparent; and if ordered to do a particular thing, the servant has a right to assume that he will not be unnecessarily exposed to perils, and may rely on the implied assurance that there is no unnecessary danger.⁸⁹

§ 4631. Does Not Assume Risk of Temporary Conditions which are Unusual and Extraordinary.—It is difficult to frame a proposition under this head which can be supported by all the judicial decisions. When it is said that the servant assumes the ordinary risks of the employment, it is implied that he does not assume those risks which are extraordinary. And yet this statement of doctrine is challenged by decisions which are to the effect that if he is experienced in the line of his employment, he assumes the increased hazard resulting from the adoption by the master or the vice-principal of the master, under whom he is working, of an unusual and extra-hazardous method of doing the work, providing the danger proceeding therefrom is obvious, and the servant has full knowledge of the nature and extent of the risk.⁹⁰ A doctrine then, as formulated by other decisions, is that the servant does not assume unusual and extraordinary risks incident to the employment unless they are or ought to be known to and comprehended by him.⁹¹ It will, therefore, not do to formulate the proposition, as some courts have done, by saying that the servant is not held, as matter of law, to have assumed more than the ordinary risks pertaining to the service, by virtue of voluntarily entering into it.⁹² In order to exonerate him from an assumption of the risk, it ought, according to another view, to appear that the condition is not a fixed one, obvious or discoverable by the servant by such care as he ought to take

⁸⁸ *Hass v. Chicago &c. R. Co.*, 97 Ill. App. 624.

⁸⁹ *Hass v. Chicago &c. R. Co.*, *supra*.

⁹⁰ *Claybaugh v. Kansas City &c. R. Co.*, 56 Mo. App. 630.

⁹¹ *Dumas v. Stone*, 65 Vt. 442; s. c. 25 Atl. Rep. 1097.

⁹² *Texas &c. R. Co. v. Eberhart*, 91 Tex. 321; s. c. 43 S. W. Rep. 510; aff'g s. c. 40 S. W. Rep. 1060; *Moore Lime Co. v. Richardson*, 95 Va. 326; s. c. 64 Am. St. Rep. 785; 23 S. E. Rep. 334. See also, *Mallen v. Waldowski*, 101 Ill. App. 367.

to promote his own safety, but that it is a temporary one resulting from the negligence of the master, such as he ought not in law to be required to foresee and guard against.⁹³ Another court has framed the proposition that a servant will not be deemed to have consented to any unusual risk where he had no knowledge of the unusual danger, and could not, with ordinary care and prudence, have discovered it.⁹⁴ It was held in another case that an employé does not assume the risk of dangers or perils which arise solely out of extraordinary or exceptional circumstances, unless they are obvious to the senses.⁹⁵ The value of these more or less inconsistent propositions lies in the manner in which they are judicially applied; and when these judicial applications are held up to view and compared with each other, the seeming inconsistency among them will no doubt diminish.

§ 4632. **Assumes Risk of Inevitable or Inscrutable Accidents.**—It is not necessary to reason upon the conclusion that no recovery can be had by a servant from his master of damages for injuries visited upon the servant by what is variously called *casus*, inevitable or unavoidable accident, inscrutable accident, or *vis major*.⁹⁶ The reason for this conclusion is twofold: 1. The master is not liable to the servant for injuries arising in this way, seeing that he has been guilty of no negligence or other wrong;⁹⁷ 2. As the master is not liable for the injuries arising in this way, the servant necessarily assumes the risk of them.⁹⁸

⁹³ Within this description has been put the condition of an obstruction of the view of the track to a railway trainman by brush allowed to grow on the side of the track,—this, in the view of the court, not being a fixed condition—a doubtful view: *Oregon Short Line &c. R. Co. v. Tracy*, 66 Fed. Rep. 931.

⁹⁴ *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; s. c. 63 N. W. Rep. 941. See also, *Boyd v. Blumenthal*, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330 (assumes all ordinary risks of the employment, and all such dangers as are patent; but does not assume risks which cannot be seen or known in the exercise of ordinary care). For a declaration in an action which was held to show no more than ordinary and apparent risks, which a servant under the facts stated assumed, see *Coolbroth v. Maine &c. R. Co.*, 77 Me. 165.

⁹⁵ *Pittsburgh Bridge Co. v. Walker*, 170 Ill. 550; s. c. 48 N. E. Rep. 915; aff'g s. c. 70 Ill. App. 55.

⁹⁶ *Mancuso v. Cataract Constr. Co.*, 87 Hun (N. Y.) 519; s. c. 68 N. Y. St. Rep. 153; 34 N. Y. Supp. 273; *Yager v. Atlantic &c. R. Co.*, 4 Hughes (U. S.) 192; *Shailer &c. Co. v. Corcoran*, 21 Ohio C. C. 639; s. c. 11 Ohio C. D. 599 (injuries from the sliding of earth from the face of a tunnel which was being constructed under a lake).

⁹⁷ "What judgment shall I dread, doing no wrong?"—*Shak.*

⁹⁸ *Easton v. Houston &c. R. Co.*, 39 Fed. Rep. 65 (accident to a member of a bridge-gang which could not have been foreseen, at least by any one except the injured servant and other members of the gang, who were his fellow servants); *Ervin v. Evans*, 24 Ind. App. 335; s. c. 56 N. E. Rep. 725; *Kelley v. Cable Co.*, 8 Mont. 440; s. c. 20 Pac. Rep. 669 (doctrine of the text applied where a miner was injured by an explosion of a piece of giant powder which he struck with his pick while digging among loose rock).

But this does not exclude the operation of the well-known rule expressed in the Latin phrase *res ipsa loquitur*, elsewhere considered,⁹⁹ since there are many cases where the fact of the injury itself, in connection with evidence of the circumstances under which it takes place, demonstrates negligence on the part of the master.¹⁰⁰

§ 4633. Rule as to Assumption of Risk does not Apply where Relation of Master and Servant does not Exist.—The principle that a servant, knowing the hazards of the business, who is injured while engaged therein, cannot maintain an action against his master, does not apply where the relation of master and servant does not exist, and where the injury is caused by the negligence of a *third person* against whom recovery is sought, although one of the risks of his employment was exposure to the injury; but in such a case the third person may be liable.¹⁰¹

§ 4634. Effect of Express Contract between Master and Servant, by which the Servant Assumes the Risk.^{101a}—In the first place, it is a question to what extent public policy will uphold contracts between employer and employé, whereby the employer undertakes to release himself from the performance of those duties which but for the contract he would owe to the employé,—in other words, where he undertakes to contract against the consequences of his own negligence, or to contract for the privilege of killing or injuring his employé through negligence. It has been held on the one hand, that such a contract is against public policy,¹⁰² especially where it undertakes to release the master from precautions enjoined upon him by the statute law for

⁹⁹ Vol. I, § 15.

¹⁰⁰ So held where a piece of coal flew from a passing train, injuring a section-hand, who was standing near the track: *Gulf & C. R. Co. v. Wood* (Tex. Civ. App.), 63 S. W. Rep. 164 (no off. rep.).

¹⁰¹ *Pennsylvania Co. v. Backes*, 133 Ill. 255; s. c. 24 N. E. Rep. 563. But it has been held that the servants of separate *independent contractors* working about the same building assume the risk of each other's negligence; so that a servant of one contractor injured through the negligence of the servant of another contractor cannot recover in an action against such other contractor: *Murphy v. Altman*, 28 App. Div. (N. Y.) 472; s. c. 51 N. Y. Supp. 106. This doctrine seems to be untenable. Where the relation between the per-

son injured and the person furnishing the appliances from which the injury proceeds is rather that of proprietor and *independent contractor*,—as where the injured person has undertaken to do certain work for the proprietor at an agreed price,—then, if the contractor subsequently borrows an appliance from the proprietor to use in accomplishing his contract, it will be his duty to examine the appliance and to ascertain whether it is sufficiently strong for the purpose to which he puts it before making use of it, and he cannot make the proprietor responsible for the injury proceeding from any defect in it: *Larose v. Laforest*, Rap. Jud. Que. 17 C. S. 331.

^{101a} See *ante*, § 3848.

¹⁰² *Roesner v. Hermann*, 10 Biss. (U. S.) 486.

the protection of his servants.¹⁰³ Other courts discover nothing in such contracts offensive to public policy.¹⁰⁴ In one jurisdiction, an employé in a cotton-mill may, by his contract of hiring, agree not to hold his employer liable for any personal injury sustained while in his service, whether from explosion, the machinery, or accident, and thereby cover all negligence, including that of the employer in failing to keep the machinery in a safe condition and in omitting to have it properly inspected.¹⁰⁵ In another jurisdiction the express contract of a local employé of an express company, to assume the risks of his employment, has been held to include the risk of injuries by cars of a railroad company with which the express company does business, in an action against the railroad company.¹⁰⁶ In a Canadian jurisdiction, a workman may so contract with his employer as to exonerate the latter from liability for his negligence, and such renunciation will be an answer to an action for the negligent killing of the servant under Lord Campbell's Act; that is to say, the servant may not only contract to waive his own right to damages in case he is injured, but he may contract to waive the right of his widow to damages in case he is killed.¹⁰⁷ It is to be regretted that the Supreme Court of the United States has let itself down to this unsound and offensive doctrine.¹⁰⁸ A master may, of course, impose upon his servant reasonable rules, devised for the safe prosecution of his business; and an incorporated employer may exact from those applying for employment, as a condition of giving such employment, a stipulation that it shall not be liable in damages to the employé for disobedience of specified rules relating to the conduct of the employment, the same being, of course, reasonable,¹⁰⁹—such, for example, as a rule of a railroad company prohibit-

¹⁰³ Chicago &c. R. Co. v. Peterson, 39 Ill. App. 114; Mt. Olive &c. Coal Co. v. Herbeck, 92 Ill. App. 441; s. c. aff'd, 190 Ill. 39; 60 N. E. Rep. 105 (invalidity of agreement whereby mine-worker, in consideration of extra wages, waived the right to demand props in the mine, which a proprietor was required to use by statute); Louisville &c. R. Co. v. Orr, 91 Ala. 548; s. c. 8 South. Rep. 360 (under a statute). That stipulations between a contractor of Government work and the Government as to supervision by the Government did not have the effect of relieving the contractor of responsibility for negligence, whereby his own servant was injured,—see Callan v. Bull, 113 Cal. 993; s. c. 45 Pac. Rep. 1017.

¹⁰⁴ Galloway v. Western &c. R. Co., 57 Ga. 512 (in so far as they do not

operate to condone any crime); Western &c. R. Co. v. Bishop, 50 Ga. 465; Western &c. R. Co. v. Strong, 52 Ga. 461; Hendricks v. Western &c. R. Co., 52 Ga. 467.

¹⁰⁵ Fulton Bag &c. Mills v. Wilson, 89 Ga. 318; s. c. 15 S. E. Rep. 322.

¹⁰⁶ Pittsburgh &c. R. Co. v. Mahoney, 148 Ind. 196; s. c. 40 L. R. A. 101; 46 N. E. Rep. 917; 47 N. E. Rep. 404.

¹⁰⁷ Griffiths v. Earl of Dudley, 9 Q. B. Div. 357.

¹⁰⁸ Baltimore &c. R. Co. v. Voigt, 176 U. S. 498; s. c. 20 Sup. Ct. Rep. 385; 44 L. ed. 560; rev'g s. c. *sub nom.* Voigt v. Baltimore &c. R. Co. 79 Fed. Rep. 561 (case of an express messenger).

¹⁰⁹ Russell v. Richmond &c. R. Co., 47 Fed. Rep. 204; s. c. 10 Rail. & Corp. L. J. 413; *post*, § 4636.

ing brakemen from coupling or uncoupling cars without the use of a stick.¹¹⁰

§ 4635. Contracts Exonerating Master from Liability in Consideration of Allowing Servant to Participate in Railway Relief Fund, Hospital Fund, Sick Benefits, Accident and Death Benefits, etc.^{110a}—

The courts seem to be agreed that a contract between a railway company and its employé, whereby the latter, in consideration of being allowed to participate in certain sick, accident and relief funds devised by the company for the benefit of its employés, variously called railway relief fund, hospital fund, sick benefits, accident and death benefits, etc., agrees not to hold the company liable for an injury to him occurring through its negligence, is valid,¹¹¹ although this fund is created by an assessment laid upon the wages of the employés of the railway company.¹¹² An acceptance of benefits under such a contract, it has been held, works a complete accord and satisfaction of any claim for damages which the injured servant might otherwise have against the master.¹¹³ If the contract leaves it optional with the servant to accept such benefits or sue for damages, and he accepts the benefits, such an acceptance creates an accord and satisfaction, and bars an action to recover damages.¹¹⁴

¹¹⁰ *Russell v. Richmond & C. R. Co.*, 47 Fed. Rep. 204; s. c. 10 Rail. & Corp. L. J. 413 (notwithstanding brakemen and others on the trains of the company habitually coupled cars without using sticks, within the knowledge of conductors, who could not be held to represent the company so as to waive rules); *Finley v. Richmond & C. R. Co.*, 59 Fed. Rep. 419. One court has, however, held that a contract that an employé will not attempt to couple or uncouple a car unless he knows the coupling is in the proper condition, is an invalid attempt to impose on him a duty which the law imposes upon the master to see that the implements are in a reasonably safe state of repair: *Missouri & C. R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. Rep. 879 (no off. rep.).

^{110a} See *ante*, § 3853.

¹¹¹ *Petty v. Brunswick & C. R. Co.*, 109 Ga. 666; s. c. 35 S. E. Rep. 82; *Railway Co. v. Cox*, 55 Ohio St. 516; s. c. 35 L. R. A. 512; *Eckman v. Chicago & C. R. Co.*, 169 Ill. 312; s. c. 48 N. E. Rep. 496; 38 L. R. A. 750; *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529; s. c. 30 Atl. Rep.

492; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; s. c. 37 N. E. Rep. 423; *Clements v. London & C. R. Co.*, [1894] 2 Q. B. 482 (contract of an infant releasing liability under Employers' Liability Act, in consideration of benefits accruing under the rules of an insurance company formed among the employés, toward the fund of which the company contributes).

¹¹² *Petty v. Brunswick & C. R. Co.*, 109 Ga. 666; s. c. 35 S. E. Rep. 82. Such a contract is not in violation of the provision of a statute that contracts between master and servant, in consideration of employment, whereby the master is exempted from liability to the servant for negligence, as such liability is now fixed by law, shall be void as against public policy: *Petty v. Brunswick & C. R. Co.*, *supra*.

¹¹³ *Petty v. Brunswick & C. R. Co.*, 109 Ga. 666; s. c. 35 S. E. Rep. 82.

¹¹⁴ *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; s. c. 37 N. E. Rep. 423; *Fuller v. Baltimore & C. Relief Assn.*, 67 Md. 433; s. c. 10 Atl. Rep. 237.

§ 4636. **Rules of Employer, Putting the Risks of the Service upon the Employé.**^{114a}—An employer may make rules and regulations for the conduct of his business, and these will be upheld, in so far as they are *reasonable*, although they put the risk of the service upon the employé and exonerate the employer therefrom, either in their substance or in the particular application which is made of them; but not where they are *unreasonable* or *oppressive*,—such as a regulation of a railroad company making it the duty of the track-foremen to protect themselves against all trains, regular and extra, without giving them any notice whatever of the extra trains;¹¹⁵ or a rule requiring railway brakemen to make careful inspections of brakes, ladders, etc., before using them, where a reasonable time and opportunity are not allowed, nor proper appliances furnished, for making such an inspection;¹¹⁶ or a rule that the regular compensation for services covers all risks, and that remaining in the service will be considered an acceptance of this condition of employment, where the servant has not, in express terms, agreed to it;¹¹⁷ or where he has agreed to it;¹¹⁸ or a rule which attempts to exempt the employer from liability under a statute requiring him to furnish and maintain suitable materials and appliances, and making it the right of the employé to presume that he has done so,—such a rule being wholly inoperative and affording no protection to the employer.¹¹⁹ But a contract embodied in a printed application for employment by a railway company, by which the servant undertakes to make a careful examination of all things near the tracks so that he may understand the dangers attending them, has been held not contrary to a statute which provides that no person or corporation can, by special contract with their employés, become exempt from its liabilities to them for injuries suffered by them in their employment which result from the employer's own negligence, or that of any other person in his employ.¹²⁰

^{114a} See *ante*, § 3849.

¹¹⁵ *Willis v. Atlantic & C. R. Co.*, 122 N. C. 905; s. c. 29 S. E. Rep. 941.

¹¹⁶ *Chicago & C. R. Co. v. Fry*, 131 Ind. 319; s. c. 28 N. E. Rep. 989.

¹¹⁷ *Georgia Pac. R. Co. v. Dooly*, 86 Ga. 294; s. c. 12 L. R. A. 342; 12 S. E. Rep. 923 (rule was contained in a printed book of rules handed to him when he was employed, but was not particularly called to his attention).

¹¹⁸ *Richmond & C. R. Co. v. Jones*, 92 Ala. 218; s. c. 9 South. Rep. 276 (rule was contained in written contract of employment).

¹¹⁹ *Memphis & C. R. Co. v. Graham*, 94 Ala. 545; s. c. 10 South. Rep. 283.

¹²⁰ *Quinn v. New York & C. R. Co.*, 175 Mass. 150; s. c. 55 N. E. Rep. 891.

ARTICLE II. AS TO THE SERVANT'S KNOWLEDGE OR MEANS OF KNOWLEDGE OF THE RISKS.

SECTION

- 4640. Proviso that the servant has the knowledge or the means of knowledge of the danger.
- 4641. Does not assume risk of unknown, unseen, latent or obscure dangers.
- 4642. When servant does not accept risk of unknown dangers.
- 4643. Rule where servant has same means of knowledge that master has.
- 4644. When servant presumed to have knowledge of defect or danger.
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SECTION

- 4648. Which generally presents a question for a jury.
- 4649. Duty of servant to inspect, examine and find out for himself.
- 4650. Servant not under the same duty to inspect as master is.
- 4651. What the servant is not required to find out and know.
- 4652. Assumption of risk where servant knows of the defect but does not know of nor appreciate the danger.
- 4653. Servant assumes risk of latent dangers not discoverable either by himself or by his master.
- 4654. When servant may assume that master has done his duty.

§ 4640. **Proviso that the Servant has the Knowledge or the Means of Knowledge of the Danger.**—Most of the decisions annex to the statement of doctrine that the servant assumes all the ordinary risks of the employment, the proviso that the servant had knowledge,¹ or the means of knowledge of the danger,—as where

¹An illustration of this is furnished by the case where the servant was acquainted with the danger through observation, experience, instruction, or familiarity with the dangerous surroundings or with the dangerous thing,—as in the following cases:—*Southern R. Co. v. Harbin*, 110 Ga. 808; s. c. 36 S. E. Rep. 218; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630; s. c. 45 N. E. Rep. 817; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; s. c. 27 Chic. Leg. N. 62; 38 N. E. Rep. 52; *Kuhns v. Wisconsin & C. R. Co.*, 70 Iowa 561; *Carey v. Sellers*, 41 La.

An. 500; s. c. 6 South. Rep. 813; *Kenney v. Hingham Cordage Co.*, 168 Mass. 278; s. c. 47 N. E. Rep. 117; *Leham v. Van Nostrand*, 165 Mass. 233; s. c. 42 N. E. Rep. 1125; *Kelley v. Calumet Woolen Co.*, 177 Mass. 128; s. c. 58 N. E. Rep. 182; *Anderson v. Clark*, 155 Mass. 368; s. c. 29 N. E. Rep. 589; *Lynch v. Sagamore Man. Co.*, 143 Mass. 206; *Wood v. Heiges*, 83 Md. 257; s. c. 34 Atl. Rep. 872; *Nephew v. Whitehead*, 123 Mich. 255; s. c. 81 N. W. Rep. 1083 (knew as much about the danger as any one); *La Pierre v. Chicago & C. R. Co.*, 99 Mich. 212;

it is obvious and apparent;² or capable of being known to

s. c. 58 N. E. Rep. 60; *Rutherford v. Chicago & C. R. Co.*, 57 Minn. 237; s. c. 59 N. W. Rep. 302; *Yazoo City Transp. Co. v. Smith*, 78 Miss. 140; s. c. 28 South. Rep. 807; *Fugler v. Bothe*, 117 Mo. 475; s. c. 22 S. W. Rep. 1113; *Collins v. Laconia Car Co.*, 68 N. H. 196; s. c. 33 Atl. Rep. 1047; *Dube v. Gay*, 69 N. H. 670; s. c. 46 Atl. Rep. 1049; *Nourie v. Theobald*, 68 N. H. 564; s. c. 41 Atl. Rep. 182 (exercised his own judgment, with full knowledge of the facts); *Regan v. Palo*, 62 N. J. L. 30; s. c. 5 Am. Neg. Rep. 63; 41 Atl. Rep. 364; *Dillenberger v. Weingartner*, 64 N. J. L. 292; s. c. 45 Atl. Rep. 638; *De Forest v. Jewett*, 23 Hun (N. Y.) 490; *Cordelia v. Dwyer*, 9 Misc. (N. Y.) 399; s. c. 61 N. Y. St. Rep. 690; 29 N. Y. Supp. 1073; *Rohan v. Metropolitan St. R. Co.*, 69 N. Y. St. Rep. 570; s. c. 59 App. Div. (N. Y.) 250; *French v. Aulls*, 72 Hun (N. Y.) 442; s. c. 54 N. Y. St. Rep. 866; 25 N. Y. Supp. 188; *Wooster v. Bliss*, 90 Hun (N. Y.) 79; s. c. 35 N. Y. Supp. 126; 70 N. Y. St. Rep. 126; *Fannessey v. Western U. Tel. Co.*, 6 Misc. (N. Y.) 322; s. c. 56 N. Y. St. Rep. 253; 26 N. Y. Supp. 796; *Benda v. Keil*, 63 N. Y. Supp. 971; s. c. 31 Misc. (N. Y.) 812; *Standtke v. Swits Conde Co.*, 53 App. Div. (N. Y.) 500; s. c. 65 N. Y. Supp. 942; *Maylor v. New York & C. R. Co.*, 33 Fed. Rep. 801; *Roth v. Northern & C. Lumbering Co.*, 18 Or. 205; s. c. 22 Pac. Rep. 842; *Beucker v. Baker*, 21 Ohio C. C. 540; s. c. 11 Ohio C. D. 642; *Weeklund v. Southern Or. Co.*, 20 Or. 591; s. c. 27 Pac. Rep. 260; *Trainor v. Philadelphia & C. R. Co.*, 137 Pa. St. 148; s. c. 20 Atl. Rep. 632; *Kelley v. Baltimore & C. R. Co. (Pa.)*, 11 Atl. Rep. 659 (no off. rep.); *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711; s. c. 18 S. W. Rep. 387; *Gulf & C. R. Co. v. Hernandez (Tex. Civ. App.)*, 45 S. W. Rep. 197 (no off. rep.); *Hogele v. Wilson*, 5 Wash. 160; s. c. 31 Pac. Rep. 469; *Burnell v. West Side R. Co.*, 87 Wis. 387; s. c. 58 N. W. Rep. 772; *Schultz v. Chicago & C. R. Co.*, 67 Wis. 616; s. c. 58 Am. Rep. 881.

² *Boyd v. Indian Head Mills*, 131 Ala. 356; s. c. 31 South. Rep. 80 (servant emptying coal-cars assumed risk of stop-blocks at end of

trestle splitting when struck by car-wheels); *Fordyce v. Stafford*, 57 Ark. 503; s. c. 22 S. W. Rep. 161; *Moline Plow Co. v. Anderson*, 19 Ill. App. 417; s. c. aff'd, 24 Ill. App. 364; 38 Ill. App. 537 (tool so obviously defective that no prudent person would have used it); *Illinois River Paper Co. v. Albert*, 49 Ill. App. 365; *United States Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474 (continuing to operate an obviously defective machine); *Swift & Co. v. Campbell*, 97 Ill. App. 360 (risk of pushing loaded tanks over uneven and slippery floor in packing-house); *McBride v. Indianapolis Frog & C. Co.*, 5 Ind. App. 482; s. c. 32 N. E. Rep. 579; *Day v. Cleveland & C. R. Co.*, 137 Ind. 206; s. c. 36 N. E. Rep. 854 (could easily have seen it if he had looked); *Lebanon v. McCoy*, 12 Ind. App. 500; s. c. 40 N. E. Rep. 700; *O'Neal v. Chicago & C. R. Co.*, 132 Ind. 110; s. c. 31 N. E. Rep. 669; *Lanyon Zinc Co. v. Bell*, 64 Kan. 739; s. c. 68 Pac. Rep. 609; *Chesapeake & C. R. Co. v. McDowell*, 16 Ky. L. Rep. 1; s. c. 24 S. W. Rep. 607 (no off. rep.); *Jenkins v. Maginnis Cotton Mills*, 51 La. An. 1011; s. c. 25 South. Rep. 643 (assumes the risk incident to his choice of a method which, in view of certain unusual conditions which he had himself brought about the day previous, is obviously dangerous, where there are other safe methods which might be adopted, although he is not informed of the danger); *Merchant v. Pine Woods Lumber Co.*, 107 La. 463; s. c. 31 South. Rep. 878; *Goldthwait v. Haverrhill & C. R. Co.*, 160 Mass. 554; s. c. 36 N. E. Rep. 486 (had ample opportunity to observe it); *Neal and v. Lynn & C. R. Co.*, 173 Mass. 42; s. c. 53 N. E. Rep. 137; *McIntire v. White*, 171 Mass. 170; s. c. 50 N. E. Rep. 524; *Tenanty v. Boston Man. Co.*, 170 Mass. 323; s. c. 49 N. E. Rep. 654 (risk that a strip of hard wood, if it falls on rapidly revolving circular saw, will be violently thrown forward, is obvious to adult and experienced employé) [limiting and distinguishing *Hanson v. Ludlow Man. Co.*, 162 Mass. 187 (boy unfamiliar with use of circular saw)]; *Gibbons v. Brit-*

the servant by the exercise on his part of ordinary care

ish &c. Steam Nav. Co., 175 Mass. 212; s. c. 55 N. E. Rep. 937; Smith v. Beaudry, 175 Mass. 286; s. c. 56 N. E. Rep. 596 (held that the defects were obvious to a person of ordinary intelligence, and that plaintiff, having long been familiar with the work, and having had several months' experience, assumed the risk); Hoard v. Blackstone Man. Co., 177 Mass. 69; s. c. 58 N. E. Rep. 180; De Souza v. Stafford, 155 Mass. 476; s. c. 30 N. E. Rep. 81; Brady v. Ludlow Man. Co., 154 Mass. 468; s. c. 28 N. E. Rep. 901; Goddard v. McIntosh, 161 Mass. 253; s. c. 37 N. E. Rep. 169; Coombs v. Fitchburg R. Co., 156 Mass. 200; s. c. 30 N. E. Rep. 1140; Lothrop v. Fitchburg R. Co., 150 Mass. 423; s. c. 23 N. E. Rep. 227; 41 Am. & Eng. R. Cas. 327; Storrs v. Michigan Starch Co., 126 Mich. 666; s. c. 8 Det. Leg. N. 182; 86 N. W. Rep. 134 (plaintiff 22 years of age and inexperienced, but all the conditions were open and obvious); Ragon v. Toledo &c. R. Co., 97 Mich. 265; s. c. 56 N. W. Rep. 612; Smith v. Peninsular Car Works, 60 Mich. 501; s. c. 27 N. W. Rep. 662; 1 Am. St. Rep. 542; Lamotte v. Boyce, 105 Mich. 545; s. c. 2 Det. Leg. N. 161; 63 N. W. Rep. 517 (defects were obvious and could not escape ordinarily careful observation); Brewer v. Flint &c. R. Co., 56 Mich. 620; s. c. 23 N. W. Rep. 440; Fisher v. Chicago &c. R. Co., 77 Mich. 546; s. c. 43 N. E. Rep. 926; Quick v. Minnesota Iron Co., 47 Minn. 361; s. c. 50 N. W. Rep. 244; Doyle v. St. Paul &c. R. Co., 42 Minn. 79; s. c. 43 N. W. Rep. 787; 41 Am. & Eng. R. Cas. 376; Hefferen v. Northern &c. R. Co., 45 Minn. 471; s. c. 48 N. W. Rep. 1; Manley v. Minneapolis Paint Co., 76 Minn. 169; Goins v. Chicago &c. R. Co., 37 Mo. App. 221 (unless his youth and inexperience excuse his ignorance of the danger); Wray v. Southwestern Electric Light &c. Co., 68 Mo. App. 380; Shea v. Kansas City &c. R. Co., 76 Mo. App. 29; s. c. 1 Mo. App. Repr. 478; Keegan v. Kavanaugh, 62 Mo. 230; Nolan v. Shickle, 3 Mo. App. 300; Covey v. Hannibal &c. R. Co., 86 Mo. 635; Union Stock-Yards Co. v. Goodwin, 57 Neb. 138; s. c. 77 N. W. Rep. 357; 12 Am. & Eng. R. Cas. (N. S.) 502 (when he

knows of them or they are apparent and obvious to persons of his experience and understanding); Dehning v. Detroit Bridge &c. Works, 46 Neb. 556; s. c. 2 Am. & Eng. Corp. Cas. (N. S.) 645; 65 N. W. Rep. 186; Collins v. Laconia Car Co., 68 N. H. 196; s. c. 38 Atl. Rep. 1047; Young v. Boston &c. R. Co., 69 N. H. 634; s. c. 41 Atl. Rep. 268; Dillingberger v. Weingartner, 64 N. J. L. 292; s. c. 45 Atl. Rep. 638 (and he is bound to use his eyes to see that which is open and apparent); Saunders v. Eastern Hydraulic Pressed-Brick Co., 63 N. J. L. 554; s. c. 44 Atl. Rep. 630; Johnson v. Devoe Snuff Co., 62 N. J. L. 417; s. c. 5 Am. Neg. Rep. 191; 41 Atl. Rep. 936; Foley v. Jersey City Electric Light Co., 54 N. J. L. 411; s. c. 24 Atl. Rep. 487 (provided the master has not induced the servant to remain by a promise to remove the danger); Coyle v. Griffing Iron Co., 63 N. J. L. 609; s. c. 44 Atl. Rep. 665; 47 L. R. A. 147; aff'g s. c. 62 N. J. L. 540; 41 Atl. Rep. 680; Robbins v. Brownville Paper Co., 65 N. Y. Supp. 955; s. c. 53 App. Div. (N. Y.) 641; Williams v. Delaware &c. R. Co., 116 N. Y. 628; s. c. 22 N. E. Rep. 111; 27 N. Y. St. Rep. 760; 41 Am. & Eng. R. Cas. 254; Miller v. Grieme, 65 N. Y. Supp. 813; s. c. 53 App. Div. (N. Y.) 276; Johnson v. Oregon &c. R. Co., 23 Or. 94; s. c. 31 Pac. Rep. 283; Disano v. New England Steam Brick Co., 20 R. I. 452; s. c. 4 Am. Neg. Rep. 219; 40 Atl. Rep. 7 (assumes risk of working near unguarded hole in slippery floor where the conditions are obvious and there is no exigency or unusual circumstances demanding his exclusive attention); Ferguson v. Phoenix Cotton Mills, 106 Tenn. 236; s. c. 61 S. W. Rep. 53; St. Louis &c. R. Co. v. Lemon, 83 Tex. 143; s. c. 18 S. W. Rep. 331; Gulf &c. Co. v. Schwabbe, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706 (no amount of prudence on the part of an employé will relieve him of the risk of work undertaken by him which is patent and obviously dangerous); International &c. R. Co. v. Story, 26 Tex. Civ. App. 23; s. c. 62 S. W. Rep. 130; Gulf &c. R. Co. v. Hohl (Tex. Civ. App.), 29 S. W. Rep. 1131 (no off. rep.); Son-

and observation,³ or by such an inspection as the nature of

nefield v. Mayton (Tex. Civ. App.), 39 S. W. Rep. 166; s. c. 1 Am. Neg. Rep. 711 (no off. rep.) (risk of danger from the negligent manner in which lumber is piled); Southwest Va. Imp. Co. v. Andrew, 86 Va. 270; s. c. 9 S. E. Rep. 1015; 17 Wash. L. Rep. 599; 6 Rail. & Corp. L. J. 252; Robare v. Seattle Traction Co., 24 Wash. 577; s. c. 64 Pac. Rep. 784; French v. First Ave. R. Co., 24 Wash. 83; s. c. 63 Pac. Rep. 1108; Relyea v. Tomahawk Pulp & Co., 110 Wis. 307; s. c. 85 N. W. Rep. 960; Sladky v. Marinette Lumber Co., 107 Wis. 250; s. c. 83 N. W. Rep. 514; Herold v. Pfister, 92 Wis. 417; s. c. 66 N. W. Rep. 355; Osborne v. Lehigh Valley Coal Co., 97 Wis. 27; s. c. 71 S. W. Rep. 814 (adult employé is presumed to have known and appreciated all such risks of the employment as were open and obvious to a man of ordinary apprehension); Baker v. Barber Asphalt Pav. Co., 92 Fed. Rep. 117; English v. Chicago & C. R. Co., 24 Fed. Rep. 606 (although the master ordered the servant into the place of danger); Anglin v. Texas & C. R. Co., 60 Fed. Rep. 553; McGrath v. Texas & C. R. Co., 60 Fed. Rep. 555; Anderson v. Winston, 31 Fed. Rep. 528; American Dredging Co. v. Walls, 84 Fed. Rep. 428; s. c. 55 U. S. App. 460; 28 C. C. A. 441. In an action for injuries caused by a shingle-bolt falling from a defective conveyor onto a table at which plaintiff was working, evidence that it was common for bolts to fall down the conveyor-trough, but that plaintiff had never known of one falling back upon the table or out of the trough, was insufficient to show that the danger was obvious and the risk assumed: Shoemaker v. Bryant Lumber & Co., 27 Wash. 637; s. c. 68 Pac. Rep. 380.

³ Denver Tramway Co. v. Nesbit, 22 Colo. 408; s. c. 45 Pac. Rep. 405; 4 Am. & Eng. R. Cas. (N. S.) 605; Western & C. R. Co. v. Bradford, 113 Ga. 276; s. c. 38 S. E. Rep. 823; Goff v. Toledo & C. R. Co., 28 Ill. App. 529 (holding that the law will infer knowledge of defects in machinery which the servant might have discovered by the exercise of ordinary care); Chicago & C. R. Co. v. Stevens, 80 Ill. App. 671; Stuart

v. New Albany Man. Co., 15 Ind. App. 184; s. c. 43 N. E. Rep. 961; Pennsylvania Co. v. Witte, 15 Ind. App. 583; s. c. 43 N. E. Rep. 319; 44 N. E. Rep. 377; 3 Am. & Eng. Corp. Cas. (N. S.) 629 (holding that a servant will be held to have known of dangerous defects which were discoverable by the exercise of ordinary care in discharging his duty); Louisville & C. R. Co. v. Quinn, 14 Ind. App. 554; s. c. 43 N. E. Rep. 240; Lumley v. Caswell, 47 Iowa 159; Money v. Lower Vein Coal Co., 55 Iowa 671 (and continues in the service without protest); Heath v. Whitebreast & C. Coal Co., 65 Iowa 737; Louisville & C. R. Co. v. Miller, 15 Ky. L. Rep. 699 (no off. rep.) [see Lasch v. Stratton, 101 Ky. 672; s. c. 19 Ky. L. Rep. 889; 42 S. W. Rep. 756]; Holman v. Kemp, 70 Minn. 422; s. c. 73 N. W. Rep. 186; Smith v. Winona & C. R. Co., 42 Minn. 87; s. c. 43 N. W. Rep. 968; 41 Am. & Eng. R. Cas. 289; Alcorn v. Chicago & C. R. Co., 108 Mo. 81 (not only such risks as are incident to the business in which he engages and the duties he undertakes to perform, but also such risks as should become apparent to him by ordinary observation, or are readily discernible by a person of his age and capacity when in the exercise of ordinary care, or where his means of knowledge are equal to those of the employer, or where he discovers the unusual risks and makes no complaint); Moore v. St. Louis Wire Mill Co., 55 Mo. App. 491 (assumes all risks arising from defective appliances of which he knew, or which were so obvious as not to escape the observation of an ordinarily prudent person); Benjamin Atha & Co. v. Costello (N. J.), 5 Am. Neg. Rep. 655; s. c. 42 Atl. Rep. 766 (no off. rep.); Western U. Tel. Co. v. McMullen, 58 N. J. L. 155; s. c. 33 Atl. Rep. 384; 32 L. R. A. 351; 2 Am. & Eng. Corp. Cas. (N. S.) 588 (assumes the ordinary risks of his employment, and also special risks known to him or which he could have known by the exercise of reasonable care and skill); Cielfield v. Browning, 9 Misc. (N. Y.) 98; s. c. 29 N. Y. Supp. 710; Wainwright v. Lake

the employment admits of,⁴ always having regard to the age,⁵ experience,⁶ and capacity;⁷ and provided that, in case he is young or inex-

Shore &c. R. Co., 11 Ohio C. D. 530; Gulf &c. R. Co. v. Williams, 72 Tex. 159; s. c. 12 S. W. Rep. 172; Nix v. Texas &c. R. Co., 82 Tex. 473; s. c. 18 S. W. Rep. 571; Galveston &c. R. Co. v. Garrett, 73 Tex. 262; s. c. 13 S. W. Rep. 62; Bookrum v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. Rep. 919 (no off. rep.); Latremouille v. Bennington &c. R. Co., 63 Vt. 336; s. c. 48 Am. & Eng. R. Cas. 265; 22 Atl. Rep. 656; Nadau v. White River Lumber Co., 76 Wis. 120; s. c. 43 N. W. Rep. 1135; Haley v. Jump River Lumber Co., 81 Wis. 412; s. c. 51 N. W. Rep. 321, 956; Mexican Cent. R. Co. v. Murray, 42 C. C. A. 334; s. c. 102 Fed. Rep. 264.

⁴Wright v. Pacific Coast Oil Co. (Cal.), 53 Pac. Rep. 1086 (no off. rep.); Dartmouth Spinning Co. v. Achard, 84 Ga. 14; s. c. 10 S. E. Rep. 449; 6 L. R. A. 190; Roddy v. Missouri &c. R. Co., 104 Mo. 234; LaCroy v. New York &c. R. Co., 132 N. Y. 570 (he and his fellow brakeman having neglected to test the condition of the brakes before beginning the descent, though familiar with the road and the liability of the brakes to get out of order while such trains were moving over steep grades); Flood v. Western U. Tel. Co., 131 N. Y. 603; s. c. 43 N. Y. St. Rep. 302; 30 N. E. Rep. 196 (telegraph company not liable for the death of a lineman caused by the breaking of a defective cross-arm of a telegraph-pole while he was resting his whole weight upon it, where he failed to make the proper inspection before climbing upon it); Cooper v. Butler, 103 Pa. St. 412 (it is the duty of the employé to inspect the tramway which he was required to operate, and to report defects therein). That the servant is not ordinarily bound to institute an inspection where the premises or the machine or appliance seems safe, see *post*, § 4649, *et seq.*

⁵Marbury Lumber Co. v. Westbrook, 121 Ala. 179; s. c. 25 South. Rep. 914; Davis v. St. Louis &c. R. Co., 53 Ark. 117; s. c. 13 S. W. Rep. 801; 7 L. R. A. 283; Fisk v. Central Pac. R. Co., 72 Cal. 38; s. c. 13 Pac. Rep. 144; Mullin v. California

Horseshoe Co., 105 Cal. 77; s. c. 38 Pac. Rep. 535; Foley v. California Horseshoe Co., 115 Cal. 184; s. c. 47 Pac. Rep. 42 (does not necessarily assume the increased risk from a defective appliance, although he is aware thereof, and an adult with the same knowledge would assume such increased risk); Jones v. Roberts, 57 Ill. App. 56; Nelson Man. Co. v. Stolzenburg, 59 Ill. App. 628 (does not assume the risk of putting a belt on a pulley near running circular saws at the express direction of his superior, without warning of the danger); American Strawboard Co. v. Foust, 12 Ind. App. 421; s. c. 39 N. E. Rep. 891; Evansville &c. R. Co. v. Maddux, 134 Ind. 571; s. c. 33 N. E. Rep. 345; 34 N. E. Rep. 511; Anderson v. Illinois &c. R. Co., 109 Iowa 524; s. c. 80 N. W. Rep. 561; Dowling v. Allen, 6 Mo. App. 195 (hidden danger); Sheetram v. Trexler Stave &c. Co., 13 Pa. Super. Ct. 219; Kehler v. Schwenck, 151 Pa. St. 505; s. c. 31 W. N. C. (Pa.) 201; 31 Am. St. Rep. 777; 25 Atl. Rep. 130; Wolski v. Knapp-Stout &c. Co., 90 Wis. 178; s. c. 63 N. W. Rep. 87 (no presumption that a minor employé assumes the risks of an employment which has elements of danger not open and obvious to the inexperienced); Felton v. Girardy, 43 C. C. A. 439; s. c. 104 Fed. Rep. 127.

⁶Neubauer v. Northern &c. R. Co., 60 Minn. 130; s. c. 61 N. W. Rep. 912; Slacer v. Field Engineering Co., 54 N. Y. St. Rep. 335; s. c. 4 Misc. (N. Y.) 493; 24 N. Y. Supp. 550; Bowers v. Star Logging &c. Co., 41 Or. 301; s. c. 68 Pac. Rep. 516 (young and inexperienced servant did not assume risk incident to walking along ties while attempting to set brakes on a logging-train, the

⁷McCarreagher v. Rogers, 120 N. Y. 526; s. c. 24 N. E. Rep. 812; 31 N. Y. St. Rep. 595 (the knowledge of a child employed to operate a machine, of its dangerous or defective character, does not impose upon him absolutely the same degree of responsibility as it imposes upon an adult, but his responsibility depends upon his appreciation of, and ability to comprehend, the danger).

perienced, the master has given him suitable warning and instruction;⁸ provided also,—in the opinion of some courts, variously expressed,—not only that the source of danger was known or apparent, but also that the *risk* proceeding from it was *appreciated*, or might have been appreciated by the exercise of ordinary care, and was so threatening that a person of ordinary prudence would not encounter it by remaining in the service;⁹ provided further, that after discovering the

danger of being thrown under the cars not being obvious); *Galveston &c. R. Co. v. Renz*, 24 Tex. Civ. App. 335; s. c. 59 S. W. Rep. 280 (a charge in favor of defendant, excluding the issue of plaintiff's inexperience and want of knowledge of the danger, was properly refused); *Hill v. Southern Pac. Co.*, 23 Utah 94; s. c. 63 Pac. Rep. 814; *Thompson v. Edward P. Allis Co.*, 89 Wis. 523; s. c. 62 N. W. Rep. 527; *Felton v. Girardy*, 43 C. C. A. 439; s. c. 104 Fed. Rep. 127; *Louisville &c. R. Co. v. Miller*, 43 C. C. A. 436; s. c. 104 Fed. Rep. 124.

⁸ *Davis v. St. Louis &c. R. Co.*, 53 Ark. 117; s. c. 13 S. W. Rep. 801; 7 L. R. A. 283; *Fisk v. Central Pac. R. Co.*, 72 Cal. 38; s. c. 13 Pac. Rep. 144; *Mullin v. California Horse-shoe Co.*, 105 Cal. 77; s. c. 38 Pac. Rep. 535; *Nelson Man. Co. v. Stolzenburg*, 59 Ill. App. 528 (does not assume the risk of putting a belt on a pulley near running circular saws at the express direction of his superior, without warning of the danger); *American Strawboard Co. v. Foust*, 12 Ind. App. 421; s. c. 39 N. E. Rep. 891; *Evansville &c. R. Co. v. Maddux*, 134 Ind. 571; s. c. 33 N. E. Rep. 345; 34 N. E. Rep. 511; *Anderson v. Illinois &c. R. Co.*, 109 Iowa 524; s. c. 80 N. W. Rep. 561; *Slacer v. Field Engineering Co.*, 54 N. Y. St. Rep. 335; s. c. 4 Misc. (N. Y.) 493; 24 N. Y. Supp. 550; *Kehler v. Schwenck*, 151 Pa. St. 505; s. c. 31 W. N. C. (Pa.) 201; 31 Am. St. Rep. 777; 25 Atl. Rep. 130; *Thompson v. Edward P. Allis Co.*, 89 Wis. 523; s. c. 62 N. W. Rep. 527; *Felton v. Girardy*, 43 C. C. A. 439; s. c. 104 Fed. Rep. 127; *Louisville &c. R. Co. v. Miller*, 43 C. C. A. 436; s. c. 104 Fed. Rep. 124.

⁹ *Southern R. Co. v. Guyton*, 122 Ala. 231; s. c. 25 South. Rep. 34; *Bjorman v. Fort Bragg Redwood Co.*, 104 Cal. 626; s. c. 38 Pac. Rep. 451;

Chicago &c. R. Co. v. Knapp, 176 Ill. 127; s. c. 52 N. E. Rep. 927; aff'g s. c. 74 Ill. App. 148; *Wierzbicky v. Illinois Steel Co.*, 94 Ill. App. 400 (it is a question of fact for the jury to determine whether the danger from the use of the appliance was so imminent and apparent that no man of ordinary prudence, having knowledge of it, would have incurred it); *Howe v. Mederis*, 82 Ill. App. 515; *Batchelor v. Union Stock Yard &c. Co.*, 88 Ill. App. 395 (instruction omitting this element erroneous); *Chicago &c. R. Co. v. Merriman*, 86 Ill. App. 454; *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; s. c. aff'd, 175 Ill. 325; 51 N. E. Rep. 709; *Chicago &c. R. Co. v. Kinnare*, 76 Ill. App. 394; *Stomne v. Hanford Produce Co.*, 108 Iowa 137; s. c. 78 N. W. Rep. 841; *Ashland Coal &c. R. Co. v. Wallace*, 101 Ky. 626; s. c. 19 Ky. L. Rep. 849; 42 S. W. Rep. 744; rehearing denied, 43 S. W. Rep. 207; 19 Ky. L. Rep. 857; *Faren v. Sellers*, 39 La. An. 1011; s. c. 3 South. Rep. 363; *Frye v. Bath Gas &c. Co.*, 94 Me. 17; s. c. 46 Atl. Rep. 804; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155; s. c. 45 Alb. L. J. 166; 29 N. E. Rep. 464; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153; s. c. 5 Am. St. Rep. 832; 33 N. W. Rep. 551; *Snedea v. Libera*, 65 Minn. 337; s. c. 68 N. W. Rep. 36; *Cook v. St. Paul &c. R. Co.*, 34 Minn. 45; s. c. 24 N. W. Rep. 311; *Russell v. Minneapolis &c. R. Co.*, 32 Minn. 230; s. c. 20 N. W. Rep. 147; *Harriman v. Kansas City Star Co.*, 81 Mo. App. 124; *Hurst v. Kansas City &c. R. Co.*, 163 Mo. 309; s. c. 63 S. W. Rep. 695; *Soeder v. St. Louis &c. R. Co.*, 100 Mo. 673; s. c. 13 S. W. Rep. 714; *Donahoe v. Kansas City*, 136 Mo. 657; s. c. 38 S. W. Rep. 571; *Compton v. Omaha &c. R. Co.*, 82 Mo. App. 175; *Watson v. Kansas &c. Coal Co.*, 52 Mo. App. 366; *Berning v. Medart*, 56 Mo. App. 443; *Griffen*

source of danger and the risk thereby incurred, the servant elects to remain in the service without objection or complaint;¹⁰ unless he has

v. Ithaca St. R. Co., 71 N. Y. Supp. 140; s. c. 62 App. Div. (N. Y.) 551; Davidson v. Cornell, 132 N. Y. 228; s. c. 43 N. Y. St. Rep. 887; 30 N. E. Rep. 573; Stager v. Troy Laundry Co., 38 Or. 480; s. c. 63 Pac. Rep. 645; Galveston & C. R. Co. v. Smith (Tex.), 57 S. W. Rep. 999 (no off. rep.); Craven v. Smith, 89 Wis. 119; s. c. 61 N. W. Rep. 317 (the true test being whether an ordinarily prudent person of his age and experience, under like circumstances, would have appreciated the danger and risk). *Opposing Cases*: More or less opposed to the doctrine of the foregoing text, are the following cases:—Louisville & C. R. Co. v. Kemper, 147 Ind. 561; Feely v. Pearson Cordage Co., 161 Mass. 426; Kohn v. McNulta, 147 U. S. 241; s. c. 37 L. ed. 152; Detroit Crude-Oil Co. v. Grable, 36 C. C. A. 94; s. c. 94 Fed. Rep. 73; Norman v. Wabash R. Co., 22 U. S. App. 505; s. c. 62 Fed. Rep. 727; 10 C. C. A. 617; Clow v. Boltz, 92 Fed. Rep. 572.

¹⁰ Louisville & C. R. Co. v. Orr, 91 Ala. 548; s. c. 8 South. Rep. 360; Fordyce v. Edwards, 60 Ark. 438; s. c. 30 S. W. Rep. 758 (defect in locomotive-engine discovered on the trip); Colorado Fuel & C. Co. v. Cummings, 8 Colo. App. 541; s. c. 46 Pac. Rep. 875; Swift v. O'Neill, 187 Ill. 337; s. c. 58 N. E. Rep. 416; aff'g s. c. 88 Ill. App. 162 (question for jury whether he assumed the risk); Ames v. Quigley, 75 Ill. App. 446; Munn v. L. Wolff Man. Co., 94 Ill. App. 122; Illinois & C. R. Co. v. Neer, 31 Ill. App. 126; Buhle v. Harland, 37 Ill. App. 350; Morris v. Gleason, 4 Ill. App. 395; Chicago Packing & C. Co. v. Rohan, 47 Ill. App. 640; Pennsylvania Co. v. Witte, 15 Ind. App. 583; s. c. 43 N. E. Rep. 319; 44 N. E. Rep. 377; 3 Am. & Eng. Corp. Cas. (N. S.) 629; Sheets v. Chicago & C. Coal R. Co., 139 Ind. 682; s. c. 39 N. E. Rep. 154; Perigo v. Chicago & C. R. Co., 52 Iowa 276; Meedham v. Louisville & C. R. Co., 85 Ky. 423; s. c. 3 S. W. Rep. 797; Norton v. Louisville & C. R. Co., 16 Ky. L. Rep. 846; s. c. 30 S. W. Rep. 599 (no off. rep.); Pollich v. Sellers, 42 La. An.

623; s. c. 7 South. Rep. 786; Smith v. Sellars, 40 La. An. 527; s. c. 4 South. Rep. 333; Conley v. American Exp. Co., 87 Me. 352; s. c. 32 Atl. Rep. 965; Gillen v. Patten & C. R. Co., 93 Me. 80; s. c. 44 Atl. Rep. 361; Cunningham v. Bath Iron Works, 92 Me. 502; s. c. 43 Atl. Rep. 106; Feeley v. Pearson Cordage Co., 161 Mass. 426; s. c. 37 N. E. Rep. 368 (although he does not know the precise extent or character of the injury he is liable to sustain therefrom); Miner v. Connecticut River R. Co., 153 Mass. 398; Sullivan v. India Man. Co., 113 Mass. 396; Mahoney v. Dore, 155 Mass. 513; s. c. 30 N. E. Rep. 366 (question for the jury whether servant assumed the risk); Goodridge v. Washington Mills Co., 160 Mass. 234; s. c. 35 N. E. Rep. 484; Adams v. Kansas & C. Coal Co., 85 Mo. App. 486; Benham v. Taylor, 66 Mo. App. 308; Winkler v. St. Louis Basket & C. Co., 137 Mo. 394; s. c. 38 S. W. Rep. 921; Price v. Hannibal & C. R. Co., 77 Mo. 508; Porter v. Hannibal & C. R. Co., 71 Mo. 66; Hamman v. Central Coal & C. Co., 156 Mo. 232; s. c. 56 S. W. Rep. 1091 (whether he assumed the risk was a question for a jury); Harney v. Missouri Pac. R. Co., 80 Mo. App. 667; s. c. 2 Mo. App. Repr. 675 (evidence under which the question was properly submitted to the jury); Golden v. Seighardt, 33 App. Div. (N. Y.) 161; s. c. 53 N. Y. Supp. 460; Shields v. Robins, 3 App. Div. (N. Y.) 582; s. c. 73 N. Y. St. Rep. 708; 33 N. Y. Supp. 214; Fitzgerald v. Elsas Paper Co., 30 Misc. (N. Y.) 438; s. c. 62 N. Y. St. Rep. 597; Rafferty v. Toledo Traction Co., 19 Ohio C. C. 288; s. c. 10 Ohio C. D. 347 (question for the jury); Chaddick v. Lindsay, 5 Okla. 616; s. c. 49 Pac. Rep. 940; Marean v. New York & C. R. Co., 167 Pa. St. 220; s. c. 31 Atl. Rep. 562; Grabowski v. Pennsylvania Steel Co., 2 Dauph. Co. Rep. (Pa.) 118; Bussey v. Charleston & C. R. Co., 52 S. C. 438; s. c. 11 Am. & Eng. R. Cas. (N. S.) 474; 30 S. E. Rep. 477 (question for the jury); Lasure v. Graniteville Man. Co., 18 S. C. 275 (question for a jury); Fletcher v. Louisville & C. R. Co.,

apprised the master of the defect, as it is his duty to do,¹¹ and has been induced to remain in the service by the master's promise to repair it, as hereafter stated.¹²

102 Tenn. 1; s. c. 6 Am. Neg. Rep. 204; 49 S. W. Rep. 739; Texas &c. R. Co. v. Bingle, 9 Tex. Civ. App. 322; s. c. 29 S. W. Rep. 674; Texas &c. R. Co. v. Bryant, 8 Tex. Civ. App. 134; s. c. 27 S. W. Rep. 825; Rogers v. Galveston City R. Co., 76 Tex. 502; s. c. 13 S. W. Rep. 540; Houston &c. R. Co. v. Myers, 55 Tex. 110; Oliver v. Ohio River R. Co., 42 W. Va. 703; s. c. 26 S. E. Rep. 444; Relyea v. Tomahawk Pulp &c. Co., 110 Wis. 307; s. c. 85 N. W. Rep. 960; Powell v. Ashland Iron &c. Co., 98 Wis. 35; s. c. 73 N. W. Rep. 573 (even though such danger results from the violation of some statutory requirement on the subject); Naylor v. Chicago &c. R. Co., 53 Wis. 661; Birmingham v. Petit, 21 D. C. 209; s. c. 21 Wash. L. Rep. 115; The Saratoga, 87 Fed. Rep. 349; Poll v. Hewitt, 23 Ont. Rep. 619. *Contra*, see Simpson v. New York Rubber Co., 80 Hun (N. Y.) 415; s. c. 30 N. Y. St. Rep. 339.

¹¹Thomas v. Bellamy, 126 Ala. 253; s. c. 28 South. Rep. 707; Limberg v. Glenwood Lumber Co., 127 Cal. 598; s. c. 60 Pac. Rep. 176; Pennsylvania Co. v. Lynch, 90 Ill. 333 (employé owes a duty to his employer and to his fellow employées to call attention to the defect); Chicago &c. R. Co. v. Merriman, 86 Ill. App. 454 (failure of employé to note and report defects is contributory negligence); Allerton Packing Co. v. Egan, 86 Ill. 253 (same doctrine); Illinois &c. R. Co. v. Pummill, 58 Ill. App. 83 (same doctrine); East St. Louis Pack. Co. v. McElroy, 29 Ill. App. 504; Peoria &c. R. Co. v. Hardwick, 48 Ill. App. 562; Pennsylvania Co. v. Burgett, 7 Ind. App. 338; s. c. 33 N. E. Rep. 914; 34 N. E. Rep. 650; Reitman v. Stolte, 120 Ind. 314; s. c. 22 N. E. Rep. 304; Missouri &c. R. Co. v. Young, 4 Kan. App. 219; s. c. 45 Pac. Rep. 963; Mundle v. Hill Man. Co., 86 Me. 400; Cunningham v. Merrimac Paper Co., 163 Mass. 89; s. c. 39 N. E. Rep. 774; Leary v. Boston &c. R. Co., 139 Mass. 580; s. c. 52 Am. Rep. 733; Fitzgerald v. Connecticut River Pa-

per Co., 155 Mass. 155; Peppett v. Michigan &c. R. Co., 119 Mich. 640; s. c. 6 Det. Leg. N. 30; 78 N. W. Rep. 900; Chicago &c. R. Co. v. McGinnis, 49 Neb. 649; s. c. 68 N. W. Rep. 1057; Johnson v. Devoe Snuff Co., 62 N. J. L. 417; s. c. 5 Am. Neg. Rep. 191; 41 Atl. Rep. 936; Recka v. Ocean S. S. Co., 3 Misc. (N. Y.) 526; s. c. 52 N. Y. St. Rep. 417; 23 N. Y. Supp. 3; Maitland v. Cleveland &c. R. Co., 7 Ohio N. P. 353; s. c. 5 Ohio Dec. 636; Gropp v. Carnegie Steel Co., 4 Pa. Super. Ct. 621; s. c. 40 W. N. C. (Pa.) 405; Lineoski v. Susquehanna Coal Co., 157 Pa. St. 153; s. c. 33 W. N. C. (Pa.) 204; 27 Atl. Rep. 577; New York &c. R. Co. v. Lyons, 119 Pa. St. 324; s. c. 13 Atl. Rep. 205; 21 W. N. C. (Pa.) 277; Ross v. Chicago &c. R. Co., 2 McCreary (U. S.) 235 (duty to give notice of the negligence or incompetency of a fellow servant); Washington &c. R. Co. v. McDade, 135 U. S. 554; s. c. 34 L. ed. 235; 10 Sup. Ct. Rep. 1044; 42 Alb. L. J. 175; 18 Wash. L. Rep. 526.

¹²Limberg v. Glenwood Lumber Co., 127 Cal. 598; s. c. 60 Pac. Rep. 176; Burlington &c. R. Co. v. Liehe, 17 Colo. 280; s. c. 29 Pac. Rep. 175; Glass v. Chicago &c. R. Co., 41 Ill. App. 87; Illinois &c. R. Co. v. Swisher, 53 Ill. App. 411; Legnard v. Lage, 57 Ill. App. 223; Morris v. Gleason, 4 Ill. App. 395; s. c. on prior appeal, 1 Ill. App. 510; Worden v. Humeston &c. R. Co., 72 Iowa 201; s. c. 33 N. W. Rep. 629 ("the rule is that *where an employe voluntarily elects to incur a risk without promise of its removal, and which he need not incur, he assumes the risk*"); Breckinridge &c. Syndicate v. Murphy, 18 Ky. L. Rep. 915; s. c. 38 S. W. Rep. 700 (no off. rep.); Wood v. Heiges, 83 Md. 257; s. c. 34 Atl. Rep. 872; Lewis v. New York &c. R. Co., 153 Mass. 73; Pauck v. St. Louis Dressed Beef &c. Co., 159 Mo. 467; s. c. 61 S. W. Rep. 806; Nugent v. Kauffman Mill Co., 131 Mo. 241; s. c. 33 S. W. Rep. 428; Recka v. Ocean S. S. Co., 3 Misc. (N. Y.) 526; s. c. 52 N. Y. St. Rep. 417; 23 N. Y. Supp. 3; Maitland v.

§ 4641. **Does Not Assume Risk of Unknown, Unseen, Latent or Obscure Dangers.**—On the other hand, the servant does not accept the risks of unknown, latent, unseen, or obscure defects or dangers, such as the servant would not discover by the exercise of ordinary care and prudence, having reference to his situation, but such as the master ought to discover by exercising the duty of inspection which the law puts upon him to the end of seeing that the premises, tools and appliances with respect to which the servant is required to labor are in a reasonably safe condition;¹³ since the servant is not, in general,—ex-

Cleveland &c. R. Co., 7 Ohio N. P. 353; s. c. 5 Ohio Dec. 636; Fick v. Jackson, 3 Pa. Super. Ct. 378; s. c. 39 W. N. C. (Pa.) 534; The Saratoga, 87 Fed. Rep. 349.

¹³ Boyd v. Blumenthal, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330 (assumes ordinary risks of employment and such dangers as are patent, but not such risks as cannot be seen or known by exercise of ordinary care); Winship Mach. Co. v. Burger, 110 Ga. 296; s. c. 35 S. E. Rep. 120 (where servant has, by the exercise of ordinary care, no means of knowing the defects in the machinery supplied); Illinois &c. R. Co. v. Orr, 56 Ill. App. 260 (no notice of defect and no opportunity to inspect); Indiana &c. R. Co. v. Bundy, 152 Ind. 590; s. c. 5 Am. Neg. Rep. 569; 1 Repr. (Ind.) 735; 14 Am. & Eng. R. Cas. (N. S.) 660; 53 N. E. Rep. 175 (servant not chargeable with the assumption of a risk as an incident of his employment, unless the presence of danger is obvious from such appearances as should put a man of ordinary prudence and caution upon his guard); Daly v. Kiel, 106 La. 170; s. c. 30 South. Rep. 254 (holding that one cannot be understood as contracting to take on himself risks which are not apparent, and of which he has not been informed or warned against at the time of his employment); Myhan v. Louisiana Electric Light &c. Co., 41 La. An. 964; s. c. 6 South. Rep. 799; 7 L. R. A. 172; Faren v. Sellers, 39 La. An. 1011; s. c. 3 South. Rep. 363; Burton v. Missouri Pac. R. Co., 32 Mo. App. 455; Nicholds v. Crystal Plate-Glass Co., 126 Mo. 55; s. c. 28 S. W. Rep. 991 (where the defect is not open to observation in its ordinary use; Herdler v. Buck's Stove

&c. Co., 136 Mo. 3; s. c. 37 S. W. Rep. 115 (defects in machinery or appliances which are unknown to him, but which are known to the master, or which, by exercise of ordinary care by the master, should be known to him); Clowers v. Wabash &c. R. Co., 21 Mo. App. 213; Dowling v. Allen, 6 Mo. App. 195; Union Stock-Yards Co. v. Goodwin, 57 Neb. 138; s. c. 77 N. W. Rep. 357; 12 Am. & Eng. R. Cas. (N. S.) 502; Chicago &c. R. Co. v. Kellogg, 54 Neb. 127; s. c. 74 N. W. Rep. 454; s. c. aff'd on rehearing, 55 Neb. 748; 76 N. W. Rep. 462; Evan v. Meredith &c. Co., 69 N. H. 664; s. c. 38 Atl. Rep. 1099 (risk accepted where servant not ignorant of any fact material to his safety); Di Vito v. Cragge, 35 App. Div. (N. Y.) 155; s. c. 55 N. Y. Supp. 64; Heavey v. Hudson River Water Power &c. Co., 57 Hun (N. Y.) 339; s. c. 32 N. Y. St. Rep. 565; 10 N. Y. Supp. 585; Kiras v. Nichols Chemical Co., 69 N. Y. St. Rep. 44; s. c. 59 App. Div. (N. Y.) 79; Duggan v. Third Ave. R. Co., 9 Misc. (N. Y.) 158; s. c. 59 N. Y. St. Rep. 681; 29 N. Y. Supp. 13; aff'g s. c. 8 Misc. (N. Y.) 89; 58 N. Y. St. Rep. 816; 28 N. Y. Supp. 598; Wooden v. Western New York &c. R. Co., 5 Misc. (N. Y.) 537; s. c. 25 N. Y. Supp. 977; 58 N. Y. St. Rep. 112; Davidson v. Cornell, 31 N. Y. St. Rep. 982; s. c. 10 N. Y. Supp. 521; s. c. rev'd on other grounds, 132 N. Y. 228; 30 N. E. Rep. 573; Byrne v. Eastmans Co., 163 N. Y. 461; s. c. 57 N. E. Rep. 738; rev'g s. c. 50 N. Y. Supp. 457; 27 App. Div. (N. Y.) 270; Jarvis v. Northern New York Marble Co., 67 N. Y. Supp. 78; s. c. 55 App. Div. (N. Y.) 272; Spaulding v. O'Brien, 26 Misc. (N. Y.) 184; s. c. 56 N. Y. Supp. 1095; Johnson v. Richmond

cept where he has agreed to do so by contract with his master,¹⁴—required to institute *special inspections* for the purpose of discovering hidden dangers.¹⁵

§ 4642. **When Servant does Not Accept Risk of Unknown Dangers.**—It is believed that most of the decisions which bear upon the question will support the statement that the servant does not accept the risk of dangers which are not obvious or which have not been made known to him, or of conditions of which he has been kept in ignorance, unless his ignorance is due to his own culpable negligence,—the rule being here, as elsewhere,¹⁶ that negligent ignorance is, in law, tantamount to actual knowledge. This view is predicated upon the premises that the master has been negligent in creating the danger or

&c. R. Co., 81 N. C. 453; Fort Worth &c. R. Co. v. Kime, 21 Tex. Civ. App. 271; s. c. 51 S. W. Rep. 558; s. c. aff'd, 94 Tex. 649 (*mem.*); 54 S. W. Rep. 240; Galveston &c. R. Co. v. McCray (Tex. Civ. App.), 43 S. W. Rep. 275 (no off. rep.) (where he could not have discovered the defective loading by inspection); Lehigh Valley Coal Co. v. Warreck, 84 Fed. Rep. 866; s. c. 55 U. S. App. 437; 28 C. C. A. 540; Carpenter v. Mexican &c. R. Co., 39 Fed. Rep. 315; s. c. 17 Wash. L. Rep. 630; 6 Rail. & Corp. L. J. 327.

¹⁴See Pratt v. Lake Shore &c. R. Co., 63 Hun (N. Y.) 616; s. c. 45 N. Y. St. Rep. 715; 18 N. Y. Supp. 682; s. c. aff'd, 136 N. Y. 654. For cases where a rule of the master, made known to the servants, required the servant to perform the duty of inspection, see Louisville &c. Co. v. Pearson, 97 Ala. 211; s. c. 12 South. Rep. 176; Terre Haute &c. R. Co. v. Pruitt, 25 Ind. App. 227; s. c. 57 N. E. Rep. 949.

¹⁵Little Rock &c. R. Co. v. Voss (Ark.), 18 S. W. Rep. 172 (no off. rep.); Chicago &c. R. Co. v. Bragonier, 119 Ill. 51 (the question whether it was his duty to know the condition of the wheel was one of fact for the jury); Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; s. c. 20 N. E. Rep. 287 (no legal presumption that it is the duty of the conductor of a railway freight-train to inspect the cars and machinery of his train); Morton v. Detroit &c. R. Co., 81 Mich. 423; s. c. 46 N. W. Rep. 111; Nicholds

v. Crystal Plate-Glass Co., 126 Mo. 55; s. c. 28 S. W. Rep. 991 (unless it was such employé's duty to make the examination or he was guilty of contributory negligence); Schaal v. Heck, 17 Ohio C. C. 38; s. c. 8 Ohio C. D. 596; Spronk v. Addyston Pipe &c. Co., 19 Ohio C. C. 714; s. c. 10 Ohio C. D. 675; Lake Shore &c. R. Co. v. Corcoran, 14 Ohio C. C. 377; s. c. 6 Ohio C. D. 773; 3 Ohio Dec. 641; Gulf &c. R. Co. v. Kelly (Tex. Civ. App.), 34 S. W. Rep. 140 (no off. rep.); Missouri &c. R. Co. v. Hanning, 91 Tex. 347; s. c. 43 S. W. Rep. 508; rev'g s. c. 41 S. W. Rep. 196; Gulf &c. R. Co. v. Warner, 22 Tex. Civ. App. 167; s. c. 54 S. W. Rep. 1064; Bookrum v. Galveston &c. R. Co. (Tex. Civ. App.), 57 S. W. Rep. 919 (no off. rep.) (instruction erroneous which casts upon the servant the duty of inspection and inquiry); Houston &c. R. Co. v. Kelly (Tex. Civ. App.), 35 S. W. Rep. 878 (no off. rep.) (a similar instruction held misleading); New Orleans &c. R. Co. v. Clements, 40 C. C. A. 465; s. c. 100 Fed. Rep. 415. Circumstances where it was held an error to grant a nonsuit in an action against a contractor to recover damages for injuries to his workmen in a trench in consequence of a beetle flying off the handle while it was being used in driving lumber along the sides of the trench: Daly v. Lee, 167 N. Y. 537; s. c. 60 N. E. Rep. 1109; aff'g s. c. 39 App. Div. (N. Y.) 188; 57 N. Y. Supp. 293.

¹⁶Vol. I, § 8; *post*, § 4647.

in allowing it to exist, and that the servant has not been negligent in failing to acquire knowledge of it.¹⁷ It has been held that an employé

¹⁷ See generally, as supporting the doctrine of the text: *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256; s. c. 68 Pac. Rep. 771 (miner injured by detaching of a hook, unfit for the purpose, being used, unknown to him, to lower lumber, though he knew it was safe for lowering and raising ore-buckets); *Boyd v. Blumenthal*, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330 (assumes ordinary risks of employment and such dangers as are patent, but not such as cannot be seen or known in exercise of ordinary care); *Chicago &c. R. Co. v. Scanlan*, 170 Ill. 106; s. c. 48 N. E. Rep. 826; aff'g s. c. 67 Ill. App. 621 (brickmason injured by defective scaffolding which he had no opportunity to inspect); *Chicago &c. R. Co. v. Gillison*, 173 Ill. 264; s. c. 50 N. E. Rep. 657; 64 Am. St. Rep. 117; aff'g s. c. 72 Ill. App. 207; *Fraser v. Collier*, 75 Ill. App. 194 (ordinary laborer employed in a foundry ordered to use a dangerous apparatus with which he had had no experience); *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; s. c. 12 N. E. Rep. 380; 9 West. Rep. 825; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; s. c. 38 N. E. Rep. 52; 27 Chic. Leg. N. 62; *East Chicago Iron &c. Co. v. Williams*, 17 Ind. App. 573; s. c. 47 N. E. Rep. 26 (risk not assumed where employé cannot discover defect by use of ordinary care); *Stucke v. Orleans R. Co.*, 50 La. An. 172; s. c. 23 South. Rep. 342 (does not assume risks which he neither knows, suspects, nor has reason to look for); *Drapeau v. International Paper Co.*, 96 Me. 299; s. c. 52 Atl. Rep. 647 (inexperienced laborer did not assume risk of dangers from operation of wire cable used in drawing logs from water, where they were not called to his attention and he had no knowledge of them); *Baltimore &c. R. Co. v. Stricker*, 51 Md. 47; *Hogarth v. Pocasset Man. Co.*, 167 Mass. 225; s. c. 45 N. E. Rep. 629 (trap-door left open without notice or warning to servant, who did not know of existence of the trap-door); *Gilbert v. Guild*, 144 Mass. 601; s. c. 4 N. Eng. Rep. 648; 12 N. E. Rep. 368 (if the serv-

ant did not know of the danger, proof that the master could not have guarded against it would be no defense); *Littlefield v. Edward P. Allis Co.*, 177 Mass. 151; s. c. 58 N. E. Rep. 692 (could not be said that the risk was obvious, and had been assumed by plaintiff); *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555; s. c. 42 N. E. Rep. 108 (railroad employé who undertakes to push a hand-car across a trestle does not assume the risk arising from a defective plank therein of which he has no knowledge); *Breen v. Field*, 157 Mass. 277; s. c. 31 Am. L. Reg. 28; 31 N. E. Rep. 1075 (cannot be held to have assumed a risk where he was ignorant of the facts on which a proper appreciation of the risk depended); *Scanlon v. Boston &c. R. Co.*, 147 Mass. 484; s. c. 18 N. E. Rep. 209; 7 N. Eng. Rep. 141 (unless he knows the danger or it is so obviously evident that he will be presumed to have known it); *Piette v. Bavarian Brew. Co.*, 91 Mich. 605; s. c. 52 N. W. Rep. 152; *Chilson v. Lansing Wagon Works*, 128 Mich. 43; s. c. 8 Det. Leg. N. 520; 87 N. W. Rep. 79 (not deemed to have assumed the risk of operating a double saw, he not knowing its dangerous character); *Hayes v. Stearns*, 130 Mich. 287; s. c. 9 Det. Leg. N. 15; 89 N. W. Rep. 947 (servant in new building injured by falling through open trap-door in platform while helping to carry a box; was not warned of its existence, and the platform was completed and apparently used as a way by employés); *Olmscheid v. Nelson-Tenney Lumber Co.*, 66 Minn. 61; s. c. 68 N. W. Rep. 605 (risk not as matter of law assumed by using bolting-saw for three weeks without carriage attachment, where none was on it at any time while employé used it and he did not know the danger of so using it); *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142; s. c. 88 N. W. Rep. 436 (servant employed about derrick, the boom of which broke, but not charged with its management, nor any duty respecting it, nor with respect to inspecting it, and not shown to have known its condition,

does not, because he knows of one defect, take the risk of another of which he has no knowledge; and if both contribute to injure him, he

did not assume risk); *Plefka v. Knapp-Stout Lumber Co.*, 72 Mo. App. 309 (defects in appliance not known or plainly obvious—not assumed); *Beard v. American Car Co.*, 72 Mo. App. 583 (defects in appliance not known and not so open and obvious that ordinarily prudent person would have discovered them); *Edwards v. Tilton Mills*, 70 N. H. 574; s. c. 50 Atl. Rep. 102 (assumes risk of such dangers only as are incident to his employment, or which, if due to peculiar methods of the master, are known to him or could be known by exercise of reasonable care—does not necessarily assume risk of iron rod projecting into dark passageway which he has never used before, but has seen other employés use); *Lechman v. Hooper*, 52 N. J. L. 253; s. c. 19 Atl. Rep. 215 (notice of danger given to one employé does not affect another employé not notified); *Daly v. Lee*, 167 N. Y. 537 (*mem.*); s. c. 60 N. E. Rep. 1109; aff'g s. c. 39 App. Div. (N. Y.) 188; 57 N. Y. Supp. 293; 6 Am. Neg. Rep. 150 (servant does not assume the risk of a defective beetle, which he has not inspected, *in the hands of another employe*, so as to preclude recovery for injuries from being struck by the head of the beetle as it flies from the handle); *Lawlor v. French*, 14 Misc. (N. Y.) 497; s. c. 70 N. Y. St. Rep. 721; 35 N. Y. Supp. 1077; 28 Chic. Leg. N. 125 (kicked by a vicious horse, not knowing its vicious character); *Dervin v. Herrman*, 58 N. Y. Super. 193; s. c. 31 N. Y. St. Rep. 179; 9 N. Y. Supp. 722 (injured from elevator being out of order while, unknown to him, undergoing repairs); *Di Vito v. Crago*, 35 App. Div. (N. Y.) 155; s. c. 55 N. Y. Supp. 64; *Sims v. Lindsay*, 122 N. C. 678; s. c. 30 S. E. Rep. 19 (must affirmatively appear that servant knew of the risk, or machinery must have been so grossly or clearly defective that she must have known of it); *St. Louis &c. R. Co. v. Mayfield*, 25 Tex. Civ. App. 207; s. c. 60 S. W. Rep. 896 (evidence warranted the finding that servant did not know the dangerous

condition of a bridge, and hence did not assume the risk); *Missouri &c. R. Co. v. Walden*, 27 Tex. Civ. App. 567; s. c. 66 S. W. Rep. 584 (servant ordered by foreman to lift over an obstruction a brace which was being pulled from under a building by means of a rope, assumed only risk of dangers open and apparent or known to him, and not the danger from negligence of foreman in ordering other employés to pull on the rope while he was so engaged); *Gulf &c. R. Co. v. Hayden*, 29 Tex. Civ. App. 280; s. c. 68 S. W. Rep. 530 (evidence that a machine and its appliances were open to the view of the operator, who understood its operation and had used it for seven weeks, but did not know of any defects; but that the inspector, also, did not discover the defect, which was such as to require an inspection to discover it,—justified a finding that plaintiff did not know of the defect and had not assumed the risk); *Missouri &c. R. Co. v. Follin*, 29 Tex. Civ. App. 512; s. c. 68 S. W. Rep. 810 (fireman ignorant of rule requiring engineer to have train under control under certain circumstances, did not assume risk of latter's violation of rule); *Texas &c. R. Co. v. Gardner*, 29 Tex. Civ. App. 90; s. c. 69 S. W. Rep. 217 (ordinary laborer not warned of danger of poisoning from immersing machinery in hot lye and caustic soda, and blowing dirt off with a steam-jet, whereby particles flew in his face, did not assume risk); *Johnson v. Ashland First Nat. Bank*, 79 Wis. 414; s. c. 48 N. W. Rep. 712 (does not assume the risk of falling of a shed within which he is at work, from the weight of debris and snow allowed by the master to remain upon its roof, when he is ignorant of the presence of such weight); *McDougall v. Ashland Sulphite Fibre Co.*, 97 Wis. 382; s. c. 73 N. W. Rep. 327 (the evidence tending to show that servant had neither knowledge nor experience sufficient to enable him to judge as to the danger attending the shifting of the belt in the manner in which he had been instructed, question of assumption

is entitled to recover, provided the accident would not have happened but for the unknown defect.¹⁸

§ 4643. **Rule where Servant has Same Means of Knowledge that Master Has.**—A servant is deemed to accept the risk where he has the same knowledge or means of knowledge of the danger that the master has.¹⁹ This does not mean that a servant is equally chargeable with

of risk was for the jury); *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; s. c. 17 Wash. L. Rep. 630; 6 Rail. & Corp. L. J. 327 (brakeman used defective appliance of which he was ignorant).

¹⁸ *Missouri Pac. R. Co. v. Somers*, 78 Tex. 439; s. c. 14 S. W. Rep. 779.

¹⁹ As in the following cases: *Hazelhurst v. Brunswick Lumber Co.*, 94 Ga. 535; s. c. 19 S. E. Rep. 756; *Stewart v. Seaboard & R. Co.*, 115 Ga. 624; s. c. 41 S. E. Rep. 981; *Anderberg v. Chicago & R. Co.*, 98 Ill. App. 207 (where peril is obvious, and no explanation by master can make it more apparent to the ordinary intelligence than does the mere view of it, the doctrine of unknown dangers incident to a known defect does not apply); *Wabash & R. Co. v. Thompson*, 15 Ill. App. 117; *Poznanski v. Szczech*, 71 Ill. App. 670 (fall of unbraced scaffolding; condition as obvious to plaintiff as to defendant, who built it, both being carpenters); *Salem Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27; s. c. 38 N. E. Rep. 538; *Stalder v. Huntington*, 153 Ind. 354; s. c. 55 N. E. Rep. 88; *Ames v. Lake Shore & R. Co.*, 135 Ind. 363; s. c. 35 N. E. Rep. 117; *Guedelhofer v. Ernsting*, 22 Ind. App. 188; s. c. 53 N. E. Rep. 113; *Wortman v. Minich*, 28 Ind. App. 31; s. c. 62 N. E. Rep. 85 (experienced employé oiling moving machinery, and injured by cogwheels which were unprotected and had been exposed for a number of days, in plain view); *Diamond Plate-glass Co. v. Dehority*, 143 Ind. 381; s. c. 40 N. E. Rep. 681; *Baltimore & R. Co. v. Welsh*, 17 Ind. App. 505; s. c. 47 N. E. Rep. 182 (brakeman on construction-train passing over road not yet open for traffic); *Kentucky & R. Co. v. Eastman*, 7 Ind. App. 514; s. c. 34 N. E. Rep. 835; *Baltimore & R. Co. v. Spaulding*, 21 Ind. App. 323; s. c. 1 Repr. (Ind.) 467; 52 N. E. Rep.

410; *Missouri & R. Co. v. Young*, 4 Kan. App. 219; s. c. 45 Pac. Rep. 963; *Quigley v. Thomas G. Plant Co.*, 165 Mass. 368; s. c. 43 N. E. Rep. 205; *Connors v. Morton*, 160 Mass. 333; s. c. 35 N. E. Rep. 860; *Allard v. Hildreth*, 173 Mass. 26; s. c. 52 N. E. Rep. 1061; 5 Am. Neg. Rep. 610; *Rohrabacher v. Woodard*, 124 Mich. 125; s. c. 82 N. W. Rep. 797; *Smith v. Tromanhauser*, 63 Minn. 98; s. c. 65 N. W. Rep. 144; *Dale v. St. Louis & R. Co.*, 63 Mo. 455, 459; *Berning v. Medart*, 56 Mo. App. 443; *Marshall v. Kansas City Hay Press Co.*, 69 Mo. App. 256; *Hengler v. Cohn*, 68 N. J. L. 240; s. c. 52 Atl. Rep. 280 (defective hinge connecting two parts of ladder); *Loomnam v. Brockway*, 28 How. Pr. (N. Y.) 472; s. c. 3 Robt. (N. Y.) 74; *O'Connell v. Clark*, 22 App. Div. (N. Y.) 466; s. c. 48 N. Y. Supp. 74 (assumes risks incident to performance of work in manner directed by master, where he has equal opportunities with master to know of risks); *Hart v. Naumburg*, 123 N. Y. 641; s. c. 33 N. Y. St. Rep. 607; 25 N. E. Rep. 385; rev'g s. c. 50 Hun (N. Y.) 392; 21 N. Y. St. Rep. 951; *Cowhill v. Roberts*, 71 Hun (N. Y.) 127; s. c. 54 N. Y. St. Rep. 219; 24 N. Y. Supp. 533; *Shadle v. Cleveland Electric & Co.*, 22 Ohio C. C. 49; s. c. 12 Ohio C. D. 37; *Carlson v. Sioux Falls Water Co.*, 5 S. D. 402; s. c. 59 N. W. Rep. 217; *Galveston & R. Co. v. Lempe*, 59 Tex. 19; *Southern & R. Co. v. Lasch*, 2 Tex. Civ. App. 68; s. c. 21 S. W. Rep. 563 (and the servant was not induced to remain in the service by the promise of the master to repair the source of danger); *Chesapeake & R. Co. v. Sparrow*, 98 Va. 630; s. c. 2 Va. Sup. Ct. Rep. 526; 37 S. E. Rep. 302; *Hencke v. Ellis*, 110 Wis. 532; s. c. 86 N. W. Rep. 171; *Hotl v. Chicago & R. Co.*, 94 Wis. 596; s. c. 69 N. W. Rep. 352; *Hazen v. West Superior Lumber Co.*,

his master with knowledge of a *latent defect* in premises or appliances, although he may have had equal opportunities to ascertain the fact of it; since he is not under the same duty of inspection which the law puts upon his master, and the discharge of his duties as servant may prevent him from taking the necessary time to make such an inspection;²⁰ nor is the employer relieved from liability for an injury to his employé from a negligent defect in an appliance where the employé has been at work for only a short time, during which time he has had no occasion to use the appliance, and where the defect could not be detected from a casual inspection.²¹ Turning the proposition around, if the situation is such that the opportunities of the servant for acquiring knowledge of the danger are not equal to those of the master, and the servant, without being guilty of culpable negligence, fails to acquire knowledge of it, the law does not put upon him the disadvantage of having assumed the risk.²²

§ 4644. When Servant Presumed to have Knowledge of Defect or Danger.—The servant will be presumed to have knowledge of the defect or danger, (1) where the defect or danger is obvious and apparent, so as to be perceived by any one, although without making a special inspection;²³ (2) where he has worked for a long time about or in connection with the defective appliance;²⁴ (3) where the absence of a

91 Wis. 208; s. c. 64 N. W. Rep. 857; *Everhard v. Diamond Match Co.*, 98 Fed. Rep. 555.

²⁰ *Salem &c. Co. v. Tepps*, 10 Ind. App. 516; s. c. 38 N. E. Rep. 229.

²¹ *Williams v. New York &c. R. Co.*, 2 Misc. (N. Y.) 30; s. c. 49 N. Y. St. Rep. 568; 21 N. Y. Supp. 259.

²² *Sackewitz v. American Biscuit Man. Co.*, 78 Mo. App. 144; s. c. 2 Mo. App. Repr. 192.

²³ *Goltz v. Milwaukee &c. R. Co.*, 76 Wis. 136; s. c. 44 N. W. Rep. 752; 41 Am. & Eng. R. Cas. 282; *Watts v. Hart*, 7 Wash. 178; s. c. 34 Pac. Rep. 423, 771 (danger of moving cars on a spur-track by means of a stake placed between them and an engine on the main track); *DeForrest v. Jewett*, 19 Hun (N. Y.) 509 (deceased employed in station-yard for several months, where there was a ditch which was plainly visible); *Lindsay v. New York &c. R. Co.*, 112 Fed. Rep. 384; s. c. 50 C. C. A. 298 (brakeman employed continuously in railroad-yard for over nine months, fell into one of 119 similar drains which had existed in the yard

during the whole time of his employment—assumed risk as matter of law).

²⁴ *Atchison &c. R. Co. v. Alsdurf*, 47 Ill. App. 200 (old brakeman who had been a baggageman for six years, and a brakeman on the particular road for three months, and who had worked near the place of the accident ballasting the track, presumed to know the manner in which the track was constructed and ballasted); *Quinn v. Chicago &c. R. Co.*, 107 Iowa 710; s. c. 12 Am. & Eng. R. Cas. (N. S.) 512; 77 N. W. Rep. 464; *Austin v. Boston &c. R. Co.*, 164 Mass. 282; s. c. 41 N. E. Rep. 288; *Lovejoy v. Boston &c. R. Co.*, 125 Mass. 79; *Fuller v. New York &c. R. Co.*, 175 Mass. 424; s. c. 56 N. E. Rep. 574 (railway employé, for six months a locomotive fireman, who had run a stationary engine before that time, presumed to be familiar with the action of steam and the liability of the glass tube of an oiler to burst from pressure upon it from within, and with the consequent danger); *O'Rielly v.*

particular means of safety is a matter of common knowledge or presumed to be within the experience of all men of common education;²⁵ (4) where employ  s are of mature age,—it being presumed, on their entering a given service, that they possess knowledge and skill fitting them therefor, and are acquainted with the dangers ordinarily attending the service;²⁶ (5) and such knowledge is often implied from the special facts and circumstances of the case, as shown by the cases noted in the margin.²⁷

Bowker Fertilizer Co., 174 Mass. 202; s. c. 6 Am. Neg. Rep. 555; 54 N. E. Rep. 534; Missouri & C. R. Co. v. Baxter, 42 Neb. 793; s. c. 60 N. W. Rep. 1044; Houston & C. R. Co. v. Burrager (Tex.), 14 S. W. Rep. 242 (no off. rep.).

²⁵ De Lisle v. Ward, 168 Mass. 579; s. c. 47 N. E. Rep. 436 (referring to working about a pile-driver used in raising logs without a guy-rope to control the logs); Gorman v. Minneapolis & C. R. Co., 78 Iowa 509; s. c. 43 N. W. Rep. 303 (inexperienced brakeman presumed to know that the object of detaching an engine is to let it move away from the train, so as to allow the train to move for a certain distance).

²⁶ Peterson v. New Pittsburg Coal & C. Co., 149 Ind. 260; s. c. 63 Am. St. Rep. 289; 49 N. E. Rep. 8; Pennsylvania Co. v. Congdon, 134 Ind. 226; s. c. 33 N. E. Rep. 795 (boy 18 years old employed as freight-brakeman, three months in service, presumed to have sufficient skill and experience to know that a lantern used by him in giving signals will go out if not properly guarded from the wind, so as to charge him with knowledge of its condition and with the duty of informing the representative of the company of it); Becker v. Baumgartner, 5 Ind. App. 576; s. c. 32 N. E. Rep. 786; Wilson v. Tremont & C. Mills, 159 Mass. 154; Kohn v. McNulta, 147 U. S. 238; s. c. 37 L. ed. 150.

²⁷ An employ   testified that, while he was operating a paper-cutting machine, he knew it would let a knife drop when its gearwheels came together, and that he made no complaint to his employer. This was held to show notice of defects in the machinery, precluding a recovery of damages for the cutting of his hand, caused by an unexpected drop of the knife: Howe v. Me-

daris, 183 Ill. 288; s. c. 55 N. E. Rep. 724; rev'g s. c. 82 Ill. App. 515. An employ   saw a canvas stretched upon the third floor of a building in which he was at work, and was ordered to lay planks across it to walk on; saw a fellow workman walk around and not across it; shoved a plank over it and saw the plank sag down, and concluded that the canvas had been placed there to catch any one if he should step on it. He was held to be chargeable with knowledge that there was a hole under the canvas: Muncie Pulp Co. v. Jones, 11 Ind. App. 110; s. c. 38 N. E. Rep. 547. It was a part of the regular duty of a switchman to handle defective cars. These cars were taken from trains and placed upon special side-tracks used for the purpose. It was held that the mere presence of a car upon such a side-track was notice to the switchman that the car was probably defective, which put upon him the duty of examining it to see wherein it was defective, and which cast upon him the risk of handling it,—and this although sound cars, improperly loaded, were sometimes placed upon the same side-tracks: Chesapeake & C. R. Co. v. Hennessy, 96 Fed. Rep. 713; s. c. 38 C. C. A. 307. A locomotive-engineer was killed in a collision with stock which had come on defendant's track through a defective fence. It appeared that stock were frequently seen on such track at and near the point of collision, and that it was decedent's duty to keep a constant lookout for them; and his reports showed that, during fifteen months prior to such collision, he had struck stock eight times. It was held that decedent had such knowledge of the defect as to preclude a recovery of damages for his death: Houston & C. R. Co. v. Quill (Tex. Civ. App.), 55 S. W. Rep.

§ 4645. **When Servant Not Presumed to have Knowledge of Defect or Danger.**—The servant will not be presumed to have knowledge of the defect or danger, in the absence of evidence tending to show actual knowledge, (1) where he has no duty to perform with respect to the dangerous structure, machine, or appliance from which the injury to him proceeds;²⁸ (2) where the employé is unskilled and inexperienced with respect to the nature of the particular structure, machine, or appliance;²⁹ (3) where the employé, although required to work with a particular machine, has not sufficient skill to determine, from an external inspection, its unfitness for use;³⁰ (4) where the experience of the servant with respect to the premises about which he is required to work, has been short and desultory;³¹ (5) where the servant, although experienced with respect to machines of the kind with which he is required to work, relies on the duty of his employer to use proper care in furnishing him with a machine which is safe, and, consequently, is not, as matter of law, chargeable with knowledge that such care has not been used;³² (6) where the servant *might* have dis-

1126; s. c. aff'd, *sub nom.* Quill v. Houston &c. R. Co., 93 Tex. 616; s. c. 57 S. W. Rep. 948.

²⁸ Georgia Pac. R. Co. v. Davis, 92 Ala. 300; s. c. 9 South. Rep. 252 (trainman having no duties to perform with respect to construction and maintenance of roadway not chargeable with notice of defects therein); Alton Paving &c. Co. v. Hudson, 176 Ill. 270; s. c. 52 N. E. Rep. 256; aff'g s. c. 74 Ill. App. 612 (one employed to oil the machinery of a steam-shovel not chargeable, as matter of law, with knowledge of the danger of the falling of a bank of clay, etc.); Waxahachie Oil Co. v. McLain, 27 Tex. Civ. App. 334; s. c. 66 S. W. Rep. 226 (where a servant was suddenly called to go on an oil-cake crusher, which he had never before been called on to do, he fulfilled his duty if he exercised ordinary care in doing so, and was not negligent in not having theretofore ascertained the dangers incident to the work).

²⁹ Colorado &c. R. Co. v. O'Brien, 16 Colo. 219; s. c. 10 Rail. & Corp. L. J. 351; 27 Pac. Rep. 701; 48 Am. & Eng. R. Cas. 235 (unskilled railroad laborer not necessarily chargeable with notice of the defective condition of a newly constructed road-bed, although he has been engaged in its construction); Johansen v. Eastmans Co., 44 App. Div. (N. Y.)

270; s. c. 60 N. Y. Supp. 708; s. c. aff'd, 168 N. Y. 648; 61 N. E. Rep. 1130 (employé employed to *shovel fat* near a revolving shaft that is not guarded as required by a statute does not, as matter of law, assume risk of injury from coming in contact with the shaft, where he is unfamiliar with machinery, is not employed in connection with the machinery or the shaft, and there is no projection on the shaft likely to catch the clothes of a person working near it).

³⁰ Central R. Co. v. Haslett, 74 Ga. 59 (no presumption that a brakeman has sufficient skill to determine, from an inspection of the brakes, their fitness for use).

³¹ Illinois &c. R. Co. v. Sanders, 166 Ill. 270; s. c. 46 N. E. Rep. 799; aff'g s. c. 66 Ill. App. 439 (brakeman not presumed, as matter of law, to know of a defect in the track in one of the yards in which he is required to do switching, because he has acted in that capacity for three weeks, passing through such yards twice a day, on a round trip of 100 miles).

³² Galveston &c. R. Co. v. Smith (Tex.), 57 S. W. Rep. 999 (no off. rep.) (unsafe locomotive-engine). In line with this doctrine it has been held that knowledge or the means of knowledge, on the part of the servant, of the general method

covered the defective condition of a machine near which he worked, if he had taken sufficient time from his duties to make an *inspection*,³³ (7) where, under a principle elsewhere considered,³⁴ a person has been employed to do certain work, and thereafter, against his protest, is put to the doing of *other work* from which another employé has been discharged.³⁵

§ 4646. **Facts Not Creating a Conclusive Presumption that the Injured Servant had Knowledge of the Defect or Danger.**—Courts have refused, conclusively, as matter of law, to impute to a servant knowledge of a defect or danger from the following facts:—From the fact that a street-car conductor, injured from a brake, knew that the brake would not properly control the motion of the car without the application of unusual force;³⁶ from the fact that an employé, killed at work in a shaft of a mine by the falling of a car from above, which was run down grade to the mouth of the shaft by trespassing children, knew that the track leading to the mouth of the shaft was down grade, that the car was not blocked when not in use, and that the stop-block at the end of the track was insufficient, but did not know that children frequently rode down the grade on the car;³⁷ from the fact that the tracks at a particular place were but five feet six inches apart, the regulation distance being seven feet,—the question whether the injured brakeman knew of the proximity of the tracks at the particular place being one for the jury;³⁸ from the fact that a girl seventeen years old, employed in a spinning-room, and injured by the parting of a belt, was present when the ends of the belt were laced together,—this not imputing knowledge that the belt was unsafe;³⁹ from the fact that a seaman, injured while operating a defective steam-winch used in shifting the cargo, had an opportunity for seeing the winch before the ship sailed;⁴⁰ from the fact that the ground on which a

adopted by the master in carrying on his business, is insufficient to charge the servant with knowledge that defective or insufficient appliances may be used; but he has a right to rely on the assumption that the appliances furnished are free from defects discoverable by a proper inspection: *Texas &c. R. Co. v. Archibald*, 170 U. S. 665; s. c. 42 L. ed. 1188; 18 Sup. Ct. Rep. 777.

³³ *Toomey v. Avery Stamping Co.*, 20 Ohio C. C. 83; s. c. 11 Ohio C. D. 216.

³⁴ *Post*, § 4672.

³⁵ *Hillsboro Oil Co. v. White* (Tex.

Civ. App.), 54 S. W. Rep. 432 (no off. rep.).

³⁶ *Newhart v. St. Paul City R. Co.*, 51 Minn. 42; s. c. 52 N. W. Rep. 983.

³⁷ *Knight v. Sattler Lead &c. Co.*, 75 Mo. App. 541.

³⁸ *Voorhes v. Lake Shore &c. R. Co.*, 193 Pa. St. 115; s. c. 44 Atl. Rep. 335.

³⁹ *McGar v. National &c. Worsted Mills*, 22 R. I. 347; s. c. 47 Atl. Rep. 1092.

⁴⁰ *Eldridge v. Atlas Steamship Co.*, 58 Hun (N. Y.) 96; s. c. 33 N. Y. St. Rep. 1016; 11 N. Y. Supp. 468; s. c. aff'd, 134 N. Y. 187; 32 N. E. Rep. 66.

side-track was laid was known by the brakeman to be wet and soft, and the fact that the brakeman knew that low joints were *liable* to be caused thereby,—this not imputing knowledge of the existence of such a defect, whereby he was injured while making a coupling;⁴¹ from the fact that an extra hand, employed in railroad switch-yards, worked in different yards, where there were many switches, in which men were constantly employed in making repairs,—this not charging him with knowledge of the defective blocking of a particular switch in one of such yards, which he was required to use *in the night-time*, whereby he was injured, although the defect had existed for some time, and was obvious in the daytime;⁴² from the fact that an employé in a sawmill knew that a conveyor was defective, and that it frequently allowed shingle-bolts to fall down the conveyor, where he did not know that the bolts might jump from the conveyor and fall on the table where he was working, and such danger was not obvious.⁴³

§ 4647. **Sufficient that Servant Knew, or with Ordinary Care Should Have Known.**—Negligent ignorance being in law tantamount to knowledge, it is sufficient, to put upon the servant the disadvantage of accepting the risk, that he knew of the source of danger, or might have known of it by the exercise of that measure of care which he ought to take for his own safety under the circumstances of the particular case, which comes within the description of ordinary or reasonable care.⁴⁴ The true test by which to determine whether the servant assumed the risk of the particular danger as one of the ordinary risks of his employment, and whether he was guilty of contributory negligence in facing or neglecting the danger, is to consider whether, under all the surrounding conditions, he *ought* to have known and comprehended the danger, and not whether, in point of fact, he did know and comprehend it;⁴⁵ and, as we shall now see, it is, in most cases, a question upon which the judge cannot speak in the application of any definite rule of law, but it is *for a jury to say* whether he ought to have known and comprehended.⁴⁶

⁴¹ Texas &c. R. Co. v. McCoy, 17 Tex. Civ. App. 494; s. c. 44 S. W. Rep. 25.

⁴² Hunt v. Kane, 40 C. C. A. 372; s. c. 100 Fed. Rep. 256. See also, Felton v. Bullard, 37 C. C. A. 8.

⁴³ Shoemaker v. Bryant Lumber & Co., 27 Wash. 637; s. c. 68 Pac. Rep. 380.

⁴⁴ Wells v. Coe, 9 Colo. 159 (experienced foreman of a mine injured by the fall of a bucket, due to a defect in the hoisting-apparatus

which he should have discovered); Baltimore &c. R. Co. v. Welsh, 17 Ind. App. 505; s. c. 47 N. E. Rep. 182 (assume such risks as the exercise of his opportunities of inspection while giving diligent attention to the service would disclose to him).

⁴⁵ Klatt v. N. C. Foster Lumber Co., 92 Wis. 622, 628; s. c. 66 N. W. Rep. 791, 793.

⁴⁶ See next section.

§ 4648. Which Generally Presents a Question for a Jury.—The employer will be liable if the employé did not know, and could not have known by the exercise of ordinary care, what precautions were being taken for his protection, and a jury will be allowed so to say;⁴⁷ or, where it is fairly a question of fact, whether or not he knew, or was negligent in not knowing, the dangerous condition of a tool in the hands of a fellow workman, where the defendant had a superintendent on hand in charge of the work, who might have discovered it by a casual inspection.⁴⁸

§ 4649. Duty of Servant to Inspect, Examine and Find Out for Himself.—No general rule on this subject can be stated which will be applicable to all cases. In many situations the servant will possess the requisite skill and the master will not, in which cases it will be the obvious duty of the servant to inspect the premises, machinery or appliances, so far as his opportunities and the nature of his duties will permit, for the purpose of ascertaining whether they are in a safe condition for use or not.⁴⁹ Again, circumstances frequently present themselves in which a competent and careful inspection by the master would discover the source of the defect or danger, but where such an inspection as the servant might be able to make would not discover it by reason of his not being an expert, or not possessing sufficient skill and knowledge. In most cases, therefore, the law does not require the servant to search for hidden dangers where, to external observation, everything seems safe; but he may rely upon the performance of a suitable inspection by his master.⁵⁰ It has been said

⁴⁷ International &c. R. Co. v. Hall, 1 Tex. Civ. App. 221; s. c. 21 S. W. Rep. 1024 (car-repairer injured by an engine backing into the car which he was repairing—judgment for plaintiff affirmed); Sledge v. Gayoso Hotel Co., 43 Fed. Rep. 463 (question not determined as a question of law on the pleadings, which showed the fact of knowledge on the part of the employé, but not the circumstances attending such knowledge); Gulf &c. R. Co. v. Darby, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446 (railroad employé injured by projecting roof of company's oil-house, which he knew was near by when he mounted the car—question for jury whether he knew or should have known of the dangerous projection of the roof).

⁴⁸ De la Vergne Refrigerating Machine Co. v. Stahl, 24 Tex. Civ. App. 471; s. c. 60 S. W. Rep. 319.

⁴⁹ See *ante*, § 3801.

⁵⁰ Dolan v. Sierra R. Co., 135 Cal. 435; s. c. 67 Pac. Rep. 686 (brake-man does not assume risk of defects in a bridge of which he is ignorant, and which the law does not require him to determine); Chicago &c. R. Co. v. Kneirim, 152 Ill. 458; s. c. 39 N. E. Rep. 324; 43 Am. St. Rep. 259 (circumstances under which helper in switch-yard not chargeable with knowledge of the condition of the brakes on a particular car); Illinois Steel Co. v. Schymanowski, 162 Ill. 447; s. c. 44 N. E. Rep. 876 (employé set to work beside a pile of ore from which material is required to be loosened by the use of explosives, not bound to study the conditions affecting the stability of the ore at the sides of the pile); Leonard v. Kinnare, 174 Ill. 532; s. c. 51 N. E. Rep. 688; aff'd s. c. 75 Ill. App. 145; Consolidated

that an employé assumes all the risks naturally arising from the conduct of the business, and those which the exercise of his opportunities

Coal Co. v. Bruce, 47 Ill. App. 444; s. c. aff'd, 150 Ill. 449; 37 N. E. Rep. 912 (employé in a coal mine not required to make critical examination, but may rely upon the discharge of the duty of inspection by his employer); Rice & Co. Malting Co. v. Paulsen, 51 Ill. App. 123; Mobile & C. R. Co. v. Harmes, 52 Ill. App. 649 (circumstances under which brakeman not required to detect a defect in a brake-chain, notwithstanding a notice by the company to its employés that it is the duty of every employé to "know" that the property with which he is to work is in a good and safe condition, and, if not, to report the fact to his immediate superior at once); Chicago & C. R. Co. v. Maroney, 170 Ill. 520; aff'g s. c. 67 Ill. App. 618; Alabaster Co. v. Loneragan, 90 Ill. App. 353; Jay v. Zwierzykowski, 192 Ill. 328; aff'g s. c. 91 Ill. App. 462; Pennsylvania Coal Co. v. Kelly, 156 Ill. 9; s. c. 40 N. E. Rep. 938; aff'g s. c. 54 Ill. App. 622 (employé shovelling coal into buckets or tubs which are elevated by machinery to be emptied, not bound to make a personal inspection of a tub before using it, to see if there is any defect in a clasp or fastening for automatically dumping or emptying it); Illinois Steel Co. v. Mann, 100 Ill. App. 367; s. c. aff'd, 197 Ill. 186; 64 N. E. Rep. 328; East Chicago Iron & Co. v. Williams, 17 Ind. App. 573; s. c. 47 N. E. Rep. 26 (employé not charged with knowledge of defects not discoverable by use of ordinary care); Louisville & C. R. Co. v. Cornelius, 14 Ind. App. 399; s. c. 43 N. E. Rep. 31 (employé in a tunnel has the right to assume that its roof has been made reasonably safe, and is not obliged to search for hidden defects therein); Pittsburg & C. R. Co. v. Woodward, 9 Ind. App. 169; s. c. 36 N. E. Rep. 442 (brakeman does not assume the risk of injury from latent defect in drawbar, merely because he had equal opportunity with the company to discover the defect); Blondin v. Oolitic Quarry Co., 11 Ind. App. 395; s. c. 37 N. E. Rep. 812 (stone dresser in a yard not required to examine the stones in proximity to

that upon which he is working, to ascertain whether they are securely placed and not in danger of falling upon him while he is engaged in dressing another stone); Illinois & C. R. Co. v. Hilliard, 18 Ky. L. Rep. 505; s. c. 37 S. W. Rep. 75 (no off. rep.) (freight-conductor not required to inspect and discover defect in the attachment of a rung in the side-ladder of a freight-car); Louisville & C. R. Co. v. Foley, 94 Ky. 220; s. c. 15 Ky. L. Rep. 17; 21 S. W. Rep. 866 (brakeman not required to know the defect in a coupling-apparatus, where he was unexpectedly called upon at midnight to make the coupling); Anderson v. Duckworth, 162 Mass. 251; s. c. 38 N. E. Rep. 510 (circumstances under which tester in an arms factory is not bound to examine a revolver submitted to him to be examined and tested to see that it does not contain an exploded cartridge); Nicholds v. Crystal Plate-Glass Co., 126 Mo. 55; s. c. 27 S. W. Rep. 516 (injury from the breaking of an old, cracked and defective chain); Banks v. Wabash & C. R. Co., 40 Mo. App. 458 (injury from the breaking of a wooden handle on a hand-car, just where it enters the iron collar); Bridges v. St. Louis & C. R. Co., 6 Mo. App. 389 (fireman injured in consequence of a defect in a locomotive-wheel not precluded from recovery, it being a matter of skill to determine how much wear the wheel would stand, and he not being an expert); Doyle v. Missouri & C. Trust Co., 140 Mo. 1; s. c. 41 S. W. Rep. 255 (servant assumes such extraordinary and unusual risks as he knows and appreciates, but need not exercise same degree of care and diligence as master in inspecting and investigating risks to which he may be exposed); Bender v. St. Louis & C. R. Co., 137 Mo. 240; s. c. 37 S. W. Rep. 132 (brakeman not bound to know of defects not discoverable by ordinary care, and not bound to exercise every precaution necessary for his safety); Cole v. Warren Man. Co., 63 N. J. L. 626; s. c. 44 Atl. Rep. 647 (millwright employed in a mill is not, merely by reason

of inspection while giving diligent attention to the service would disclose to him.⁵¹

of his employment, under the duty of inspecting the machinery); *Flood v. Western U. Tel. Co.*, 39 N. Y. St. Rep. 674; s. c. 15 N. Y. Supp. 400 (cross-arm of telegraph-pole broke with lineman thereon, by reason of being cross-grained and brittle); *O'Malley v. New York & C. R. Co.*, 67 Hun (N. Y.) 130; s. c. 51 N. Y. St. Rep. 366; 22 N. Y. Supp. 48 (brakeman not guilty of contributory negligence in failing to inspect the appliances which he is to use in compliance with a rule of the company, where his only opportunity to do so is while the train is standing at a station waiting for a connecting train, and liable to start at any moment); *Van Tassel v. New York & C. R. Co.*, 48 N. Y. St. Rep. 767; s. c. 1 Misc. (N. Y.) 299; 20 N. Y. Supp. 708 (failure of railroad brakeman to examine the brake-step before attempting to use it); *Lake Shore & C. R. Co. v. Gilday*, 16 Ohio C. C. 649; s. c. 9 Ohio C. D. 27 (failure of a brakeman to inspect cars and appliances before working upon or using them, as required in his contract of employment, when train was about to start); *Strabler v. Toledo Bridge Co.*, 11 Ohio C. D. 87 (servant injured on a defective scaffolding,—compare *post*, §§ 4817, 4818); *Van-esse v. Catsburg Coal Co.*, 159 Pa. St. 403; s. c. 33 W. N. C. (Pa.) 387; 28 Atl. Rep. 200; 25 Pitts. L. J. (N. S.) 40 (mine-worker not required to inspect an apparently safe gangway, provided with new timbers, which had just been put in place under the eye of his employer, who was an experienced miner); *Pennsylvania R. Co. v. Zink*, 126 Pa. St. 288; s. c. 17 Atl. Rep. 614 (brakeman employed in a yard-crew not bound to know the unsafe condition of the railroad-track, where the defect is not so palpable that it must have been seen and known by him); *Texas & C. R. Co. v. Magrill*, 15 Tex. Civ. App. 353; s. c. 40 S. W. Rep. 188 (brakeman not required to inspect the track); *Fordyce v. Culver*, 2 Tex. Civ. App. 569; s. c. 22 S. W. Rep. 237 (not the duty of a railway brakeman to inspect cars to ascertain whether the handholds on top

of them are secure, in the absence of any rule of the company requiring him to do so, or making brakeman inspectors also, their only duty being to report any defects of which they have knowledge); *International & C. R. Co. v. Emery*, 14 Tex. Civ. App. 551; s. c. 40 S. W. Rep. 149 (brakeman does not, as matter of law, fail to use reasonable care because of his failure to discover a defect in a "dog" intended to catch in the ratchet of a brake which he set); *Sabine & C. R. Co. v. Ewing*, 1 Tex. Civ. App. 531 (failure of locomotive-fireman to inspect a defective coupling-apparatus between the engine and tender, and to discover latent defects therein); *Taylor & C. R. Co. v. Taylor*, 79 Tex. 104; s. c. 14 S. W. Rep. 918 (not bound to exercise care to discover defects not known to him unless it is in the line of his duty so to do); *Missouri & C. R. Co. v. Baker* (Tex. Civ. App.), 58 S. W. Rep. 964 (no off. rep.) (not error to refuse to charge that plaintiff assumed all the risks from all defects in appliances used by him of which he might have known by the use of ordinary care,—since a servant is not bound to use ordinary care to discover defects); *Missouri & C. R. Co. v. Cox* (Tex. Civ. App.), 55 S. W. Rep. 354 (no off. rep.); rehearing denied, 56 S. W. Rep. 97 (brakeman on freight-train not required to inspect the drawhead fastenings on the cars, and may recover if injured by the pulling out of a drawhead); *International & C. R. Co. v. Elkins* (Tex. Civ. App.), 54 S. W. Rep. 931 (no off. rep.); (locomotive-firemen not required to inspect the ropes attached to the valves of a water-tank); *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61; s. c. 12 S. W. Rep. 838 (employé not bound to search for defects in appliances or instruments which he himself is not engaged in using); *Gulf & C. R. Co. v. Darby*, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446 (railroad employé owes no duty of inspection to discover ob-

⁵¹ *Baltimore & C. R. Co. v. Welsh*, 17 Ind. App 505; s. c. 47 N. E. Rep. 182.

§ 4650. **Servant Not Under the Same Duty to Inspect as Master Is.**—It is therefore a sound conclusion that the servant is not, under all conditions of fact, under the same obligation as the master to know the nature and extent of the risks of the service, unless they are patent.⁵² For example, although a locomotive-engineer, running upon a road which is in constant use, may know that the rails are old, light and well worn, yet he is not required, as matter of law, to determine for himself, and at his own peril, whether the road is or is not fit for use.⁵³ So, a stone-mason employed in a quarry does not, as matter of law, assume the risk of being injured by the explosion of a quantity of dynamite left unexploded in a block of stone which he is dressing, though if the presence of the explosive in the block of stone were apparent, the conclusion would be different.⁵⁴ So, a common laborer employed in bringing timbers and in carrying a heavy girder, although a carpenter by trade, is not bound to inspect the materials in a scaffold which he helps to build for the purpose of carrying such timber over it.⁵⁵ At the risk of repetition, the doctrine of this and the preceding paragraph may be roundly stated by saying that the servant assumes the ordinary risks of the employment which are apparent to him, or which he has the opportunity to detect, but not those risks which arise from defects which he has no fair opportunity to discover.⁵⁶ These, and many other decisions, justify

struction dangerously near track through company's negligence, and does not necessarily assume risk by his contract of service, though they are permanent in character and exist at the time he enters the service); *San Antonio &c. R. Co. v. Lindsey*, 27 Tex. Civ. App. 316; s. c. 65 S. W. Rep. 668 (locomotive-engineer did not assume risk of engine-step being loose, by reason of a dowel-pin being absent, unknown to him, where its absence could be determined only by unscrewing a nut, and he was under no duty to make such an inspection, and the step was apparently firm); *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; s. c. 17 Wash. L. Rep. 630; 6 Rail. & Corp. L. J. 327 (brakeman not required to inspect the brakes to discover latent or hidden defects rendering their use more hazardous); *Monsarrat v. Keegan*, 87 Fed. Rep. 849; s. c. 58 U. S. App. 377; 11 Am. & Eng. R. Cas. (N. S.) 507; 40 Ohio L. J. 167; 31 C. C. A. 255 (circumstances under which a yard-

man not required to know the character of the road where it crosses a public highway); *Little Rock &c. R. Co. v. Moseley*, 12 U. S. App. 514; s. c. 6 C. C. A. 225; 56 Fed. Rep. 1009 (switchman not required, as matter of law, to examine all the tracks in the yard before taking service therein); *Bowers v. Union Pac. R. Co.*, 4 Utah 215; s. c. 7 Pac. Rep. 251 (employé not required to know those things which belong to a different branch of the service).

⁵² *McDonald v. Chicago &c. R. Co.*, 41 Minn. 439; s. c. 43 N. W. Rep. 380.

⁵³ *Devlin v. Wabash &c. R. Co.*, 87 Mo. 545.

⁵⁴ *Neveu v. Sears*, 155 Mass. 303; s. c. 29 N. E. Rep. 472.

⁵⁵ *Goldie v. Werner*, 50 Ill. App. 297; s. c. aff'd, 151 Ill. 551; 38 N. E. Rep. 95.

⁵⁶ *Bland v. Shreveport &c. R. Co.*, 48 La. An. 1057; s. c. 20 South. Rep. 284; 4 Am. & Eng. R. Cas. (N. S.) 349; *Auburn v. National Tube Works Co.*, 14 Pa. Super. Ct. 568.

the conclusion, sometimes judicially expressed, that the master is required to exercise *more diligence* to discover hidden defects, than is a servant who is not charged with the duty of inspection.⁵⁷

§ 4651. **What the Servant is Not Required to Find Out and Know.**—A detailed account of those risks and dangers which the servant is not required to find out and know would make a long catalogue. He is not blameworthy, for instance, for not finding out and knowing that the key to the pin which holds in place the apparatus for hoisting materials from a trench is out of its place, when he is hurriedly put to work without an opportunity to examine the machine.⁵⁸

§ 4652. **Assumption of Risk where Servant Knows of the Defect, but does not Know of nor Appreciate the Danger.**—Another doctrine which does not seem to be generally admitted is that in order to put upon the servant the assumption of the risk of a defect or danger, he must not only know of the defect, but he must also know of and appreciate the *dangers arising therefrom*.⁵⁹ For example, it has been

⁵⁷ *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; s. c. 43 N. E. Rep. 319; 44 N. E. Rep. 377; 3 Am. & Eng. Corp. Cas. (N. S.) 629; *Doyle v. Missouri &c. Trust Co.*, 140 Mo. 1; s. c. 41 S. W. Rep. 255. One court has held that it is proper to refuse an instruction to the effect that the plaintiff cannot recover unless the defendants knew or ought to have known of the defect, and the plaintiff had not equal means of knowledge,—the theory being that an employé is not required to use diligence to discover defects, and is chargeable with notice thereof only when they are so obvious as to impute gross negligence in overlooking them: *Silveira v. Iversen*, 128 Cal. 187; s. c. 60 Pac. Rep. 687. In South Carolina it has been stated that an employer is liable to an employé for injuries resulting from defective appliances although the employé could have discovered the defect by the use of ordinary care and diligence: *Evans v. Chamberlain*, 40 S. C. 104; s. c. 18 S. E. Rep. 213 (where the injury resulted from a defective bumper on a freight-car, the defect not being apparent); *Lasure v. Graniteville Man. Co.*, 18 S. C. 275 (where the injury resulted from the breaking of defective tim-

bers supporting a tramway over which the injured employé was required to pass). These cases seem really to hold that the servant is under no duty to inspect—that he does not assume the risk of injury from defects which are not obvious.

⁵⁸ *Higgins v. Williams*, 114 Cal. 176; s. c. 45 Pac. Rep. 1041.

⁵⁹ *Nofsinger v. Goldman*, 122 Cal. 609; s. c. 55 Pac. Rep. 425; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118; s. c. 35 Pac. Rep. 572; *Faren v. Sellers*, 39 La. An. 1011; s. c. 3 South. Rep. 363; *Guakden v. Kansas City &c. R. Co.*, 106 La. 409; s. c. 30 South. Rep. 889 (not only defect, but danger arising therefrom, must be known to him or apparent to him); *Clapp v. Minneapolis &c. R. Co.*, 36 Minn. 6; s. c. 29 N. W. Rep. 340; *Hungerford v. Chicago &c. R. Co.*, 41 Minn. 444; s. c. 43 N. W. Rep. 324; 41 Am. & Eng. R. Cas. 269; *Russell v. Minneapolis &c. R. Co.*, 32 Minn. 230; s. c. 20 N. W. Rep. 147; *Devlin v. Wabash &c. R. Co.*, 87 Mo. 545; *Sullivan v. Hannibal &c. R. Co.*, 107 Mo. 66; s. c. 17 S. W. Rep. 748 (defect in staging,—foreman ought to have known of the danger); *Hill v. Lake Shore &c. R. Co.*, 22 Ohio C. C. 291; s. c. 12 Ohio C. D. 241 (failure to provide rule

held that knowledge by an *inexperienced* railroad employé of the existence of a defect in the appliance furnished to him does not prevent a recovery for the injury caused by such defect, when he did not know that the continued use of the defective appliance was dangerous.⁶⁰ It may be added that whether the servant understood and appreciated the danger of working in a particular place or in a particular manner, or whether, in the exercise of reasonable care, he ought to have known it, is, under many conditions of fact, a *question for the jury*.⁶¹ But it has been held that an employé who is experienced in the work he is engaged in will be *conclusively presumed* to appreciate the *dangers* which may arise from *defects* of which he has, or in the exercise of due care might have, knowledge.⁶²

§ 4653. Servant Assumes Risk of Latent Dangers Not Discoverable Either by Himself or by his Master.—In like manner, an employé assumes the risk of an accident resulting from a cause not discoverable in advance, when there is no visible defect in any part of the machinery, or knowledge of the defect on the part of those using it, or of his employer.⁶³

§ 4654. When Servant may Assume that Master has Done his Duty.^a—Within limits indicated by what has preceded in this chapter, and in the absence of circumstances which do not admit of the assumption,⁶⁴ the servant, in going to work at a particular place, or

to warn employés when emergency brakes are to be applied—risk not assumed unless employé knows the risk or danger incident to operation of train without such rule); *St. Louis & C. R. Co. v. McClain*, 80 Tex. 85; *Galveston & C. R. Co. v. Parrish* (Tex. Civ. App.), 40 S. W. Rep. 191 (no off. rep.) (the mere fact that a track-walker knows that the brake on a hand-car on which he is casually riding has a rubber thereon will not prevent a recovery for an injury caused by the defective brake, unless he also knows that the presence of the rubber renders it dangerous); *Fordyce v. Culver*, 2 Tex. Civ. App. 569; s. c. 22 S. W. Rep. 237 (brakeman injured by the pulling out of a handhold—knew that some of the cars had rotten tops—did not know that they were rotten at the place where the handholds were attached); *Shoemaker v. Bryant Lumber & C. Co.*, 27 Wash. 637; s. c. 68 Pac. Rep. 380

(employé in sawmill knew that conveyor was defective and would frequently allow shingle-bolts to fall back down the trough, but did not know that they might *jump out* of the trough and fall on the table where he was working, and the danger was not obvious—risk not assumed); *Dumas v. Stone*, 65 Vt. 442; *Brooke v. Ramsden* (Q. B. Div.), 9 Ry. & Corp. L. J. 18.

⁶⁰ *Pitts v. Florida R. Co.*, 98 Ga. 655; s. c. 27 S. E. Rep. 189.

⁶¹ *McDonald v. Chicago & C. R. Co.*, 41 Minn. 439; s. c. 43 N. W. Rep. 380.

⁶² *Pennsylvania Co. v. McCurdy*, 66 Ohio St. 118; s. c. 63 N. E. Rep. 585.

⁶³ *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231; s. c. 33 W. N. C. (Pa.) 94; 27 Atl. Rep. 400.

^a Compare *post*, § 4669.

⁶⁴ That the rule does not apply where the servant has *actual knowledge* that the master has not per-

with particular machinery, tools or appliances, may ordinarily assume that the master has done his duty in making them reasonably safe for the purposes intended.⁶⁵ But the servant is not entitled to rely

formed his duty in this respect.—see *Jennings v. Tacoma R. & Co.*, 7 Wash. 275; s. c. 34 Pac. Rep. 937; nor where he has used the appliance for a considerable length of time and under such circumstances that, in the exercise of reasonable diligence, he could have ascertained its unsafe condition,—see *Chicago & C. R. Co. v. Garner*, 78 Ill. 281; nor where the danger is so obvious and apparent that an ordinarily prudent man would under like circumstances refuse to obey,—see *Christianson v. Pacific Bridge Co.*, 27 Wash. 582; s. c. 68 Pac. Rep. 191.

⁶⁵ *Louisville & C. R. Co. v. Hawkins*, 92 Ala. 241; s. c. 9 South. Rep. 271; *Louisville & C. R. Co. v. Baker*, 106 Ala. 624; s. c. 17 South. Rep. 452; *Louisville & C. R. Co. v. Orr*, 91 Ala. 548; s. c. 8 South. Rep. 360; *Denver & C. R. Co. v. Smock*, 23 Colo. 456; s. c. 48. Pac. Rep. 681; *Crocker v. Pusey & Co.*, 3 Pen. (Del.) 1; s. c. 50 Atl. Rep. 61 (reasonably safe tools); *Diamond State Iron Co. v. Giles*, 7 Houst. (Del.) 557; s. c. 11 Atl. Rep. 189 (servant going on top of house to work may assume that master has exercised due care in the erection of the building); *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; s. c. 44 N. E. Rep. 876; aff'g s. c. 59 Ill. App. 32; *Swift & Co. v. Wyatt*, 75 Ill. App. 348; s. c. 3 Chic. L. J. Wkly. 165; *Kirk v. Senzig*, 79 Ill. App. 251; *Chicago & C. R. Co. v. Hines*, 132 Ill. 161; s. c. 23 N. E. Rep. 1021 (rule is of special force where the performance of the duties of the servant requires constant attention to other matters); *Chicago & C. R. Co. v. Goebel*, 119 Ill. 515 (man unloading coal from a car on a side-track is justified in believing that care will be taken to prevent other cars from running into his car); *Ashley Wire Co. v. McFadden*, 66 Ill. App. 26; *Graver Tank Works v. O'Donnell*, 91 Ill. App. 524; *Lake Shore & C. R. Co. v. Conway*, 169 Ill. 505; s. c. 48 N. E. Rep. 483; aff'g s. c. 67 Ill. App. 155 (towerman employed by railway company to operate gates at crossing need not inspect tracks to see

that they are safe and that train will not run off); *Whitney & Co. v. O'Rourke*, 172 Ill. 177; s. c. 50 N. E. Rep. 242; aff'g s. c. 68 Ill. App. 487 (employé engaged in construction of building may assume that the methods, place and appliances are safe and suitable for the business unless he has or ought to have notice); *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; s. c. 50 N. E. Rep. 225; aff'g s. c. 68 Ill. App. 523 (may assume that appliances are reasonably safe and free from hazard, where danger from defective appliance is not patent); *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248; s. c. aff'd, 196 Ill. 156; 63 N. E. Rep. 649 (miners may assume that owner has had mine examined each morning as required by a statute); *McLean County Coal Co. v. Simpson*, 97 Ill. App. 21; s. c. aff'd, 196 Ill. 258; 63 N. E. Rep. 626 (employé did not, by accepting employment, assume risk of rotten boards in floor of trestle 12 years old, used for supplying coal to locomotives, unless he knew of defects and failed to report them); *Western Stone Co. v. Muscial*, 96 Ill. App. 288; s. c. aff'd, 196 Ill. 382; 63 N. E. Rep. 664 (may assume that place to work is reasonably safe, but is bound to take notice of and guard against obvious dangers); *Pioneer Fireproof Const. Co. v. Howell*, 90 Ill. App. 122; s. c. aff'd, 189 Ill. 123; 59 N. E. Rep. 535; *Illinois & C. R. Co. v. Sanders*, 166 Ill. 270; s. c. 46 N. E. Rep. 799; aff'g s. c. 66 Ill. App. 439; *Pioneer Cooperage Co. v. Romanowicz*, 186 Ill. 9; s. c. 57 N. E. Rep. 864, aff'g s. c. 85 Ill. App. 407; *Ross v. Shanley*, 185 Ill. 390; s. c. 56 N. E. Rep. 1105; *Ashley Wire Co. v. Mercier*, 61 Ill. App. 485; *Charles Pope Glucose Co. v. Byrne*, 60 Ill. App. 17; *Pawnee Coal Co. v. Royce*, 184 Ill. 402; s. c. 56 N. E. Rep. 621; rev'g s. c. 79 Ill. App. 469 (servant has the right to assume that the master has performed a statutory duty); *Illinois Cent. R. Co. v. Johnson*, 95 Ill. App. 54; s. c. aff'd, 191 Ill. 594; 61 N. E. Rep. 334 (employé injured

upon this assumption where he knows of facts which make it probable that the contrary is true. For example, a railway employé is not

while using defective engine, by order of foreman of crew, to make running switch—risk not assumed unless he knew engine was unsafe for such service, and knew risk encountered in obeying foreman's orders); *Ohio &c. R. Co. v. Percy*, 128 Ind. 197; s. c. 27 N. E. Rep. 479; *Chicago &c. R. Co. v. Branyan*, 10 Ind. App. 570; s. c. 37 N. E. Rep. 190; *Arcade File Works v. Juteau*, 15 Ind. App. 460; s. c. 40 N. E. Rep. 818; 44 N. E. Rep. 326; *Ft. Wayne v. Patterson*, 25 Ind. App. 547; s. c. 58 N. E. Rep. 747; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9; s. c. 44 N. E. Rep. 676; authorities cited in *Louisville &c. R. Co. v. Wright*, 115 Ind. 378; s. c. 13 West. Rep. 804; 16 N. E. Rep. 145; *Baltimore &c. R. Co. v. Amos*, 20 Ind. App. 378; s. c. 49 N. E. Rep. 854; *Louisville &c. R. Co. v. Howell*, 147 Ind. 266; s. c. 45 N. E. Rep. 584 (brakeman may assume that coupling-link is free from defects discoverable by a proper inspection on the part of the master); authorities cited in *Cincinnati &c. R. Co. v. Long*, 112 Ind. 166; s. c. 11 West. Rep. 322; 13 N. E. Rep. 659; *Indiana &c. Gas Co. v. Marshall*, 22 Ind. App. 121; s. c. 1 Repr. (Ind.) 427; 52 N. E. Rep. 232; *Haugh v. Chicago &c. R. Co.*, 73 Iowa 66; s. c. 35 N. W. Rep. 116; *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa 169; s. c. 81 N. W. Rep. 227; *St. Louis &c. R. Co. v. Irwin*, 37 Kan. 701; s. c. 16 Pac. Rep. 146; *Atchison &c. R. Co. v. Swarts*, 58 Kan. 235; s. c. 48 Pac. Rep. 953 (railroad employé may assume that tracks are so constructed and maintained as to be reasonably safe); *Ohio Valley R. Co. v. McKinley*, 17 Ky. L. Rep. 1028; s. c. 33 S. W. Rep. 186 (no off. rep.); *Cincinnati &c. R. Co. v. Barber*, 17 Ky. L. Rep. 424; s. c. 31 S. W. Rep. 482 (no off. rep.); *Bogenschutz v. Smith*, 84 Ky. 330; s. c. 1 S. W. Rep. 578; *Ashland Coal &c. Co. v. Wallace*, 101 Ky. 626; *Helm v. O'Rourke*, 46 La. An. 178; s. c. 15 South. Rep. 400; *Faren v. Sellers*, 39 La. An. 1011; s. c. 3 South. Rep. 363; *Wilson v. Louisiana &c. R. Co.*, 51 La. An. (part 2) 1133; s. c. 25 South. Rep. 961; 14 Am. & Eng. R. Cas. (N. S.) 648; *Frye v. Bath Gas &c. Co.*, 94 Me. 17; s. c. 46 Atl. Rep. 804; *Knight v. Overman Wheel Co.*, 174 Mass. 455; s. c. 54 N. E. Rep. 890; *Bartholomeo v. McKnight*, 178 Mass. 242; s. c. 59 N. E. Rep. 804; *Smizel v. Odanah Iron Co.*, 116 Mich. 149; s. c. 74 N. W. Rep. 488; 4 Det. Leg. N. 1111; *Delude v. St. Paul City R. Co.*, 55 Minn. 63; s. c. 56 N. W. Rep. 461; *McDonald v. Chicago &c. R. Co.*, 41 Minn. 439; s. c. 43 N. W. Rep. 380; *Anderson v. Northern Mill Co.*, 42 Minn. 424; s. c. 44 N. W. Rep. 315; *Erickson v. St. Paul &c. R. Co.*, 41 Minn. 500; *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474; s. c. 91 N. W. Rep. 15 (employé required to use trap-door may assume that it is equipped with the hinges necessary for its safe use); *Mississippi Cotton-Oil Mills v. Ellis*, 72 Miss. 191; s. c. 17 South. Rep. 214; *Helfenstein v. Medart*, 136 Mo. 595; s. c. 36 S. W. Rep. 863; s. c. *aff'd in banc*, 37 S. W. Rep. 829; s. c. *aff'd* on rehearing, 38 S. W. Rep. 294; *Covey v. Hannibal &c. R. Co.*, 27 Mo. App. 170; *Kelley v. Cable Co.*, 7 Mont. 70; s. c. 14 Pac. Rep. 633; *O'Neill v. Chicago &c. R. Co.*, 62 Neb. 358; s. c. 86 N. W. Rep. 1098; *Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138; s. c. 77 N. W. Rep. 357; 12 Am. & Eng. R. Cas. (N. S.) 502; *Chicago &c. R. Co. v. Kellogg*, 54 Neb. 127; s. c. 74 N. W. Rep. 454; s. c. *aff'd* on rehearing, 55 Neb. 748; 76 N. W. Rep. 462; *Cole v. Warren Man. Co.*, 63 N. J. L. 626; *Nord Deutscher Lloyd S. S. Co. v. Ingebrechtsen*, 57 N. J. L. 400; s. c. *sub nom.* *Ingebrechtsen v. Nord Deutscher Lloyd S. S. Co.*, 31 Atl. Rep. 619; *Smith v. Erie R. Co.*, 67 N. J. L. 636; s. c. 52 Atl. Rep. 634; *Mikkelsen v. Ocean &c. Transp. Co.*, 31 N. Y. St. Rep. 408; s. c. 9 N. Y. Supp. 741; *Davidson v. Cornell*, 31 N. Y. St. Rep. 982; s. c. 10 N. Y. Supp. 521; s. c. *rev'd* on other grounds, 132 N. Y. 223; 30 N. E. Rep. 573; *Kranz v. Long Island R. Co.*, 123 N. Y. 1; s. c. 33 N. Y. St. Rep. 46; 25 N. E. Rep. 206; *McCauley v. Smith*, 65 Hun (N. Y.) 620; s. c. 47 N. Y. St. Rep. 500; 19 N. Y. Supp. 991 (right to assume that the

justified in assuming that a car furnished by the company is in good repair, and supplied with proper brakes, when he knows that about

employer has complied with a statutory duty); *Mayer v. Liebmann*, 16 App. Div. (N. Y.) 54; s. c. 44 N. Y. Supp. 1067; *Bird v. Long Island R. Co.*, 11 App. Div. (N. Y.) 134; s. c. 42 N. Y. Supp. 888; *Dunn v. Connell*, 20 Misc. (N. Y.) 727; s. c. 46 N. Y. Supp. 684; s. c. aff'd, 21 Misc. (N. Y.) 295; 47 N. Y. Supp. 185; *Cunningham v. Sicilian Asphalt Pav. Co.*, 49 App. Div. (N. Y.) 380; s. c. 63 N. Y. Supp. 357; *Harroun v. Brush Electric Light Co.*, 12 App. Div. (N. Y.) 126; s. c. 42 N. Y. Supp. 716; *Selleck v. Langdon*, 59 Hun (N. Y.) 627; s. c. 37 N. Y. St. Rep. 511; 13 N. Y. Supp. 858; s. c. aff'd, 133 N. Y. 535 (*mem.*); *Rigdon v. Allegany Lumber Co.*, 59 Hun (N. Y.) 627; s. c. 37 N. Y. St. Rep. 514; 13 N. Y. Supp. 871; *Goodrick v. New York & C. R. Co.*, 116 N. Y. 398; s. c. 26 N. Y. St. Rep. 767; 5 L. R. A. 750; 41 Am. & Eng. R. Cas. 259; 22 N. E. Rep. 397; *Wilkie v. Raleigh & C. R. Co.*, 127 N. C. 203; s. c. 37 S. E. Rep. 204; *Cameron v. Great Northern R. Co.*, 8 N. D. 124; s. c. 77 N. W. Rep. 1016; 5 Am. Neg. Rep. 454; 12 Am. & Eng. R. Cas. (N. S.) 520; *Pittsburgh & C. R. Co. v. Burroughs*, 6 Ohio N. P. 37 (right to assume that there are no unblocked frogs in a railroad-yard, left there in violation of a statute); *Wellston Coal Co. v. Smith*, 65 Ohio St. 70; s. c. 61 N. E. Rep. 143; 55 L. R. A. 99 (right to assume that mine owner or operator has furnished reasonably safe entries to mine and kept them in reasonably safe condition); *O'Brien v. Sullivan*, 195 Pa. St. 474; s. c. 46 Atl. Rep. 130; *Ortlip v. Philadelphia & C. Traction Co.*, 9 Pa. Dist. Rep. 291; *Bannon v. Lutz*, 158 Pa. St. 166; s. c. 27 Atl. Rep. 890; *McDonald v. Postal Tel. Co.*, 22 R. I. 131; s. c. 46 Atl. Rep. 407 (not error to refuse an instruction ignoring this principle); *Carter v. Oliver Oil Co.*, 34 S. C. 211; s. c. 13 S. E. Rep. 419; *Carter v. Oliver Oil Co.*, 37 S. C. 604; s. c. 15 S. E. Rep. 928; *Freeman v. Railroad Co.*, 107 Tenn. 340; s. c. 64 S. W. Rep. 1; *Galveston & C. R. Co. v. Adams*, 94 Tex. 100; s. c. 58 S. W. Rep. 831; aff'g s. c. 55 S. W. Rep. 803 (no off. rep.); *Texas & C. R. Co. v. O'Feil*, 78 Tex. 486; s. c. 15 S. W. Rep. 33 (has a right to rely on the master's promise, and it is not the servant's duty to inspect); *Texas & C. R. Co. v. Eberhart*, 91 Tex. 321; s. c. 43 S. W. Rep. 510; aff'g s. c. 40 S. W. Rep. 1060 (no off. rep.) (right to assume that the company has established proper rules for his protection in the performance of his duties); *Missouri & C. R. Co. v. Crowder* (Tex. Civ. App.), 55 S. W. Rep. 380 (no off. rep.) (instruction that a servant has a right to presume that the master has performed his duty with ordinary care is not objectionable, as being upon the weight of the evidence); *Jackson v. Missouri & C. R. Co.*, 23 Tex. Civ. App. 319; s. c. 55 S. W. Rep. 376 (instruction ignoring this principle, erroneous); *Galveston & C. R. Co. v. Smith*, 24 Tex. Civ. App. 127; s. c. 57 S. W. Rep. 999; *International & C. R. Co. v. Johnston*, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772; *Houston & C. R. Co. v. Quill* (Tex. Civ. App.), 55 S. W. Rep. 1126 (no off. rep.); s. c. aff'd *sub nom.* *Quill v. Houston & C. R. Co.*, 93 Tex. 616; 57 S. W. Rep. 948; *Missouri & C. R. Co. v. Hamilton* (Tex. Civ. App.), 30 S. W. Rep. 679 (no off. rep.) (has the right to rely upon the exercise of ordinary prudence and care by him); *Dillingham v. Harden*, 6 Tex. Civ. App. 474; s. c. 26 S. W. Rep. 914; *Texas & C. R. Co. v. Guy* (Tex. Civ. App.), 23 S. W. Rep. 633 (no off. rep.); *Galveston & C. R. Co. v. Garrett*, 73 Tex. 262; s. c. 13 S. W. Rep. 62; *Lawrence v. Texas & C. R. Co.* (Tex. Civ. App.), 61 S. W. Rep. 342; *Terrell Compress Co. v. Arrington* (Tex. Civ. App.), 48 S. W. Rep. 59 (no off. rep.); *Smith v. Gulf & C. R. Co.* (Tex. Civ. App.), 65 S. W. Rep. 83 (no off. rep.) (may assume that tools furnished for specific work are reasonably safe and suitable for the work, in the absence of knowledge to the contrary); *Daniels v. Union Pac. R. Co.*, 6 Utah 357; s. c. 23 Pac. Rep. 762 (old crack in wheel which could have been discovered by the car-inspector); *Bowers v. Union Pac. R. Co.*, 4 Utah 215; s. c. 7 Pac. Rep. 251; *Goodman v. Richmond & C. R. Co.*, 81 Va. 576;

one-half of the cars furnished by the company are broken or out of order.⁶⁶ Moreover, as already seen,⁶⁷ there are many employments where the employé is reasonably expected and required to attend to the safety of the tools and appliances which are provided for him. Applying this doctrine to the case of *electrical linemen*, it has been reasoned that it cannot be held, as matter of law, that linemen of telegraph and telephone companies have the right to rely upon the soundness and safety of poles upon which they are working, nor that it is the duty of the companies to test and inspect poles and supports, in order to discover such as are insecure, before permitting their linemen to climb them; but the question upon whom the duty of inspection rests is usually one of fact depending upon the terms of the contract of employment, the lineman's knowledge of the hazards of the work, and his ability and opportunity to discover the dangers incident thereto and avoid them, and other circumstances.⁶⁸ Again, there are situations where the premises upon which, or the tools or appliances with which the servant is required to work, are under the control of a party other than his master, in which case the servant has no right to expect that his master will make the place safer than it was when he entered it, since he has no control over it for that purpose.⁶⁹

Chesapeake &c. R. Co. v. Lee, 84 Va. 642; s. c. 5 S. E. Rep. 679; Norfolk &c. R. Co. v. Nunnally, 88 Va. 546; s. c. 16 Va. L. J. 73; 14 S. E. Rep. 367; McDonald v. Svenson, 25 Wash. 441; s. c. 65 Pac. Rep. 789; Mackey v. Baltimore &c. R. Co., 19 D. C. 282; s. c. 18 Wash. L. Rep. 767; Crawford v. The Wells City, 38 Fed. Rep. 47; Western Coal &c. Co. v. Ingraham, 70 Fed. Rep. 219; s. c. 36 U. S. App. 1; 2 Am. & Eng. Corp. Cas. (N. S.) 689; 17 C. C. A. 71; Mason &c. R. Co. v. Yockey, 43 C. C. A. 228; s. c. 103 Fed. Rep. 265; Grand Trunk R. Co. v. Tennant, 66 Fed. Rep. 922; Great Northern R. Co. v. McLaughlin, 70 Fed. Rep. 669; s. c. 17 C. C. A. 330; 44 U. S. App. 189; Tennessee Coal &c. R. Co. v. Currier, 108 Fed. Rep. 19; s. c. 47 C. C. A. 161. It has been held that knowledge or the means of knowledge of the general method adopted by the master in carrying on his business is insufficient to charge the employé with knowledge that defective or insufficient appliances may be used, but he may assume that the appliances furnished

are free from defects discoverable by a proper inspection: Texas &c. R. Co. v. Archibald, 170 U. S. 665; s. c. 42 L. ed. 1188; 18 Sup. Ct. Rep. 777.

⁶⁶Roddy v. Missouri Pac. R. Co., 104 Mo. 234; s. c. 12 L. R. A. 746; 43 Alb. L. J. 479; 15 S. W. Rep. 1112.

⁶⁷*Ante*, §§ 3801, 4649.

⁶⁸McGorty v. Southern &c. Teleph. Co., 69 Conn. 635; s. c. 38 Atl. Rep. 359.

⁶⁹Hughes v. Malden &c. Gaslight Co., 168 Mass. 395; s. c. 47 N. E. Rep. 125 (employé of gas company has no right to expect his employer to shore the sides of a trench dug by authority of the city). It has been held that an employé who obtained knowledge of a defect in an appliance while assisting in the operation of it, has no right to presume, when he comes to use it three weeks later, or when others working near him come to use it at that time, that it has been repaired by his employer: Pennsylvania Co. v. Burgett, 7 Ind. App. 352; s. c. 34 N. E. Rep. 650.

ARTICLE III. CONTINUING IN SERVICE AFTER ACQUIRING KNOWLEDGE OF DANGER.

SECTION

- 4657. Effect of continuing in the service after acquiring knowledge of the defect or danger.
- 4658. Continuing in service where defect is known, but danger not glaring or imminent.
- 4659. Continuing in service after knowledge of a defect or change increasing the risk.
- 4660. Effect of failure of servant to give notice to master of the defect or danger.
- 4661. Definiteness and sufficiency of the notice.
- 4662. To whom notice of the defect or danger may be given.
- 4663. Effect of coercion, threats, or fear of losing employment.
- 4664. Effect of assurance of the master or his representative that the place, machine, appliance, or method of work is safe.
- 4665. Continuing in service after complaint and inadequate repairs.

SECTION

- 4666. Circumstances under which the employé does accept the risk notwithstanding the promise of the employer to repair.
- 4667. Complaining of defect and then continuing in service after promise to repair.
- 4668. What is a reasonable time in which to perform the promise to repair.
- 4669. When servant may presume that master has complied with his promise to repair.
- 4670. What agent of the master deemed to have authority to make the promise to repair.
- 4671. Effect of continuing in service with knowledge of defect or danger without complaint, or without promise of master to repair.
- 4672. Effect of servant objecting or protesting.

§ 4657. **Effect of Continuing in the Service after Acquiring Knowledge of the Defect or Danger.**—As shown in another paragraph,¹ the general trend of authority in cases where the question is not influenced by statute, is that if the servant, after acquiring knowledge of the danger or defect, remains in the employment without notice or protest followed by the promise of the master to remedy or repair it, he assumes the risks proceeding therefrom, as much as though he had acquired such knowledge before entering the employment; and he waives any claim for damages against his master in case he receives injury therefrom.² For instance, it has been held that where a serv-

¹ *Ante*, § 4608.

² *Kinnare v. Chicago*, 70 Ill. App. 106; s. c. aff'd, 171 Ill. 332; 3 Chic. L. J. Wkly. 128; 49 N. E. Rep. 536 (employé at work on unfenced roof assumed risk of falling off); Chi-

cago &c. R. Co. v. Merckes, 36 Ill. App. 195; Illinois &c. R. Co. v. Morrissey, 45 Ill. 127 (under which circumstances the master is liable for injuries to him only when caused by the master's willful act); Kolb

ant has performed certain work many times, and with the assistance of but one man, he should be held to know the danger of so doing; so that, if he voluntarily attempts to perform the work another time with the same assistance, and makes no objection, nor any demand for

v. Sandwich Enterprise Co., 36 Ill. App. 419; Bowles v. Indiana R. Co., 27 Ind. App. 672; s. c. 62 N. E. Rep. 94 (plaintiff continued to use team of horses which he knew were unruly); Reberk v. Horne & Co., 85 Minn. 326; s. c. 88 N. W. Rep. 1003 (failure to enforce rule against throwing dangerous substances around room in tinware factory—servant continued to work with full knowledge of its violation without protest—risk assumed); Harff v. Green, 168 Mo. 308; s. c. 67 S. W. Rep. 576 (carpenter complained of want of protection from falling bricks, and was told to go to work or quit—risk assumed); Garety v. King, 27 App. Div. (N. Y.) 114; s. c. 50 N. Y. Supp. 179 (employé at work on roof assumed risk of falling through skylight of which he had knowledge); Webber v. Piper, 39 Hun (N. Y.) 353; s. c. aff'd, 109 N. Y. 496 (continued to use circular saw after notifying foreman that it needed setting); Kueckel v. O'Connor, 73 App. Div. (N. Y.) 594; s. c. 76 N. Y. Supp. 829; aff'g s. c. 36 Misc. (N. Y.) 335; 73 N. Y. Supp. 546 (continued to work at bottom of hoistway through which merchandise was being hoisted, conscious of the danger and having been warned, to which he replied that he was insured); Lake Shore & C. R. Co. v. Whidden, 23 Ohio C. C. 85 (employé used lifting-jack which he knew was weak, to raise tank from tender, and placed one end of jack on floor of tender, which he knew was freshly painted—risk of jack slipping was assumed); Gulf & C. R. Co. v. Brentford, 79 Tex. 619; s. c. 15 S. W. Rep. 561; Faulkner v. Mammoth Min. Co., 23 Utah 437; s. c. 66 Pac. Rep. 799; Sanderson v. Panther Lumber Co., 50 W. Va. 42; s. c. 40 S. E. Rep. 368; 55 L. R. A. 908 (employé accepting or continuing in the employment after knowledge of master's negligence, assumes risk); Sweet v. Ohio Coal Co., 78 Wis. 127; s. c. 9 L. R. A. 861; 47 N. W. Rep. 182; Atkyn v. Wabash R. Co., 41 Fed. Rep. 193;

s. c. 23 Ohio L. J. 151; Lindsay v. New York & C. R. Co., 50 C. C. A. 298; s. c. 112 Fed. Rep. 384 (yard brakeman, who had been employed continuously in the yard for over nine months, fell into one of 119 similar drains, which had existed in the yard during all of that time). In a thoroughly considered case, determined in the English Court of Appeal, reversing the Court of Exchequer, it appeared that the plaintiff was a workman in the employ of a contractor engaged by the defendants to execute certain work on a side-wall on their line of railway, in a dark tunnel. Trains were passing the spot every ten minutes, and, the line being curved at this point, he could not be aware of the approach of a train until it was within a distance of twenty or thirty yards. The space between the rail and the wall, on which the plaintiff and other workmen had to stand while at work, was just sufficient to enable them to keep clear of a train when sensible of its approach. The place in question was wholly without light. On a previous occasion, when similar work was being done, a lookout man had been stationed to give warning of approaching trains; but this precaution had been discontinued. The speed of the trains was not slackened on arriving near where the men were at work, nor was any signal given by sounding the whistle. With full knowledge of the danger, the plaintiff worked in this place a fortnight, until the accident happened which was the cause of the action. While reaching across the rail to find a tool which he had laid down, a train came along suddenly, striking and seriously injuring him. It was held that the plaintiff, having continued in his employment with full knowledge, could not make the defendants liable for an injury arising from danger to which he had voluntarily exposed himself: Woodley v. Metropolitan & C. R. Co., 2 Exch. Div. 384; s. c. 46 L. J. 521.

more help, he cannot recover for an injury caused thereby.³ But authority to this effect is by no means unanimous. In many cases the question whether he assumes the risk, or, as some of the decisions put it, is guilty of contributory negligence by reason of remaining in the service, is regarded as presenting a *question of fact for a jury*. One line of doctrine is to the effect that mere knowledge of a defect or danger will not, as matter of law, impute to the servant contributory negligence, or an assumption of the risk, because he remains in the service, but this will generally be a *question for a jury*.⁴ Possibly it

³ Lake Shore &c. R. Co. v. Whidden, 23 Ohio C. C. 85.

⁴ Whatley v. Zenida Coal Co., 122 Ala. 118; Mobile &c. R. Co. v. Holborn, 84 Ala. 133; s. c. 4 South. Rep. 146; Maydole v. Denver &c. R. Co., 15 Colo. App. 449; s. c. 62 Pac. Rep. 964 (railway brakeman continuing work with knowledge of the discontinuance of night inspection of the track,—did not assume risk of an accident caused by the burning of a bridge in the night); Chicago &c. R. Co. v. Warner, 108 Ill. 538 (brakeman injured while attempting to pass from one car to another, knowing that *some* of the cars had no ladder or handles); Ciriack v. Merchants' Woolen Co., 151 Mass. 152; rev'g s. c. 146 Mass. 182; s. c. 5 N. Eng. Rep. 728; 15 N. E. Rep. 579 (uninstructed and inexperienced boy twelve years old entangled in machinery while obeying an order of overseer to hurry and get a tool—verdict for plaintiff sustained); Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364; s. c. 18 S. W. Rep. 977; Settle v. St. Louis &c. R. Co., 127 Mo. 336; s. c. 30 S. W. Rep. 125; Devore v. St. Louis &c. R. Co., 86 Mo. App. 429 (whether it was so glaringly dangerous as to threaten immediate injury was a question for the jury); Spronk v. Addyston Pipe &c. Co., 19 Ohio C. C. 714; s. c. 10 Ohio C. D. 675 (servant not required to judge nicely, etc.); Coates v. Chapman, 195 Pa. St. 109; s. c. 45 Atl. Rep. 676; Sullivan v. Nicholson File Co., 21 R. I. 540; St. Louis &c. R. Co. v. McLain, 80 Tex. 85; s. c. 15 S. W. Rep. 789 (where employé does not know of the danger of continuing to use the machine until the danger is reasonably apparent, although he knows of the defect); Missouri &c. R. Co. v. Somers, 78 Tex. 439; s. c. 14 S. W. Rep. 779

(holding that the servant merely assumes the risk of injury from such defects as are known to him); Harrison v. Denver &c. R. Co., 7 Utah 523; s. c. 27 Pac. Rep. 728 (servant not bound to set up his own judgment against that of the master where the place is not obviously dangerous, or where there might be a difference of opinion upon the question, in the minds of reasonable and prudent persons); Dumas v. Stone, 65 Vt. 442; s. c. 25 Atl. Rep. 1097; Richmond &c. R. Co. v. Norment, 84 Va. 167; s. c. 4 S. E. Rep. 211; Graham v. Newburg Orrel Coal &c. Co., 38 W. Va. 273; s. c. 18 S. E. Rep. 584; Dwyer v. St. Louis &c. R. Co., 52 Fed. Rep. 87; Southern Pac. Co. v. Yeargin, 109 Fed. Rep. 436; s. c. 48 C. C. A. 497 (helper engine running backward on same track, without headlight—fact known to deceased,—his negligence a question for the jury); Mexican Cent. R. Co. v. Murray, 42 C. C. A. 334; s. c. 102 Fed. Rep. 264 (employé did not, as matter of law, assume the risk of danger from the breaking of a loop, although he had seen two, made of the same material, break before); Louisville &c. R. Co. v. Kelly, 63 Fed. Rep. 407; s. c. 11 C. C. A. 260 (where knowledge of defect had come to employé so recently as to afford him no opportunity to make objection or complaint); Mason &c. R. Co. v. Yockey, 103 Fed. Rep. 265; s. c. 43 C. C. A. 228 (question for jury whether it was the duty of a locomotive-fireman to abandon his engine on account of a formation of ice on the apron, upon which he slipped, in order to avoid an assumption of the risk); New York &c. Steamship Co. v. Anderson, 50 Fed. Rep. 462; s. c. 1 C. C. A. 529; 1 U. S. App. 176 (was for the jury to decide whether or

may be concluded from the authorities previously cited, that the American decisions are tending toward the doctrine of the English courts, that the assumption of the risk by a servant of injury from the defective condition of the premises or appliances cannot be inferred, *as a matter of law*, from the mere fact that he continued in the employment with knowledge of such condition and of the risk incident thereto.⁵

§ 4658. Continuing in Service where Defect is Known, but Danger Not Glaring or Imminent.—One or two jurisdictions appear to have settled upon the rule that the employé is not deemed to accept the risk unless the defect in the premises, in the machinery, in the appliances, or the incompetency of the fellow servant, or other danger of the situation, is so glaring and imminent that a prudent man would not, after acquiring such knowledge, remain in the service;⁶ and, on the other hand, that where the danger is so glaring, palpable, or imminent that a man of prudence would not, having knowledge of it,

not the sailor was justified in believing that a winchman was competent to handle the winch properly); *Smith v. Baker*, [1891] 1 A. C. 325 (holding that the mere fact that one employed by railway contractors to drill holes in rock near a crane continued in such occupation, with full knowledge that workmen in charge of the crane would swing stones over his head without warning, and of the danger arising therefrom, will not bar a recovery for injuries from a stone falling from such crane). Compare *McPeck v. Central Vt. R. Co.*, 79 Fed. Rep. 590, 595, where the authority of *Smith v. Baker* is denied.

⁵ *Williams v. Birmingham Battery &c. Co.*, [1899] 2 Q. B. 338; s. c. 68 L. J. Q. B. (N. S.) 918. It has been held that an *averment* that plaintiff had no knowledge of the danger of continuing in the service of his employer, which existed because of the latter's failure to provide suitable machinery and competent workmen, is necessary to warrant a recovery for injuries alleged to have resulted from such failure; otherwise it will be assumed by the employé. An allegation of freedom from fault is not sufficient for this purpose: *Louisville &c. R. Co. v. Corps*, 124 Ind. 427; s. c. 24 N. E. Rep. 1046; 8 L. R. A. 636; 8 Rail. & Corp. L. J. 206. Under S. C. Const., art. 9,

§ 15, providing that knowledge by an employé of the defective or unsafe condition or character of any machinery shall be no defense to an action for injury caused thereby, except as to *conductors or engineers* in charge of dangerous or unsafe cars or engines voluntarily operated by them, a motion for a nonsuit on the ground that the undisputed evidence showed that a *brakeman* suing a railroad for injuries resulting from defective mechanism saw the defects complained of before the accident and thereby assumed the risk, was properly denied, since the Constitution meant that such prior knowledge of defects would not defeat the action: *Youngblood v. South Carolina &c. R. Co.*, 60 S. C. 9; s. c. 38 S. E. Rep. 232 (plaintiff injured while coupling cars by reason of a defective coupler).

⁶ *Shortel v. St. Joseph*, 104 Mo. 114; *Mahoney v. St. Louis &c. R. Co.*, 108 Mo. 191; *Hamilton v. Rich Hill &c. Co.*, 108 Mo. 364; *O'Mellia v. Kansas City &c. R. Co.*, 115 Mo. 205; *Weldon v. Omaha &c. R. Co.*, 93 Mo. App. 668; s. c. 67 S. W. Rep. 698 (state of facts under which risk of using defective hand-car was not assumed); *Jones v. St. Louis &c. Co.*, 43 Mo. App. 398; *Mangum v. Bullion Beck &c. Min. Co.*, 15 Utah 534; s. c. 50 Pac. Rep. 834.

enter the service or remain therein, the servant is deemed to accept the risk and the master is not liable;⁷ and that whether this fact is to be ascertained by the court or by the jury will depend upon the state and conclusiveness of the evidence, as in other cases.

§ 4659. Continuing in Service after Knowledge of a Defect or Change Increasing the Risk.—It is a part of the foregoing doctrine that if a servant, without objection or complaint,⁹ continues in the service after acquiring knowledge of a defect,¹⁰ or of a change in the character of the machine or appliance with which he is required to work,¹¹ he assumes the risk incident to such defect or change. So, if a change is made in the premises, the machinery, the appliance, or the service of the master which increases the hazard, a servant who remains in the service with full knowledge of such change assumes the increased risk thereby produced.¹²

§ 4660. Effect of Failure of Servant to Give Notice to Master of the Defect or Danger.—It is said that at common law a workman is not precluded from obtaining compensation for injuries received by reason of defective machinery, or by reason of a defective system of using the same, because of his failure to give notice to his employer

⁷ *Smith v. St. Louis & C. R. Co.*, 69 Mo. 32; *Covey v. Hannibal & C. R. Co.*, 86 Mo. 635; *Waldheier v. Hannibal & C. R. Co.*, 87 Mo. 37; *Thorpe v. Missouri & C. R. Co.*, 89 Mo. 650; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464 (assumes risk of using unsafe or defective machinery, tool, or appliance where his judgment based on his experience gives notice of imminent danger in using it with skill and care, so that it would be reckless to use it).

⁹ Such a result follows only where he continues in the service without objection, complaint, or protest, or without being induced by his master to believe that a change will be made: *Kroy v. Chicago & C. R. Co.*, 32 Iowa 357; *Greenleaf v. Dubuque & C. R. Co.*, 33 Iowa 52; *Muldowney v. Illinois & C. R. Co.*, 39 Iowa 615; *Way v. Illinois & C. R. Co.*, 40 Iowa 341; *Lumley v. Caswell*, 47 Iowa 159; s. c. 7 Rep. 559; *Crutchfield v. Richmond & C. R. Co.*, 78 N. C. 300; *Jones v. Roach*, 9 Jones & Sp. (N. Y.) 248.

¹⁰ *Indianapolis & C. R. Co. v. Watson*, 114 Ind. 20; s. c. 12 West. Rep.

285; 14 N. E. Rep. 721; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; s. c. 9 West. Rep. 823; 12 N. E. Rep. 380; *Bohn v. Havemeyer*, 46 Hun (N. Y.) 557; s. c. 12 N. Y. St. Rep. 589; *Philadelphia & C. R. Co. v. Hughes*, 119 Pa. St. 301; s. c. 13 Atl. Rep. 286; 21 W. N. C. (Pa.) 166; *New York & C. R. Co. v. Lyons*, 119 Pa. St. 324; s. c. 13 Atl. Rep. 205; 21 W. N. C. (Pa.) 277.

¹¹ *Freeman v. Dennison Man. Co.*, 40 App. Div. (N. Y.) 99; s. c. 57 N. Y. Supp. 478; *Hunt v. Kane*, 40 C. C. A. 372; s. c. 100 Fed. Rep. 256 (locomotive taken out by crew and became defective while they were using it,—risk assumed by their continuing to use it without objection). That change in the running direction of trains on tracks, made by defendant four months previously to the accident to a servant, did not increase the risk of employment,—see *Naylor v. New York & C. R. Co.*, 33 Fed. Rep. 801.

¹² *Fritz v. Salt Lake Gas & C. Co.*, 18 Utah 493; s. c. 5 Am. Neg. Rep. 727; 56 Pac. Rep. 90.

of such defect.¹³ But it is also said that while, in many circumstances, the servant may, by giving notice of the defect or danger, relieve himself from the risk which he ordinarily assumes, yet the rule relates more particularly to the question of the negligence of the employer, though it bears to some extent on the question of the negligence of the employé, and upon the question whether he has used reasonable care for his safety under all the circumstances known to him.¹⁴ But the rule of the common law seems to be that if the servant continues in the use of the particular machine, tool, or appliance, or continues to work in the particular building, on the particular premises, or in connection with the particular fellow servant, after he has discovered that it is dangerous for him to do so, without informing his master of the danger, he is guilty of contributory negligence, such as will preclude him from recovering damages of the master in case he is afterwards injured thereby,¹⁵ which is obviously the same thing as accepting the risk.¹⁶ But dealing with it on the footing of contributory negligence, it has been held that the negligence of the servant, like that of the master, is measured by the standard of ordinary or reasonable care, which, as in other cases,¹⁷ is a care proportionate to the danger.¹⁸ A

¹³ Webster v. Foley, 21 Can. S. C. 580; so held on the authority of Smith v. Baker, [1891] 1 A. C. 325, 348. In McPeck v. Central Vt. R. Co., 79 Fed. Rep. 590; s. c. 50 U. S. App. 27, it is said that the rule of Smith v. Baker, *supra*, "is certainly not the rule of the Federal courts."

¹⁴ McPeck v. Central Vt. R. Co., 79 Fed. Rep. 590; s. c. 50 U. S. App. 27 (in substance). See also, Schnibbe v. Central & Co., 85 Ga. 592. It is said that if, after receiving notice from one servant of the *incompetency* of a fellow servant, the employer continues the servant so denounced in his service, he does so at his own risk, notwithstanding the fact that he has made inquiry, and decided that such servant is not incompetent or negligent; and that the employer is *bound by the fact*, whatever it may be: Ross v. Chicago & C. R. Co., 2 McCrary (U. S.) 235. This does not seem to be a sound statement of the law. The question is whether, after receiving the complaint, the employer has *acted with reasonable care* in retaining the servant complained of instead of discharging him. Compare Adams v. McCormick & C. Mach. Co., 95 Mo. App. 111; s. c. 68 S. W. Rep. 1053, where, under similar circum-

stances, it is held that whether the servant assumes the risk by remaining in the service is a question for a jury, depending upon whether or not the danger is so glaring that a prudent man could not reasonably suppose that he could continue in the service by the exercise of great care.

¹⁵ Chicago & C. R. Co. v. Merriman, 95 Ill. App. 628; Greenleaf v. Dubuque & C. R. Co., 33 Iowa 52, 57; Crutchfield v. Richmond & C. R. Co., 78 N. C. 300; s. c. 76 N. C. 320; Timmons v. Central Ohio R. Co., 6 Ohio St. 105; Buzzell v. Laconia Man. Co., 48 Me. 113; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; McCharles v. Horn Silver & C. Co., 10 Utah 470; s. c. 37 Pac. Rep. 733 (recklessness and carelessness of fellow servant).

¹⁶ Helbig v. Slaughter, 95 Ill. App. 623 (defective condition of walk leading to employer's building); Weeks v. Scharer, 111 Fed. Rep. 330; s. c. 49 C. C. A. 372 (incompetency of fellow servant).

¹⁷ Vol. I, § 25.

¹⁸ Toledo & C. R. Co. v. Asbury, 84 Ill. 429; s. c. 17 Alb. L. J. 91. Compare Greenleaf v. Dubuque & C. R. Co., 33 Iowa 52, 57 (instruction which was held not erroneous).

workman is, of course, not bound to give his employer notice of a defect or danger where, to the knowledge of the workman, the employer *already knows* of the defect or danger;¹⁹ or where he has reasonable cause to believe that the employer knows of it.²⁰

§ 4661. **Definiteness and Sufficiency of the Notice.**—Plainly, the notice ought to be such as to direct the mind of the master, or his vice-principal, to the source of the apprehended danger. For example, it has been held that a statement made to an employer that an eye-bolt, through which led a guy-rope, was so loose that it would turn round, and failed to lead right, and should be changed, was not notice of a latent defect in the bolt which had no connection with its looseness.²¹

§ 4662. **To Whom Notice of the Defect or Danger may be Given.**—In the case of an individual employer such a notice is properly given to the employer himself, or to his representative, as elsewhere stated;²² in the case of an incorporated employer, to the governing board or body, by whatever name called;²³ and in case of a change of management, a notice to the preceding board will, of course, bind the corporation;²⁴ and in the case of any employer, individual or incorporated, it may be assumed that such notice may be given to the immediate *foreman* in charge of the workman who is affected by the danger and who gives the notice.²⁵

¹⁹ *Truman v. Rudolph*, 22 Ont. App. 250 (so held under a statute).

²⁰ *Seley v. Southern &c. R. Co.*, 6 Utah 319; s. c. 23 Pac. Rep. 751 (as in the case of open, instead of blocked railroad-frogs). So, it has been held that a railroad engineer is not conclusively bound, as matter of law, to take notice of all the omissions of the company to maintain statutory fences and cattle-guards, so as to make his failure to complain of such an omission an assumption of the risk thereby caused: *Terre Haute &c. R. Co. v. Williams*, 69 Ill. App. 392.

²¹ *Killman v. Robert Palmer &c. Shipbuilding &c. R. Co.*, 42 C. C. A. 281; s. c. 102 Fed. Rep. 224.

²² *Ante*, § 3797; *post*, § 4961.

²³ *Bland v. Shreveport Belt Ry.*, 48 La. An. 1057; s. c. 4 Am. & Eng. R. Cas. (N. S.) 349; 20 South. Rep. 248.

²⁴ *Bland v. Shreveport Belt Ry.*, *supra*.

²⁵ *Union Bridge Co. v. Teehan*, 92 Ill. App. 259; s. c. aff'd, 190 Ill. 374; 60 N. E. Rep. 533. But it has been held that notice of a defect to one charged with the duty of employing and discharging hands in a shop is not notice to the employer, where another person has charge of the machinery and repairs: *Chesapeake &c. R. Co. v. McDowell*, 16 Ky. L. Rep. 1; s. c. 24 S. W. Rep. 607 (no off. rep.). It has been held in another case that a *shift-boss* in charge of a gang of men, whose duty it is to direct and supervise the men and their work, but who has *no authority to hire or discharge employes*, is a fellow servant, and notice to him of the incompetency of a fellow servant is not notice to the master: *Weeks v. Scharer*, 111 Fed. Rep. 330; s. c. 49 C. C. A. 372. And it has been held that notice to a *foreman* of a company occupying a building as *tenant*, of the defective condition

§ 4663. **Effect of Coercion, Threats, or Fear of Losing Employment.**—If a servant is required, although after complaint, to continue to work with a defective or dangerous machine or appliance, or in a dangerous place, under a threat of being discharged;²⁶ or is required, under a similar threat or fear, to undertake a dangerous job of work,²⁷—he is deemed to accept the risk of the defect or danger, and cannot make his voluntary act the ground of recovering damages against the master. Some courts have, however, shown a tendency to allow the threats or coercion of the master to absolve the servant from the position of accepting the risk, or from the imputation of contributory negligence, except where the danger was so glaring and imminent that no prudent man would have encountered it although under stress of the threat or prospect of losing his employment;²⁸ and,

thereof, is not a substitute for notice to the officers of the company in personal charge and direction of the place, and is not binding upon the company: *McKenna v. Martin &c. Paper Co.*, 176 Pa. St. 306; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 640; 38 W. N. C. (Pa.) 503; 35 Atl. Rep. 131. In the case of a railroad company, notice of a defect in an engine may be given to a *yard-master*, whose duty it is to report defective engines to the trainmaster, although he has no personal authority to direct the reparation of such a defect: *Pieart v. Chicago &c. R. Co.*, 82 Iowa 148; s. c. 47 N. W. Rep. 1017. In another case it was held that notice of a defect in an elevator might be given to a *shipping-clerk* who had charge of the employes and directed the use of the elevator: *Larkin v. Washington Mills Co.*, 45 App. Div. (N. Y.) 6; s. c. 61 N. Y. Supp. 93.

²⁶ *Lamson v. American Axe &c. Co.*, 177 Mass. 144; s. c. 58 N. E. Rep. 585; *Sweeney v. Berlin &c. Envelope Co.*, 101 N. Y. 520; s. c. 54 Am. Rep. 722; *Harff v. Green*, 168 Mo. 308; s. c. 67 S. W. Rep. 576 (carpenter complained of want of protection from falling bricks, and was told to resume work or quit—risk assumed).

²⁷ *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 38 Ill. App. 531; *Brown v. Oregon Lumber Co.*, 24 Or. 315; s. c. 33 Pac. Rep. 557; *Worlds v. Georgia R. Co.*, 99 Ga. 283; s. c. 5 Am. & Eng. R. Cas. (N. S.) 514; 25 S. E. Rep. 646 (rail-

road employé overstrained himself in lifting a cross-tie at the direction of his superior); *Robertson v. Chicago &c. R. Co.*, 146 Ind. 486; s. c. 45 N. E. Rep. 655; 6 Am. & Eng. R. Cas. (N. S.) 611; *Southern &c. R. Co. v. Moore*, 49 Kan. 616; s. c. 31 Pac. Rep. 138; *Gensen v. Ohio Oil Co.*, 22 Ohio C. C. 276; s. c. 12 Ohio C. D. 10. See also, Vol. V, subtitle CONTRIBUTORY NEGLIGENCE OF SERVANT, where this subject is more extensively considered. For a case where a laborer employed for *one day*, who undertook dangerous work at the command of his foreman for fear he would be discharged, was held not to assume the risk,—see *Orr v. Southern Bell Teleph. Co.*, 130 N. C. 627; s. c. 41 S. E. Rep. 880.

²⁸ *East Tennessee &c. R. Co. v. Duffield*, 12 Lea (Tenn.) 63; s. c. 47 Am. Rep. 319 (section-hand allowed to recover for injuries sustained from a hammer known by him to be defective, but which he was ordered by his foreman to use on pain of discharge); *Citizens' Gas-Light &c. Co. v. O'Brien*, 118 Ill. 174 (gas company ordered its servant into a room from which the gas could not escape and he was suffocated—company liable to his personal representatives); *Wells &c. Co. v. Gortorski*, 50 Ill. App. 445 (ignorant foreign laborer pushed into a position of danger by his foreman and coerced to remain there through fear of the foreman, contrary to his own judgment—recovery). See also, *Chicago &c. R.*

as we shall see when considering the question of CONTRIBUTORY NEGLIGENCE OF THE SERVANT,²⁹ there are many cases where the commands, threats, or coercion of the master or of the master's representative, will excuse the contributory negligence of the servant, so far at least as to take the question to a jury.

§ 4664. Effect of Assurance of the Master or his Representative that the Place, Machine, Appliance, or Method of Work is Safe.³⁰—

It may be collected from the almost unanimous current of judicial authority that, if the servant complains of or directs attention to a defect or danger in the place where he is required to work, or in the tools, machinery, or appliances with which he is required to work, and thereupon the master, or his representative, assures him that he can proceed without danger, and requests or commands him to continue his work,—the servant will not, as matter of law, be put in the position of having accepted the risk, or of having been guilty of contributory negligence, because of relying upon the presumed superior knowledge of his master or of his master's representative, and continuing the work.^{30a} The servant will not be imputable with wrong

Co. v. Clark, 11 Ill. App. 104, where the doctrine is recognized that coercion of the servant may excuse his contributory negligence. — — — But it has been held that the mere request of the foreman that a servant do the best he can when working alone, is not such coercion as will justify the servant in undertaking the work without assistance, when he knows that it is dangerous to do so: Mayott v. Norcross, 24 R. I. 187; s. c. 52 Atl. Rep. 894.

²⁹ Vol. V.

³⁰ See *ante*, §§ 4008, 4072.

^{30a} Coggin v. Osborne, 115 Cal. 437; s. c. 47 Pac. Rep. 248; Walter v. Fisher, 96 Ill. App. 590 (bricklayer attempted to lay a brick on the assurance of the foreman that there was no danger of a certain curbing-stone falling); Watson Cut-Stone Co. v. Small, 181 Ill. 366; s. c. 54 N. E. Rep. 995; Bradbury v. Goodwin, 108 Ind. 286; Stomne v. Hanford Produce Co., 108 Iowa 137; s. c. 78 N. W. Rep. 841; Chicago Drop Forge & C. Co. v. Van Dam, 149 Ill. 337; s. c. 36 N. E. Rep. 1024; aff'g s. c. 50 Ill. App. 470; Phillips v. Michael, 11 Ind. App. 672; s. c. 39 N. E. Rep. 669; Lasch v. Stratton, 101 Ky. 672; s. c. 19 Ky. L. Rep. 889; 42 S. W. Rep. 756; Lawrence v. Hagemeyer, 93

Ky. 591; s. c. 14 Ky. L. Rep. 566; 20 S. W. Rep. 704; Wake v. Price, 22 Ky. L. Rep. 696; s. c. 58 S. W. Rep. 519 (no off. rep.); Denning v. Gould, 157 Mass. 563; s. c. 32 N. E. Rep. 862 (employer tied two ladders together to make one long enough to reach the roof of his barn and directed his employé to ascend, assuring him that it was safe, that he was an old sailor and a skillful tyer of knots; employé ascended without examining the fastening, which gave way because improperly tied — employer liable); McKee v. Tourtellotte, 167 Mass. 69; s. c. 44 N. E. Rep. 1071 (servant otherwise entitled to rely upon a master's assurance that a place is safe to work in, not chargeable, as matter of law, with contributory negligence in continuing the work, merely because a fellow workman tells him it is dangerous; the question depends upon whether or not the servant is justified, as a prudent man, in surrendering his own opinion and obeying the command); Schlacker v. Ashland Iron Min. Co., 89 Mich. 253; s. c. 50 N. W. Rep. 839; Shadford v. Ann Arbor St. R. Co., 121 Mich. 224; s. c. 80 N. W. Rep. 30; Burnside v. Novelty Man. Co., 121 Mich. 115; s. c. 6 Det. L.

for thus acting upon the advice or assurance of the master or his vice-principal, nor will it lie in the mouth of the master to impute blame to the servant for so doing.³¹ So, it has been held that a serv-

N. 382; 79 N. W. Rep. 1108 (the foreman, an expert, familiar with the machine, and expressly charged by the employer with the duty of inspecting and repairing it); *LeClair v. First Division &c. R. Co.*, 20 Minn. 9, 19; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607; s. c. 63 S. W. Rep. 827; *Monahan v. Kansas City Clay &c. Co.*, 58 Mo. App. 68; *Warner v. Chicago &c. R. Co.*, 62 Mo. App. 184; *Helfenstein v. Medart*, 136 Mo. 595; s. c. 36 S. W. Rep. 863; 37 S. W. Rep. 829; 38 S. W. Rep. 394; *Malone v. Morton*, 84 Mo. 436; *Conroy v. Vulcan Iron Works*, 62 Mo. 35, 39; *Stoddard v. St. Louis &c. R. Co.*, 65 Mo. 514, 521; *Keegan v. Kavanagh*, 62 Mo. 230, 232; *Smith v. Union R. Co.*, 61 Mo. 88; *Schmit v. Gillen*, 41 App. Div. (N. Y.) 302; s. c. 58 N. Y. Supp. 458; *Pilkey v. Harrower*, 59 App. Div. (N. Y.) 378; s. c. 69 N. Y. Supp. 243; *Chadwick v. Brewshier*, 39 N. Y. St. Rep. 718; s. c. 15 N. Y. Supp. 598; *Daly v. Schaaf*, 28 Hun (N. Y.) 314; *Anderson v. Steinreich*, 66 N. Y. Supp. 498; s. c. 32 Misc. (N. Y.) 237; rev'g s. c. 65 N. Y. Supp. 799; 32 Misc. (N. Y.) 680; *Laning v. New York &c. R. Co.*, 49 N. Y. 521; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 932; *Record v. Dean*, 11 Ohio C. D. 808 (circumstances under which the servant was *not* entitled to recover); *Patterson v. Pittsburgh &c. R. Co.*, 76 Pa. St. 393, 394; *Kelley v. Silver Spring &c. Co.*, 12 R. I. 112; s. c. 7 Rep. 60; *Gulf &c. R. Co. v. Duvall*, 12 Tex. Civ. App. 349; s. c. 35 S. W. Rep. 699 (right of inexperienced servant to rely upon superior knowledge of master and obey instructions, although work may seem dangerous to servant); *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; s. c. 66 Pac. Rep. 799 (miner thought ground overhanging place where he was ordered to excavate looked "a little suspicious," but foreman assured him it was safe); *Hoffman v. Dickinson*, 31 W. Va. 142; s. c. 6 S. E. Rep. 53 (good illustration of the rule); *Graham v. Newburg Orrell Coal &c.*

Co., 38 W. Va. 273; s. c. 18 S. E. Rep. 534 (servant not precluded from recovery where he is lulled into a sense of security by the words, acts, and conduct of his master, and the danger is not so plain and obvious that a prudent and careful man, anxious for his own safety, ought not to risk it); *Wallace v. Standard Oil Co.*, 66 Fed. Rep. 260 (employer invited young and inexperienced boy, whose clothing had become saturated with dangerous and inflammable oils and gases, to warm himself by a hot stove, assuring him that clothes so saturated were no more liable to take fire than if wet with water—clothes took fire, boy burned to death, employer liable); *Harder &c. Min. Co. v. Schmidt*, 43 C. C. A. 532; s. c. 104 Fed. Rep. 282; *Haas v. Balch*, 6 C. C. A. 201; s. c. 56 Fed. Rep. 984; 48 Alb. L. J. 327; *Holmes v. Worthington*, 2 Post. & Fin. 533; *Holmes v. Clarke*, 6 Hurl. & N. 349; s. c. 30 L. J. (Exch.) 135; s. c. aff'd in Exchequer Chamber, *sub nom.* *Clarke v. Holmes*, 7 Hurl. & N. 937, 945; 2 Thomp. Neg. (1st ed.), p. 953; *Britton v. Great Western &c. Co.*, L. R. 7 Exch. 130; *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748; s. c. 1 Pat. Sc. App. 389; 26 Sc. Jur. 550; rev'g s. c. 16 Dunlop 233; 26 Sc. Jur. 123.

³¹ *Harder &c. Min. Co. v. Schmidt*, 43 C. C. A. 532; s. c. 104 Fed. Rep. 282. Somewhat upon this principle, it has been held that an employé who goes to work on an intensely cold night at a point where no shelter, fire, or fuel can be had, to remove a snow blockade on a railroad, relying on the assurance that peril of freezing will be provided against, can recover for injuries sustained by freezing, where such protection is not provided; *Hyatt v. Hannibal &c. R. Co.*, 19 Mo. App. 287. For a case where the servant was not relieved of the assumption of the risk of a caving in of a trench in digging, the danger arising from undermining without leaving supports, which danger was understood by him, and of the risk of his taking a

ant has a right to rely on the superior judgment of the master in directing certain work to be done in a particular way, although the servant knows the dangerous character of the work, unless the danger is so manifest that no reasonably prudent man would undertake it in the same situation.³² A possible exception to the rule arises where, notwithstanding the advice, assurance or command, the *danger is imminent and glaring*, or at least so obvious that an ordinarily prudent man would not, even under the circumstances, encounter it.³³

§ 4665. Continuing in Service after Complaint and Inadequate Repairs.—If the servant complains to the master, or to the superintendent or other representative of the master, that a given place, machine or appliance is defective and dangerous, and the latter undertakes to repair the defect so as to make it safe, and assures the servant that he has done so, it is not negligence, as matter of law, for the servant to continue to work as before, though it afterwards turns out that the repairs were such as to not make it safe.³⁴

dangerous position,—see *Cisney v. Pennsylvania Sewer-Pipe Co.*, 199 Pa. St. 519; s. c. 49 Atl. Rep. 309. Decision to the effect that the assurance of the foreman that there was no danger, where the dangerous condition was as obvious to the servant as to the foreman, was not within the scope of his authority, but the opinion of a fellow servant merely, and hence, though acted on by the servant, was nothing for which the master was liable: *Pintorelli v. Horton*, 22 R. I. 374; s. c. 48 Atl. Rep. 142. It has been held that where an experienced carpenter, without making any examination, stands on a box handed to him by his vice-principal, who to his knowledge has made no examination thereof, he *assumes the risk* of the box not being strong enough to bear his weight: *Soutar v. Minneapolis &c. Electric Co.*, 68 Minn. 18; s. c. 70 N. W. Rep. 796.

³² *Larson v. Center Creek Min. Co.*, 71 Mo. App. 512.

³³ *Lasch v. Stratton*, 101 Ky. 672; s. c. 19 Ky. L. Rep. 889; 42 S. W. Rep. 756; *Wake v. Price*, 22 Ky. L. Rep. 696; s. c. 58 S. W. Rep. 519. Compare *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; s. c. 66 Pac. Rep. 799 (miner thought that ground overhanging place where foreman

ordered him to excavate looked "a little suspicious," but foreman assured him it was safe—danger held not to be so obvious under the circumstances as to create an assumption of the risk). Cases will be discovered here and there which proceed in seeming opposition to or oblivion of the principle of the text. Thus, it has been held that a brakeman, having occasion to work on the trains of his employer while passing over another railroad, just constructed, cannot rightfully assume that the frogs and guard-rails of the new railroad are filled or blocked, as required by a statute, and hence dismiss all thought of them from his mind: *Gillen v. Paten &c. R. Co.*, 93 Me. 80; s. c. 44 Atl. Rep. 361. Another court has held that a mason, employed by a contractor, is not absolved from any care in inspecting the construction of a scaffolding on which he is directed to work, merely because the foreman tells him that it is all right and ready for him to go to work on: *Bannon v. Sanden*, 68 Ill. App. 164.

³⁴ *Atchison &c. R. Co. v. McKee*, 37 Kan. 592; s. c. 15 Pac. Rep. 484; *Connolly v. St. Joseph Press Printing Co.*, 166 Mo. 447; s. c. 66 S. W. Rep. 268 (state of evidence insufficient to show assumption of risk).

§ 4666. **Circumstances under which the Employé Does Accept the Risk Notwithstanding the Promise of the Employer to Repair.**—On the other hand, the employé is deemed to accept the risk notwithstanding the promise of the employer to repair the defect, (1) where the danger is great, obvious and immediate,—such as a reasonably prudent man would not encounter;³⁵ (2) where the promise is made by a person not authorized to bind the employer;³⁶ (3) where the promise is so vague, indefinite or conditional that the employé ought not to rely upon it and expect its performance;³⁷ (4) where the work is simple and the tools reasonably safe, although out of repair;³⁸

³⁵ *St. Louis &c. R. Co. v. Kelton*, 55 Ark. 483; s. c. 18 S. W. Rep. 993; *Indianapolis &c. R. Co. v. Watson*, 114 Ind. 20; s. c. 13 West. Rep. 332; 15 N. E. Rep. 824; *Marsh v. Chickering*, 101 N. Y. 396 (lamplighter continued to use ladder without hooks or spikes, knowing that, without them, it was dangerous, in consequence of which he was injured—master had promised several times to repair); *Reese v. Clark*, 146 Pa. St. 465; s. c. 23 Atl. Rep. 246; *Mayott v. Norcross*, 24 R. I. 187; s. c. 52 Atl. Rep. 894 (servant voluntarily attempted to do work alone, knowing that it could not safely be done without assistance, upon the master's failure to furnish promised assistance); *Erdman v. Illinois Steel Co.*, 95 Wis. 6; s. c. 69 N. W. Rep. 993. Compare *Spencer v. Worthington*, 60 N. Y. Supp. 873; s. c. 44 App. Div. (N. Y.) 496.

³⁶ *Purcell Mill &c. Co. v. Kirkland* (Ind. Terr.), 47 S. W. Rep. 311 (no off. rep.) (mere suspicions, surmises, and belief that the defects will be remedied not enough—must be something emanating from the employer to induce such belief); *Nealand v. Lynn &c. R. Co.*, 173 Mass. 42; s. c. 53 N. E. Rep. 137 (promise made to a coal shoveller, without authority, by the engineer in charge of the steam-boiler); *Ehmcke v. Porter*, 45 Minn. 338; s. c. 47 N. W. Rep. 1066 (promise made by a millwright working in a mill); *Gulf &c. R. Co. v. Brentford*, 79 Tex. 619; s. c. 15 S. W. Rep. 561.

³⁷ *Silvia v. Wampanoag Mills*, 177 Mass. 194; s. c. 58 N. E. Rep. 590 (employé complained to foreman, who promised to repair the defect in a few days, but employé made no complaint to the overseer, who knew

nothing of the defect,—held that he had not exercised due care); *McClusky v. Garfield &c. Coal Co.*, 180 Mass. 115; s. c. 61 N. E. Rep. 804 (promise of foreman to level surface of coal in hold of a ship “in a moment,” so that an employé could more readily get out of the way of a steam-shovel used in unloading the coal, was not an assurance that the place was safe, or that it should be made safer at once, but plainly implied that the surface of the coal would be steeper yet before it would be levelled, and plaintiff assumed the risk by remaining at work); *Hayball v. Detroit &c. R. Co.*, 114 Mich. 135; s. c. 4 Det. Leg. N. 532; 72 N. W. Rep. 145 (was told that it would be fixed after a while, when the machine was reached in the course of repair); *Wilson v. Winona &c. R. Co.*, 37 Minn. 326; s. c. 5 Am. St. Rep. 851; 33 N. W. Rep. 908 (“would do it if he got time Sunday afternoon”); *Brewer v. Tennessee Coal &c. R. Co.*, 97 Tenn. 615; s. c. 37 S. W. Rep. 549 (defective walk in a switch-yard at a coal mine); *Dwyer v. Nixon*, 108 Fed. Rep. 751; s. c. 47 C. C. A. 666 (plaintiff was injured by a sudden start of machinery—statement by the foreman that he intended to move the machinery slowly was not a promise or assurance of the master that the defects would be cured or dangerous places would be made safe). But see *Westville Coal Co. v. Wood*, 96 Ill. App. 616 (promise to remedy dangerous condition of working-place “as soon as possible”—risk not assumed).

³⁸ *Meador v. Lake Shore &c. R. Co.*, 138 Ind. 290; s. c. 37 N. E. Rep. 721 (short ladder used in lighting street-lamps—obvious defect consist-

(5) where the defects complained of do not add to the danger of operating the machine, in which case the promise of the employer to repair them does not render him liable;³⁹ (6) where the work is a short job;⁴⁰ (7) where the evidence fails to show that the servant continued in the service by reason of *relying* upon the promise of the master;⁴¹ (8) where the master promises to make the reparation by a definite time, in which case it has been held, on the one hand, that the servant assumes the risk up to the time of the promise only,⁴² and, on the other hand, that he assumes the risk up to the time at which the repairs are promised to be made;^{42a} (9) where the servant remains in the service an unreasonable time after the promise with the expectation that the promise will be fulfilled;⁴³ (10) where, notwithstanding the promise to repair, the proximate cause of the injury is not the defect in the tool, machinery, appliance or place of work, but the contributory negligence of the servant;⁴⁴ (11) where, although such

ing in the nails which held the steps being partially withdrawn—could have been easily remedied by a hatchet, hammer, stone or brick); *Gowen v. Harley*, 56 Fed. Rep. 973; s. c. 56 Am. & Eng. R. Cas. 238; 6 C. C. A. 190 (simple manual labor capable of being done in reasonable safety without the tools—promise to supply skids to remove a heavy box, —not because removal was dangerous without skids, but because it was easier with them).

³⁹ *Higgins v. Fanning*, 195 Pa. St. 599; s. c. 46 Atl. Rep. 102.

⁴⁰ *Purcell Mill & Co. v. Kirkland* (Ind. Terr.), 47 S. W. Rep. 311 (no off. rep.).

⁴¹ *Bodwell v. Nashua Man. Co.*, 70 N. H. 390; s. c. 47 Atl. Rep. 613; *Showalter v. Fairbanks & Co.*, 88 Wis. 376; s. c. 60 N. W. Rep. 257; *Houston v. Owen* (Tex. Civ. App.), 67 S. W. Rep. 788 (no recovery where evidence shows that employé had no intention of quitting work even if promised repairs to bridge were not made, but that he made his complaint merely because he thought bridge might be injured unless repairs were made; and especially where it appears that many like promises to repair had been broken). But where an employé is assured from time to time that the defect complained of will be remedied, he may rely on such assurance, and such reliance cannot be overcome by matters tending merely to create a *suspicion* that the promise will not be performed: *Illinois Steel Co. v. Mann*, 100 Ill. App.

367; s. c. aff'd, 197 Ill. 186; 64 N. E. Rep. 328.

⁴² *Nelson v. Shaw*, 102 Wis. 274; s. c. 78 N. W. Rep. 417; 5 Am. Neg. Rep. 743.

^{42a} *Rice v. Eureka Paper Co.*, 70 App. Div. (N. Y.) 336; s. c. 75 N. Y. Supp. 49.

⁴³ *Mull v. Curtice Bros. Co.*, 74 App. Div. (N. Y.) 561; s. c. 77 N. Y. Supp. 813 (plaintiff remained at work three months after a promise by machinist to fix machine "when he had time"—risk assumed as matter of law).

⁴⁴ *Carlson v. Walsh*, 67 N. Y. Supp. 516; s. c. 56 App. Div. (N. Y.) 551 (put his foot in a dangerous position without necessity); *Holloran v. Union Iron & Co.*, 133 Mo. 470; s. c. 35 S. W. Rep. 260 (employé fell into a cellar by reason of his foot slipping from a girder upon which he had placed his foot without apprehending danger from it); *District of Columbia v. McElligott*, 117 U. S. 621 (supervisor promised to send a man to watch a bank of earth in danger of falling; did not keep his promise; laborer went on working until bank fell, injuring him,—held that it was the laborer's duty to be on the alert and to protect himself); *Olson v. Doherty Lumber Co.*, 102 Wis. 264; s. c. 78 N. W. Rep. 572 (failure of employer to furnish additional live rollers upon the bench of a slab-saw as promised, did not render him liable for an injury sustained by a workman who, while trying to dislodge with a hook a slab too short to go over

promise has been made, and on the faith of it the employé remains in the service, injury proceeds not from the failure to fulfill the promise, but from the negligence of a fellow servant, in a jurisdiction where the "fellow-servant doctrine" is in vogue;⁴⁵ (12) but not where the injury was caused both by the failure of the master to fulfill his promise to repair, and by the fault of a fellow servant,⁴⁶—the rule in such cases being that both or either of the tort-feasors is liable.⁴⁷ (13) The employé was also deemed to accept the risk notwithstanding the promise of the master to repair the defect, in the cases next cited in the margin.⁴⁸

§ 4667. **Complaining of Defect and then Continuing in Service after Promise to Repair.**—But if the servant complains to his master, or to the representative of his master, of a particular defect or danger, and receives a promise that the same will be repaired, the servant will be excused by the law for remaining in the service a *reasonable time* thereafter to await such reparation, and will not be deemed to accept the risk, unless the danger is so obvious, imminent or glaring that a reasonably prudent man would not, even after such a promise, encounter it by continuing in the service;⁵⁰ and,

the rollers, stepped back into the saw-slit when the hook gave way).

⁴⁵ Vogt v. Honstain, 81 Minn. 174; s. c. 83 N. W. Rep. 533; McFarlan Carriage Co. v. Potter, 153 Ind. 107; Jones v. New American File Co., 21 R. I. 125.

⁴⁶ Romona Oolitic Stone Co. v. Phillips, 11 Ind. App. 118; s. c. 39 N. E. Rep. 96.

⁴⁷ Vol. I, § 75.

⁴⁸ Branstrator v. Keokuk & C. R. Co., 108 Iowa 377; s. c. 79 N. W. Rep. 130 (employé of independent contractor with railroad company relied upon company's promise—rule held not to apply); Engel v. Standard Lighting Co., 12 Ohio C. C. 489; s. c. 5 Ohio C. D. 572 (employé complained of *two* defects; foreman promised to repair *one* of them and told him that the other was not dangerous; he remained in service and was injured by the other—no recovery, for he had assumed risk as to that).

⁵⁰ Huber v. Jackson & C. Co., 1 Marv. (Del.) 374; s. c. 41 Atl. Rep. 92; Ray v. Diamond State Steel Co., 2 Pen. (Del.) 525; s. c. 47 Atl. Rep. 1017 (three days was not an unreasonable length of time for him to continue at the work without assum-

ing the risk); Foster v. Pusey, 8 Houst. (Del.) 168; s. c. 13 Cent. Rep. 47; 14 Atl. Rep. 545; Boyd v. Blumenthal, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330; Harvey v. Alturas Gold Min. Co. (Idaho), 31 Pac. Rep. 819 (no off. rep.); Consolidated Coal Co. v. Bokamp, 75 Ill. App. 605 (instruction approved); Illinois & C. R. Co. v. Creighton, 63 Ill. App. 165; Tesmer v. Boehm, 58 Ill. App. 609; Illinois Steel Co. v. Mann, 67 Ill. App. 66; s. c. 1 Chic. L. J. Wkly. 675; Swift & Co. v. Madden, 165 Ill. 41; s. c. 45 N. E. Rep. 979; aff'g s. c. 63 Ill. App. 341; 1 Chic. L. J. Wkly. 486; Joliet & C. R. Co. v. Velie, 140 Ill. 59; s. c. 26 N. E. Rep. 1086; aff'g s. c. 36 Ill. App. 450 (circumstances justifying a submission to the jury of the question whether the servant remained in the position unreasonably long after receiving such promise); Taylor v. Felsing, 164 Ill. 331; s. c. 45 N. E. Rep. 161; aff'g s. c. 63 Ill. App. 624; Pardridge v. Gilbride, 98 Ill. App. 134 (risk of injury from defect in passenger-elevator not assumed *as matter of law*, after a promise to repair); Chicago Bridge & C. Co. v. Hayes, 91 Ill. App. 269; Swift v. O'Neill, 187 Ill. 337; s. c. 58 N. E. Rep. 416; aff'g s. c.

under such circumstances, he will not, as matter of law, be put in the position of having accepted the risk, but whether he has done so

88 Ill. App. 162; Weber Wagon Co. v. Kehl, 139 Ill. 644; s. c. 29 N. E. Rep. 714; aff'g s. c. 40 Ill. App. 584; Westfield Coal Co. v. Wood, 96 Ill. App. 616 (promise to repair as soon as possible—risk not assumed by remaining in employment); Illinois Steel Co. v. Mann, 100 Ill. App. 367; s. c. aff'd, 197 Ill. 186; 64 N. E. Rep. 328; Illinois Steel Co. v. Mann, 170 Ill. 200; s. c. 43 N. E. Rep. 417; 40 L. R. A. 781; rev'g s. c. 67 Ill. App. 66 (assumes risk after reasonable time has elapsed); Illinois Cent. R. Co. v. North, 97 Ill. App. 124; Rogers v. Leyden, 127 Ind. 50; s. c. 26 N. E. Rep. 210; McFarlan Carriage Co. v. Potter, 153 Ind. 107; s. c. 1 Repr. (Ind.) 920; 6 Am. Neg. Rep. 254; 53 N. E. Rep. 465; rev'g on rehearing s. c. 1 Repr. (Ind.) 432; 5 Am. Neg. Rep. 132; 52 N. E. Rep. 209; and aff'g the conclusion of the Appellate Court (from which the case was transferred to the Supreme Court) in s. c. 21 Ind. App. 692; 1 Repr. (Ind.) 199; 51 N. E. Rep. 737 (protection of the promise is not postponed until after the arrival of the time fixed for the performance of the promise, but commences as soon as it is made); Daugherty v. Midland Steel Co., 23 Ind. App. 78; s. c. 53 N. E. Rep. 844; 1 Repr. (Ind.) 1070 (six days not too long for servant to wait, as matter of law); Burns v. Windfall Man. Co., 146 Ind. 261; s. c. 45 N. E. Rep. 188; Indianapolis & C. R. Co. v. Ott, 11 Ind. App. 564; s. c. 38 N. E. Rep. 842; 39 N. E. Rep. 529 (means such reasonable time as may be necessary for the performance of the promises made by the master); Stoutenburg v. Dow, 82 Iowa 179; s. c. 47 N. W. Rep. 1039; Pieart v. Chicago & C. R. Co., 82 Iowa 148; s. c. 47 N. W. Rep. 1017; Belair v. Chicago & C. R. Co., 43 Iowa 662; Southern Kansas R. Co. v. Crocker, 41 Kan. 747; s. c. 21 Pac. Rep. 785; Missouri & C. R. Co. v. Puckett, 62 Kan. 770; s. c. 64 Pac. Rep. 631; Atchison & C. R. Co. v. Lannigan, 56 Kan. 109; s. c. 42 Pac. Rep. 343; Atchison & C. R. Co. v. Midgett, 1 Kan. App. 138; s. c. 40 Pac. Rep. 995; Bell & C. Co. v. Applegate, 23 Ky. L. Rep. 470; s. c. 62 S. W. Rep. 1124 (no off. rep.); Breckinridge

Co. v. Hicks, 94 Ky. 362; s. c. 15 Ky. L. Rep. 143; 22 S. W. Rep. 554; Shanny v. Androscoggin Mills, 66 Me. 420, 427; Counsell v. Hall, 145 Mass. 468; s. c. 5 N. Eng. Rep. 462; 14 N. E. Rep. 530 (circumstances under which it was for the jury to decide whether the servant had assumed the risk in the meantime); Roux v. Blodgett & Co., 85 Mich. 519; s. c. 48 N. W. Rep. 1092 (known on the same day not an unreasonable time); Little v. Chicago & C. R. Co., 84 Mich. 289; s. c. 47 N. W. Rep. 571; Mann v. Lake Shore & C. R. Co., 124 Mich. 641; s. c. 83 N. W. Rep. 596; 7 Det. Leg. N. 376 (thirty days not an unreasonable time to wait, as matter of law, but question for the jury); Schlacker v. Ashland Iron Min. Co., 89 Mich. 253; s. c. 50 N. W. Rep. 839 (miner complained of danger and asked to be relieved, but was directed to remain at work by the mining captain, and was killed in two hours—recovery); Greene v. Minneapolis & C. R. Co., 31 Minn. 248; s. c. 47 Am. Rep. 785 (locomotive-engineer injured in a collision by reason of a defect, after a promise to repair); Lyberg v. Northern & C. R. Co., 39 Minn. 15; s. c. 38 N. W. Rep. 632 (question of a servant's negligence in continuing with an incompetent fellow servant after promise to remove him is one for the jury); Harris v. Hewitt, 64 Minn. 54; s. c. 65 N. W. Rep. 1085; Schlitz v. Pabst Brewing Co., 57 Minn. 303; s. c. 59 N. W. Rep. 188; Smith v. E. W. Backus Lumber Co., 64 Minn. 447; s. c. 67 N. W. Rep. 358; Meyer v. Gundlach-Nelson Man. Co., 67 Mo. App. 389 (court will not hold as a matter of law, that a servant could not reasonably wait two weeks for the fulfillment of the promise of the superintendent to remedy the defect in a machine, although the latter had repeatedly made the same promise before and failed to keep it); Stalzer v. Jacob Dold Packing Co., 84 Mo. App. 565; Conroy v. Vulcan Iron Works, 6 Mo. App. 102; s. c. aff'd, 62 Mo. 35; Sioux City & C. R. Co. v. Finlayson, 16 Neb. 578 (locomotive-engineer injured by an explosion by reason of a defect, after a promise to repair); Taylor

will be a *question for a jury*.⁵¹ Such a promise on the part of the master does not, of course, relieve the servant of the duty of continu-

v. Nevada &c. R. Co., 26 Nev. 415; s. c. 69 Pac. Rep. 858; Schulze v. Rohe, 4 Misc. (N. Y.) 384; s. c. 53 N. Y. St. Rep. 576; 24 N. Y. Supp. 118; Crutchfield v. Richmond &c. R. Co., 78 N. C. 300; Lake Shore &c. R. Co. v. Winslow, 10 Ohio C. C. 193; s. c. 4 Ohio C. D. 242; 1 Ohio Dec. 147; E. P. Breckenridge Co. v. Reagan, 22 Ohio C. C. 71; s. c. 12 Ohio C. D. 50; Union Man. Co. v. Morrissey, 40 Ohio St. 148; s. c. 48 Am. Rep. 669; Sopherstein v. Bertels, 178 Pa. St. 401; s. c. 35 Atl. Rep. 1000; Wust v. Erie City Iron Works, 149 Pa. St. 263; s. c. 1 Pa. Adv. Rep. 869; 24 Atl. Rep. 291; Brownfield v. Hughes, 128 Pa. St. 194; s. c. 18 Atl. Rep. 340; 47 Phila. Leg. Int. 71; 24 W. N. C. (Pa.) 557; Madara v. Pottsville Iron &c. Co., 160 Pa. St. 109; s. c. 28 Atl. Rep. 639 (accident happened twenty minutes after the promise to repair the defect); Webster v. Monongahela River Consol. Coal &c. Co., 201 Pa. St. 278; s. c. 50 Atl. Rep. 964 (dangerous condition of place to work); Louisville &c. R. Co. v. Kenley, 92 Tenn. 207; s. c. 21 S. W. Rep. 326; Hillje v. Hettich, 95 Tex. 321; s. c. 67 S. W. Rep. 90; rev'g s. c. (Tex. Civ. App.), 65 S. W. 491 (promise to furnish light in dangerous place—risk assumed after reasonable time has elapsed in which to perform promise); Gulf &c. R. Co. v. Donnelly, 70 Tex. 371; s. c. 8 Am. St. Rep. 608; 8 S. W. Rep. 52; International &c. R. Co. v. Williams (Tex. Civ. App.), 34 S. W. Rep. 161 (no off. rep.); Texas &c. R. Co. v. Bingle, 91 Tex. 287; s. c. 42 S. W. Rep. 971; writ of error denied, 41 S. W. Rep. 90; aff'g s. c. 9 Tex. Civ. App. 322; 29 S. W. Rep. 674; Southern &c. Co. v. Leash, 2 Tex. Civ. App. 68; s. c. 21 S. W. Rep. 563; Industrial Lumber Co. v. Johnson, 22 Tex. Civ. App. 596; s. c. 55 S. W. Rep. 362 (circumstances under which the servant, remaining in the service after complaint and promise to repair, was held to have continued to accept the risk,—seemingly untenable decision); Reddon v. Union &c. R. Co., 5 Utah 344; s. c. 15 Pac. Rep. 362 (his negligence in continuing to work is a question for

the jury); Darracott v. Chesapeake &c. R. Co., 83 Va. 288; s. c. 5 Am. St. Rep. 266; 2 S. E. Rep. 511; Virginia &c. Wheel Co. v. Chalkey, 98 Va. 62; s. c. 34 S. E. Rep. 976 (accident happened twenty minutes after promise to repair the defect); Hoffman v. Dickinson, 31 W. Va. 142; s. c. 6 S. E. Rep. 53; Ferriss v. Berlin Mach. Works, 90 Wis. 541; s. c. 63 N. W. Rep. 234 (no longer than a reasonable time for the performance of such promise); Barney Dumping Boat Co. v. Clark, 50 C. C. A. 616; s. c. 112 Fed. Rep. 921; aff'g s. c. *sub nom.* Clark v. Barney Dumping Co., 109 Fed. Rep. 235 (though the place is obviously dangerous); Holmes v. Worthington, 2 Fost. & Fin. 533. Where plaintiff's *petition* alleged that he was employed by defendant in pushing cars on a tramway elevated twenty feet above the ground; that the tramway was negligently constructed, and became out of repair, whereby the rails spread, causing the car which he was pushing to leave the track; and in trying to save the load he was thrown off and injured; and the *evidence* showed that both plaintiff and defendant knew the tramway was defective, and that defendant's agent had promised to repair it,—it was held that there was nothing on the face of the pleading showing such a state of facts as would preclude a recovery: Prophet v. Kemper, 95 Mo. App. 219; s. c. 68 S. W. Rep. 956

⁵¹ Swift & Co. v. O'Neill, 181 Ill. 337; s. c. 58 N. E. Rep. 416; aff'g s. c. 88 Ill. App. 162; Kewanee Boiler Co. v. Erickson, 78 Ill. App. 35; Missouri Furnace Co. v. Abend, 107 Ill. 44; s. c. 47 Am. Rep. 425; St. Clair Nail Co. v. Smith, 43 Ill. App. 105; Indianapolis &c. R. Co. v. Ott, 11 Ind. App. 564; s. c. 38 N. E. Rep. 842 (brakeman, furnished with lantern which was defective and liable to go out at any time, received promise from superintendent to supply him with a new lantern in a short time and was ordered to go on with his work—continued to work a short time and was injured in consequence of the lantern going out—did not accept the risk);

ing to exercise reasonable care for his own safety.⁵² Nor will the promise, where it has no relation to the danger which the servant in fact incurs, be available to lay the foundation of an action against the master,—as, for example, the promise to have a trench braced and curbed *thereafter*, if the employé would lay pipes in that part which was already dug, where the servant was injured a few minutes after the promise was made.⁵³

Wible v. Burlington &c. R. Co., 109 Iowa 557; s. c. 80 N. W. Rep. 679; Dempsey v. Sawyer, 95 Me. 265; s. c. 49 Atl. Rep. 1035; Conroy v. Vulcan Iron Works, 62 Mo. 35, 39; Mann v. Lake Shore &c. R. Co., 124 Mich. 641; s. c. 83 N. W. Rep. 596; 7 Det. Leg. N. 376 (remained in the service thirty days after the promise and was then injured); Rothenberger v. Northwestern Consol. Milling Co., 57 Minn. 461; s. c. 59 N. W. Rep. 531; Taylor v. Nevada &c. R. Co., 26 Nev. 415; s. c. 69 Pac. Rep. 858 (question for jury whether danger from tender which rocked on its trucks was so imminent that engineer assumed risk by continuing to use it after promise to repair); Laning v. New York &c. R. Co., 49 N. Y. 521; s. c. 2 Thomp. Neg. (1st ed.), p. 932; Kelley v. Silver Spring &c. Co., 12 R. I. 112; s. c. 7 Rep. 60; Louisville &c. R. Co. v. Kenley, 92 Tenn. 207; s. c. 21 S. W. Rep. 326; Missouri &c. R. Co. v. Nordell, 20 Tex. Civ. App. 362; s. c. 50 S. W. Rep. 601; Hough v. Texas &c. R. Co., 100 U. S. 214; Northern Pac. R. Co. v. Babcock, 154 U. S. 190; s. c. 38 L. ed. 958; 14 Sup. Ct. Rep. 978 (locomotive-engineer was told by master-mechanic that the pilot-plow was broken and dangerous, but was afterward required to run the engine without having opportunity to know whether it had been repaired); Homestake Min. Co. v. Fullerton, 69 Fed. Rep. 923; s. c. 16 C. C. A. 545; 2 Am. & Eng. Corp. Cas. (N. S.) 596; 36 U. S. App. 32 (after such promise employé under no obligation to turn aside from his ordinary duties to remedy the defect); Dells Lumber Co. v. Erickson, 80 Fed. Rep. 257; s. c. 46 U. S. App. 697; 25 C. C. A. 397 (the important inquiry said to be, not what authority the person making the promise really possessed, but what the employé supposed him to have); Kane v. Northern Cent.

R. Co., 128 U. S. 91; s. c. 32 L. ed. 339; 16 Wash. L. Rep. 715; 9 Sup. Ct. Rep. 16; 4 Rail. & Corp. L. J. 461 (brakeman not guilty of negligence as matter of law in staying upon a train after discovering that a step was missing from one of the cars over which he might have to pass, where he had been told by the conductor that the car should be removed when it reached a coal-yard or junction beyond them, if he found, on examining his papers, that it did not contain perishable freight); Erdman v. Illinois Steel Co., 95 Wis. 6; Holmes v. Worthington, 2 Fost. & Fin. 533; Holmes v. Clarke, 6 Hurl. & N. 349; s. c. 30 L. J. (Exch.) 135; s. c. aff'd in Exchequer Chamber *sub nom.* Clark v. Holmes, 7 Hurl. & N. 937; 2 Thomp. Neg. (1st ed.), p. 953; Pater-son v. Wallace, 1 Macq. H. L. Cas. 748; s. c. 1 Pat. Sc. App. 389; 26 Sc. Jur. 550. Upon the question *how long* the servant may wait after receiving the promise to repair, without incurring the imputation of having accepted the risk,—see Roux v. Blodgett &c. Lumber Co., 85 Mich. 519; s. c. 13 L. R. A. 728; Fordyce v. Edwards, 60 Ark. 238.

⁵² Texas &c. R. Co. v. Bingle, 91 Tex. 287; writ of error denied, 41 S. W. Rep. 90; aff'g s. c. 9 Tex. Civ. App. 322; 29 S. W. Rep. 674; McAndrews v. Montana &c. R. Co., 15 Mont. 290; s. c. 39 Pac. Rep. 85 (cannot use a dangerous hand-car in a reckless manner and recover against the company by reason of its promise to repair or furnish a new car).

⁵³ Showalter v. Fairbanks, 88 Wis. 376; s. c. 60 N. W. Rep. 257 (trench had caved in a few feet away from plaintiff, but, relying on superintendent's assurance that it was safe, and not on his promise to have it braced thereafter, he went back to work). Compare Hilje v. Hettich, 95 Tex. 321; s. c. 67 S. W. Rep. 90;

§ 4668. **What is a Reasonable Time within which to Perform the Promise to Repair.**—What is a reasonable time for an employé to continue in the employment after a promise to repair, before he assumes the risk of injury from the defect or danger complained of, is generally held to be a *question for a jury*.⁵⁴

§ 4669. **When Servant may Presume that Master has Complied with his Promise to Repair.**^a—If, after notifying the master or his representative of a defect or danger, the servant receives the promise that it shall be repaired, and is afterwards required to use it without having an opportunity to examine to see whether it has been repaired, he is not, by reason of thereafter using it, held to have assumed the risk.⁵⁵ The same rule obtains where the defect is not apparent upon

rev'g s. c. *sub nom.* Hillje v. Het-tich (Tex. Civ. App.), 65 S. W. Rep. 491 (where it was held to be a question for a jury whether a previous promise to furnish lights applied to the execution of a particular order); Illinois Steel Co. v. Mann, 197 Ill. 186; s. c. 64 N. E. Rep. 328; aff'g s. c. 100 Ill. App. 367 (question for jury whether promise to repair floor had reference to the threatened danger to an employé, or whether it was a promise to make the floor more fit for the *purposes of the work*, or both; and also whether more than a reasonable time had elapsed since the promise in which to repair the floor).

⁵⁴ Illinois Steel Co. v. Mann, 197 Ill. 186; s. c. 64 N. E. Rep. 328; aff'g s. c. 100 Ill. App. 367; Taylor v. Nevada & C. R. Co., 26 Nev. 415; s. c. 69 Pac. Rep. 858; and cases cited in preceding paragraph. In one case it appeared that the plaintiff was employed to operate a rip-saw which had no guard on it, but he was assured that one would be put on immediately. He was not accustomed to running such a saw, and the danger of operating it without a guard was not so imminent that it was not reasonably safe to operate it a short time without one. He continued to use it thus for *two weeks*, when the machinery was stopped for repairs, but no guard was put on. The plaintiff complaining again, he was told that some pieces were needed immediately, and that after he had sawed such pieces the guard would be put on, and he resumed work and was in-

jured. It was held that it was error to hold that the promise to repair was not performed within a reasonable time, and that therefore, as matter of law, the plaintiff had assumed the risk; but the question was whether plaintiff had relied on the promise, and this was for a jury to say: Crooker v. Pacific Lounge & C. Co., 29 Wash. 30; s. c. 69 Pac. Rep. 359.

^a Compare *ante*, § 4654.

⁵⁵ Northern Pac. R. Co. v. Babcock, 154 U. S. 190; s. c. 38 L. ed. 958; 14 Sup. Ct. Rep. 978; Larkin v. Washington Mills Co., 45 App. Div. (N. Y.) 6; s. c. 61 N. Y. Supp. 93 (employé did not use elevator again until three weeks had elapsed since promise to repair). A servant was held entitled to recover where boards placed between the rails of an inclined tram-way on which cars ran at a "coal-hoist" gave way beneath him, to his injury, while discharging his duties at this place. It appeared that he had discovered the condition of the track two days previously to the accident, and reported its dangerous condition to the superintendent, who promised to make the proper repairs, but added that he could not do everything at once. The servant had a right to presume that the defendant would take proper steps to secure his safety: Conroy v. Vulcan Iron-Works, 62 Mo. 35. Knowledge of a defect is not such *contributory negligence* as will prevent a recovery under Miss. Const., § 193, where the injured employé believes, with reason, that the defect has been repaired, and he is outside

a casual inspection, in which case the servant is not required to inspect the machinery or appliance before again using it, in order to ascertain whether or not the promised repairs have in fact been made, unless there is something in the condition of it which would cause an ordinarily prudent man to make such an examination.⁵⁶ And where the servant is told that a defect has been repaired by some one authorized to make the repairs, and he acts on the belief that such repairs have in fact been made, and is injured, he is not, it has been held, charged with an assumption of the risk.⁵⁷ On the other hand, the promise by the master to repair a defective appliance does not relieve the servant from the assumption of the risk in continuing in his employment after the expiration of a reasonable time for fulfillment of the promise, under circumstances which indicate that the promise will not be fulfilled.⁵⁸

§ 4670. What Agent of the Master Deemed to have Authority to Make the Promise to Repair.—It seems that the promise to repair, in order to relieve the servant from the position of having accepted the risk, must have been made either by the master himself, or by some servant or agent of the master having authority to make such a promise.⁵⁹ Obviously, the general *superintendent* of a particular department of an extensive manufacturing company will be presumed to have had such authority;⁶⁰ and the same has been held of a *foreman* of the *mine* in which the injured employé was engaged;⁶¹ and of a *shipping-clerk* who had charge of the employés of the master and who directed the use of an elevator which injured the plaintiff.^{61a}

of the class against whom such a defense may be made: *Welsh v. Alabama & c. R. Co.*, 70 Miss. 20; s. c. *sub nom. Welch v. Alabama & c. R. Co.*, 11 South. Rep. 723.

⁵⁶ *Missouri & c. R. Co. v. Nordell*, 20 Tex. Civ. App. 362; s. c. 50 S. W. Rep. 601.

⁵⁷ *Kerrigan v. Chicago & c. R. Co.*, 86 Minn. 407; s. c. 90 N. W. Rep. 976 (fireman injured by defective step on engine).

⁵⁸ *Trotter v. Chattanooga Furniture Co.*, 101 Tenn. 257; s. c. 47 S. W. Rep. 425 (promise was to fix the next morning. It was held that it would have been error to submit the question of reasonable time to a jury, since the promise *fixed* the time during which employé was relieved from assumption of risk); *Eureka Co. v. Bass*, 81 Ala. 200; s. c. 8 South. Rep. 216; 60 Am. Rep. 152.

⁵⁹ See, for a statement of the prin-

ciple in a slightly different relation, *Atchison & c. R. Co. v. McKee*, 37 Kan. 592; s. c. 15 Pac. Rep. 484.

⁶⁰ *Weber Wagon Co. v. Kehl*, 139 Ill. 644; s. c. 29 N. E. Rep. 714; aff'g s. c. 40 Ill. App. 584. It has been held that, where the master is a corporation, the servant may rely upon a promise to repair made by its superintendent in charge of the work, who assumes to have authority to make the changes promised, although he may not in fact have it: *Barney Dumping Boat Co. v. Clark*, 112 Fed. Rep. 921; s. c. 50 C. C. A. 616; aff'g s. c. *sub nom. Clark v. Barney Dumping Co.*, 109 Fed. Rep. 235.

⁶¹ *Homestake Min. Co. v. Fullerton*, 69 Fed. Rep. 923; s. c. 36 U. S. App. 32; 16 C. C. A. 545; 2 Am. & Eng. Corp. Cas. (N. S.) 596.

^{61a} *Larkin v. Washington Mills Co.*, 45 App. Div. (N. Y.) 6; s. c. 61 N. Y. Supp. 93.

§ 4671. **Effect of Continuing in Service with Knowledge of Defect or Danger without Complaint, or without Promise of Master to Repair.**—As already stated,⁶² if, after acquiring knowledge of a defect or danger in the premises where he is required to work, or in the tools or appliances which he is required to use, the servant elects to remain in the service without complaint, objection, or protest, or without receiving the promise of his master or of the representative of his master, that the defect will be repaired or the danger obviated, then he is deemed to accept the risk of the danger, and in case of his being injured in consequence of it, he cannot recover damages from the master.⁶³

§ 4672. **Effect of Servant Objecting or Protesting.**—It may be collected from the foregoing paragraphs that where the servant has full knowledge of the risk of a situation into which he is ordered, the mere fact that he objects or protests will not have the effect of casting the risk upon his master.⁶⁴ Where, however, a servant was ordered into a more dangerous employment than the one which he contracted to discharge, and was injured while in such employment, it seems that it is competent for him to show that he protested against being compelled to go into it, and that he was compelled to go into it in order not to lose his place.⁶⁵ In the case of minors,—for example, a girl fourteen years old,—ordered into a more dangerous employment than the employment contracted to be performed, and hurt in such employment, the question of assumption of the risk or of contributory negligence would ordinarily be a question for a jury;⁶⁶ and where a servant complains of defects in the appliances which he is required to use, but, nevertheless, continues to use them, it is held in some jurisdictions that the question of his contributory negligence is not one of law, to be decided on the face of the pleadings, but is a question of fact for the jury, upon the evidence.⁶⁷

⁶² *Ante*, §§ 4608, 4657.

⁶³ *Kroy v. Chicago & C. R. Co.*, 32 Iowa 357; *Greenleaf v. Dubuque & C. R. Co.*, 33 Iowa 52; *Muldowney v. Illinois & C. R. Co.*, 39 Iowa 615; *Way v. Illinois & C. R. Co.*, 40 Iowa 341; *Lumley v. Caswell*, 47 Iowa 159; s. c. 7 Repr. 559; *Crutchfield v. Richmond & C. R. Co.*, 78 N. C. 300; *Jones v. Roach*, 9 Jones & Sp. (N. Y.) 248; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; s. c. 66 Pac. Rep. 799; *Bowles v. Indiana R. Co.*,

27 Ind. App. 672; s. c. 62 N. E. Rep. 94.

⁶⁴ *Wheeler v. Berry*, 95 Mich. 250; s. c. 54 N. W. Rep. 376 (risk of injury from a saw about which he had worked for a year).

⁶⁵ *Jones v. Lake Shore & C. R. Co.*, 49 Mich. 573.

⁶⁶ *McIntyre v. Empire Printing Co.*, 103 Ga. 288; s. c. 29 S. E. Rep. 923.

⁶⁷ *Devore v. St. Louis & C. R. Co.*, 86 Mo. App. 429.

ARTICLE IV. RISK OF DANGERS OUTSIDE OF SCOPE OF EMPLOYMENT.

SECTION

4675. Assumption of risk where servant is ordered to a duty which he did not contract to perform.
4676. Servant ordered, uninstructed, into an unfamiliar and dangerous service, outside of his employment, does not accept the risk.
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SECTION

4680. Strangers and outsiders volunteering to assist servants of the master.
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4682. What emergency will justify the servant in quitting his regular duties without assuming the risks arising from so doing.
4683. Master under no obligation to use diligence in releasing volunteer caught in a machine.

§ 4675. **Assumption of Risk where Servant is Ordered to a Duty which he did not Contract to Perform.**—There is no absolute rule, applicable to all cases, by which to determine the question of the liability of the master to the servant where the servant is injured in consequence of being ordered by the master, or by the representative of the master, to perform a duty which he did not undertake, by the contract of service, to perform; but the question will depend upon the circumstances of each particular case.¹ The master does not, by reason of so ordering the servant, become an insurer that his premises and appliances are absolutely secure, but discharges his obligations to the servant by exercising reasonable care to that end.² If, therefore, a servant, of mature years and of ordinary intelligence, is directed to do a temporary piece of work outside the line of his employment, and proceeds to do such work without objection, negligence on the part of the master cannot be predicated upon that fact alone, but something more must appear in order to charge him in case the change in the employment results in injury to the servant.³ It is

¹ Consolidated Coal Co. v. Haenni, 146 Ill. 614; s. c. 35 N. E. Rep. 162; aff'g s. c. 48 Ill. App. 115; Supple v. Agnew, 191 Ill. 439; s. c. 61 N. E. Rep. 392; rev'g s. c. *sub nom.* Agnew v. Supple, 80 Ill. App. 437 (servant employed as foreman of gang of diggers, injured while temporarily working under carpenter foreman—risk not necessarily assumed).

² Mary Lee Coal &c. Co. v. Char-

bliss, 97 Ala. 171; s. c. 53 Am. & Eng. R. Cas. 254; 11 South. Rep. 897.

³ Garden City Wire Springs Co. v. Boecher, 94 Ill. App. 96; Hillsboro Oil Co. v. White (Tex. Civ. App.), 3 Am. Neg. Rep. 104; s. c. 41 S. W. Rep. 874 (no off. rep.); Hogan v. Northern Pac. R. Co., 53 Fed. Rep. 519; s. c. 53 Am. & Eng. R. Cas. 384.

equally clear that a servant, thus temporarily ordered into a work more hazardous than that for which he was employed, assumes all such risks, incident to the new work, as are equally open to the observation of the master and himself,⁴ and all such as are apparent and obvious or known to the servant from experience, although he has no special warning of them,⁵ and no absolute knowledge of them;⁶ and, although the employé is not bound to obey the order without having such instructions as will enable him to protect himself from injury, yet if he does so he assumes the risks;⁷ and this, although he obeys the command through fear of losing his employment, and is injured in consequence of his ignorance and inexperience.⁸

§ 4676. Servant Ordered, Uninstructed, into an Unfamiliar and Dangerous Service, Outside of his Employment, does Not Accept the Risk.—On the other hand, there is a general concurrence of authority in support of the conclusion that where the master orders the servant into an employment outside the scope of the duties which the servant has contracted to perform, which employment is attended with dangers unknown to the servant and not open to his observation, and which are not discoverable by him by means of such an inspection as he has time and opportunity to make, and gives him no instructions with respect to such dangers, and he is injured in consequence of so entering upon the new service,—he is not deemed to have accepted the risk of such dangers, but he may recover damages from the master for the injury.⁹

⁴North Chicago St. R. Co. v. Conway, 76 Ill. App. 621; Paule v. Florence Mining Co., 80 Wis. 350; s. c. 50 N. W. Rep. 189.

⁵Hanson v. Hammell, 107 Iowa 171; s. c. 77 N. W. Rep. 839; Leary v. Boston &c. R. Co., 139 Mass. 587; s. c. 52 Am. Rep. 733; Demers v. Deering, 93 Me. 272; s. c. 44 Atl. Rep. 922; Walker v. Lake Shore &c. R. Co., 104 Mich. 606; s. c. 62 N. W. Rep. 1032; 2 Det. Leg. N. 34 (assumes the risk only if the danger is apparent).

⁶East St. Louis Ice &c. Co. v. Sculley, 63 Ill. App. 147; Cahill v. Hilton, 106 N. Y. 512.

⁷Crown v. Orr, 140 N. Y. 450; s. c. 55 N. Y. St. Rep. 834; 35 N. E. Rep. 648; rev'g s. c. 54 N. Y. St. Rep. 308; 24 N. Y. Supp. 620.

⁸Dougherty v. West Superior Iron Co., 88 Wis. 343; s. c. 60 N. W. Rep. 274; Leary v. Boston &c. R. Co., 139 Mass. 580; s. c. 52 Am. Rep. 733.

The humane genius of one court applied this doctrine so as to cut off a recovery where a *cook* employed on a steam-tug was ordered by the master and owner of the tug, with an oath, to go forward and handle the bow-line, in which he became tangled and got hurt: Williams v. Churchill, 137 Mass. 243; s. c. 50 Am. Rep. 304.

⁹Ryan v. Los Angeles Ice &c. Co., 112 Cal. 244; s. c. 32 L. R. A. 524; 44 Pac. Rep. 471; Chielinsky v. Hoopes &c. Co., 1 Marv. (Del.) 273; s. c. 40 Atl. Rep. 1127 (doctrine applied where servant was *permitted* to do the extra-hazardous work or was induced to do so by the fact of other like employés being allowed to do so); Consolidated Coal Co. v. Haenni, 146 Ill. 614; s. c. 35 N. E. Rep. 162; aff'g s. c. 48 Ill. App. 115; Consolidated Coal Co. v. Wombacher, 134 Ill. 57; s. c. 24 N. E. Rep. 662; Banks v. Effingham, 63 Ill. App.

§ 4677. **Volunteer Assumes the Risks of the New Situation.**—An employé who undertakes, without the order or request of his employer

221; *American Wire-Nail Co. v. Connelly*, 8 Ind. App. 398; s. c. 35 N. E. Rep. 721; *Ervin v. Evans*, 24 Ind. App. 335; s. c. 56 N. E. Rep. 725; *Cincinnati &c. R. Co. v. Madden*, 132 Ind. 462; s. c. 34 N. E. Rep. 227 (servant was compelled to undertake the more hazardous duty in consequence of the wrongful direction of the master, given through an employé having authority to give it); *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 329; s. c. 27 N. E. Rep. 741 (servant not compelled to abandon the service or assume an additional risk unless the apparent danger is such as to deter a man of ordinary prudence from encountering it); *James v. Rapides Lumber Co.*, 50 La. An. 717; s. c. 44 L. R. A. 33; 23 South. Rep. 469 (suddenly called on by the foreman in a mill to take the place of an absent workman, in a position that was dangerous); *Stucke v. Orleans R. Co.*, 50 La. An. 172; s. c. 23 South. Rep. 342 (street-railway conductor, in an emergency, and by order of the foreman of the company, went to work to repair the brake of a car standing on the track over the pit in the station, and was run upon and injured by another car); *Veginan v. Morse*, 160 Mass. 143; s. c. 35 N. E. Rep. 451 (holding that an employé hired to work in a mill-yard, and not specially upon machinery, does not, as a matter of law, assume the risk of injury from the revolving knives of a planing-machine at which he is put to work, where he does not and cannot see such knives or know of the danger); *La Fortune v. Jolly*, 167 Mass. 170; s. c. 45 N. E. Rep. 83 (employé injured by reason of being directed to feed a furnace, which was no part of his usual duties—a good illustration of the rule); *Patnode v. Warren Cotton Mills*, 157 Mass. 283; s. c. 32 N. E. Rep. 161 (minor employé, injured while obeying peremptory order to assist in operating a machine at which he was not employed to work, was not, as a matter of law, guilty of contributory negligence); *Broderrick v. Detroit &c. R. Co.*, 56 Mich. 261; s. c. 56 Am. Rep. 382; *Smith v. Peninsular Car Works*, 60 Mich.

501; s. c. 27 N. W. Rep. 662; *Stiller v. Bohn Man. Co.*, 80 Minn. 1; s. c. 82 N. W. Rep. 981; *Cook v. St. Paul &c. R. Co.*, 34 Minn. 45; *Stephens v. Hannibal &c. R. Co.*, 86 Mo. 221 (master liable unless to obey his order was plainly to imperil life or limb); *Cummings v. Collins*, 61 Mo. 520; *Chicago &c. R. Co. v. McCarty*, 49 Neb. 475; s. c. 68 N. W. Rep. 633 (obeying order requiring immediate action and allowing no time for deliberation); *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100; s. c. 80 N. W. Rep. 296; *Kehler v. Schwenk*, 151 Pa. St. 505; s. c. 31 W. N. C. (Pa.) 201; 31 Am. St. Rep. 777; 25 Atl. Rep. 130 (boy fourteen years of age); *Martin v. Wrought Iron Range Co.*, 4 Tex. Civ. App. 185; s. c. 23 S. W. Rep. 387 (employé contracted to drive a gentle team; injured by being required to drive a vicious one); *Gulf &c. R. Co. v. Duvall*, 12 Tex. Civ. App. 349; s. c. 35 S. W. Rep. 699 (employé injured by reason of obeying orders to remove a dangerous obstruction from in front of a railway-train); *Douglas v. Texas &c. R. Co.*, 63 Tex. 564; *Fort Worth &c. R. Co. v. Wrenn*, 20 Tex. Civ. App. 628; s. c. 50 S. W. Rep. 210 (when ordered to perform duties outside of his contract, servant assumes only risk of those dangers of which he has knowledge, or which are as obvious to him as they would be to the master or to his vice-principal); *Galveston Oil Co. v. Thompson*, 76 Tex. 235; s. c. 13 S. W. Rep. 60 (doctrine placed on the ground of due care on the part of the servant and a want of due care on the part of the superintendent of the master); *Hillboro Oil Co. v. White* (Tex. Civ. App.), 54 S. W. Rep. 432 (no off. rep.); *Gulf &c. R. Co. v. Newman*, 27 Tex. Civ. App. 77; s. c. 64 S. W. Rep. 790 (fireman ordered to take charge of stationary engine, outside of and more hazardous than his regular employment—risk not assumed); *Hayes v. Colchester Mills*, 69 Vt. 1; s. c. 37 Atl. 369 (risk not assumed where the servant is a person of immature years and incapable of determining whether the work required is with-

or the representative of the employer, or contrary to his orders, or in compliance with the orders or request of another employé who has no authority from the employer to give such orders or to make such request, to perform work outside the scope of his employment, or upon dangerous premises where the terms of his employment do not require him to go or to be,—is deemed to assume the risk attendant upon his voluntary undertaking, and cannot recover for injuries occasioned by any defect in the premises, machinery or appliances to which he thus voluntarily exposes himself,¹⁰—unless an emergency arises justifying a departure from the ordinary line of his duty.¹¹ The reason of the rule is obvious. The master undertakes to exercise reasonable care to the end of keeping his premises, his machinery, his tools and his appliances in a reasonable condition of safety for the protection of the servant employed in a stated service and so long as he continues in that service. But when he steps outside the line of his duty the relation of master and servant is deemed to be temporarily suspended: his position is then analogous to that of a trespasser or bare licensee;¹² the master owes him no duty to anticipate his deviation from his duty and the possible danger which may arise to him therefrom and to provide against it; he takes things as he finds them, and suffers the consequences of his own error, and cannot make his master liable therefor. The law will not, on obvious grounds of justice, compel the master to pay damages which the servant has brought on himself by undertaking to do something which the master did not employ him to do, but will ascribe his calamity to his own unnecessary and gratuitous act. Thus, in the absence of a special contract to that effect, it is

in the scope of his employment); *Felton v. Girardy*, 43 C. C. A. 439; s. c. 104 Fed. Rep. 127 (boiler-maker's helper injured by being put to extra-hazardous service—good illustration of the doctrine); *Northern Pac. Coal Co. v. Richmond*, 15 U. S. App. 262; s. c. 7 C. C. A. 485; 58 Fed. Rep. 756 (boy of fourteen employed in a mine did not assume risk of extra-hazardous service which neither he nor his father had reason to believe he would be required to perform). Where, therefore, *the plaintiff alleged* that he was employed for no other purpose than to operate machinery in defendant's mill and to work on certain articles, and that he was ordered to repair certain machinery; that the work was different from, and more dangerous than, the work he was employed to do; that defendant knew the danger; and that,

while doing the work, plaintiff was injured through no negligence of his own,—the complaint stated a cause of action: *Ervin v. Evans*, 24 Ind. App. 335; s. c. 56 N. E. Rep. 725.

¹⁰ *Ante*, § 3748, *et seq.*; *Ray v. Diamond State Steel Co.*, 2 Pen. (Del.) 525; s. c. 47 Atl. Rep. 1017; *Central R. & Co. v. Chapman*, 96 Ga. 769; s. c. 22 S. E. Rep. 273; *Indiana & C. Gas Co. v. Marshall*, 22 Ind. App. 121; s. c. 1 Repr. (Ind.) 427; 52 N. E. Rep. 232 (doctrine recognized); *Mellor v. Merchants' Man. Co.*, 150 Mass. 362; s. c. 23 N. E. Rep. 100; 7 Rail. & Corp. L. J. 155; 5 L. R. A. 792 (rule held to apply notwithstanding Massachusetts Employers' Liability Act of 1887, chap. 270, § 1); *Miller v. Madison Car Co.*, 130 Mo. 517; s. c. 31 S. W. Rep. 574.

¹¹ *Central R. & Co. v. Chapman*, 96 Ga. 769; s. c. 22 S. E. Rep. 273.

¹² Vol. I, § 946.

no part of the business of a railway conductor to couple or uncouple cars, except in case of pressing emergency, of which the jury must judge. If, in the absence of such an emergency, he undertakes such a duty, and is killed therein, no damages can be recovered on account of his death.¹³ But if he undertakes to do such a duty under the existence of such an emergency, then the question would be, whether, in what he attempted to do, he acted with prudence or not.¹⁴ So, an employé in a stove-factory, in the absence of his employers, and contrary to their directions, exchanged the place of work for which he had been employed, that of a "catcher," a place of little or no danger, for that of a "sawyer," a much more dangerous position. While thus acting, a band-wheel broke, and one of the pieces of it hit and injured him. It was held that he could not recover damages of his employers.¹⁵ The case here supposed is to be carefully distinguished from cases where the servant is *ordered outside the scope of his employment*, either by his master or by a representative of the master having authority to give the order. Here, as already seen,¹⁶ if the servant, obeying such order, encounters dangers which are unknown or unappreciated by him, and which are not obvious and of which his employer or the representative of his employer has failed to warn him, he is not deemed to have accepted the risk unless the danger of the new situation is such that an ordinarily prudent man would not encounter it, and his master may be liable to him in damages.¹⁷

§ 4678. Who are Volunteers within the Meaning of this Rule.—There is no consistent line of legal doctrine under this head. As will be seen in some of the cases cited below, there are unjust and untenable decisions which put upon the servant the burden of accepting the risk where he does no more than make a slight deviation from the strict line of his employment, although he does so in entire good faith and in some cases at the request or command of a superior servant, and

¹³ *Sears v. Central R. &c. Co.*, 53 Ga. 630; s. c. after a second trial, *sub nom.* *Central R. &c. Co. v. Sears*, 59 Ga. 436; 5 Rep. 494; *Brown v. Byroads*, 47 Ind. 435. Compare *Sammon v. New York &c. R. Co.*, 62 N. Y. 251.

¹⁴ *Central R. &c. Co. v. Sears*, *supra*.

¹⁵ *Brown v. Byroads*, 47 Ind. 435. See also, *Di Pietro v. Empire Portland Cement Co.*, 70 App. Div. (N. Y.) 501; s. c. 75 N. Y. Supp. 275 (employé who left work to which he was assigned, which was free from danger, and volunteered to as-

sist another, going over a platform over machinery in operation, not intended for use at such times, and disregarded the warnings of others to get down, as it was a dangerous place,—assumed the risk).

¹⁶ *Ante*, §§ 4630, 4676.

¹⁷ *Felton v. Girardy*, 43 C. C. A. 439; s. c. 104 Fed. Rep. 127; *Dallemand v. Saalfeldt*, 175 Ill. 310; s. c. 17 Nat. Corp. Rep. 439; 51 N. E. Rep. 465; aff'g s. c. 73 Ill. App. 151; 15 Nat. Corp. Rep. 698; *Lindenberg v. Crescent Min. Co.*, 9 Utah 163; *Pittsburg &c. R. Co. v. Adams*, 105 Ind. 151.

even with the permission of the master, expressly asked and granted.¹⁸ It has been held that a servant becomes a volunteer and accepts the risk in the following cases:—Where a railroad brakeman undertakes to perform the duties of a locomotive-fireman;¹⁹ where a female operator, without any request or direction from the superintendent, volunteers to assist him in ascertaining the defective condition of the machine which she operates;²⁰ where a weaver who had nothing to do with the belts or machinery, which were under the care of a loom-fixer who had no authority to make such a request, undertook to assist the loom-fixer, at his request, in adjusting a belt, and, while so engaged, was caught in the belt and injured;²¹ where a boy, sixteen years old, employed in a cotton-gin to mark, assort, and weigh bales of cotton ginned at the round-bale press, who had been employed about two months and was inexperienced, was called by a workman, who was not a foreman and had no authority, to assist him in cleaning out a gin-stand in one of the square-bale gins, and, in doing so, was injured,—and this although one of the proprietors was standing near by supervising the work, but did not see the boy until just before the accident, and did not hear his co-employé call him to his assistance because of the noise of the machinery;²² where a car-inspector, directed to carry an iron casting which had fallen from a car, to a designated engine, temporarily lays it down in a dangerous place and subsequently returns to get it and carry it to the designated place, and receives an injury while attempting to pick the casting up;²³

¹⁸ For example, there is a decision of an authoritative court (and there are others like it, as will be seen below) which responds to this syllabus: "An employé who is injured while attempting to make repairs to machinery, which it is no part of his duty to make, acting of his own free will, upon the suggestion of a fellow workman, and after asking and obtaining the consent of his own immediate superior,—is a mere volunteer, and cannot recover for injuries occasioned by an accident caused by the defect which he was trying to remedy": *Mellor v. Merchants' Man. Co.*, 150 Mass. 362; s. c. 23 N. E. Rep. 100; 7 Rail. & Corp. L. J. 155; 5 L. R. A. 792.

¹⁹ *Alabama & C. R. Co. v. Hall*, 105 Ala. 599; s. c. 17 South. Rep. 176.

²⁰ *Allen v. Hixson*, 111 Ga. 460; s. c. 35 S. E. Rep. 810.

²¹ *Parent v. Nashua Man. Co.*, 70 N. H. 199; s. c. 47 Atl. Rep. 261. To

the same effect, on substantially identical facts, see *Martin v. Highland Park Man. Co.*, 128 N. C. 264; s. c. 38 S. E. Rep. 876. Further as to the effect of obeying orders on the question of *contributory negligence* of the servant,—see *Orman v. Mannix*, 17 Colo. 564; s. c. 30 Pac. Rep. 1037; 17 L. R. A. 602; *Morewood Co. v. Smith*, 25 Ind. App. 264; s. c. 57 N. E. Rep. 199; *Walker v. Lake Shore & C. R. Co.*, 104 Mich. 606; s. c. 62 N. W. Rep. 1032; *Chicago & C. R. Co. v. McCarty*, 49 Neb. 475; s. c. 68 N. W. Rep. 633; *Hillsboro Oil Co. v. White* (Tex. Civ. App.), 54 S. W. Rep. 432; and especially, sub-title CONTRIBUTORY NEGLIGENCE OF SERVANT, in Vol. V.

²² *Werner v. Trautwein*, 25 Tex. Civ. App. 608; s. c. 61 S. W. Rep. 447.

²³ *East St. Louis & C. R. Co. v. Craven*, 52 Ill. App. 415 (guilty also of contributory negligence).

where the servants of the master were under a general instruction that all of them were to obey the vice-principal, and a servant, obeying the instructions of a vice-principal, but disregarding the master's instructions, undertook to do work outside of and more hazardous than his regular employment;²⁴ where a section-foreman gives a direction to a section-hand to notice the track closely any time he is going over the road in going to or coming from his home, and to report anything which he finds to be wrong, and the section-hand goes upon the track for the purpose of going home at the end of his day's work, and on his way home is killed;²⁵ where an engine-wiper, whose duties were to wipe the engine, to put out its fires, and to remove ashes and cinders, etc., undertook to move an engine over side-tracks for the convenience of other employes who were engaged in making up trains, such act being beyond the scope of his employment and wholly unauthorized;²⁶ where a servant, under the direction of the foreman, undertakes to assist in protecting the master's property from fire, and is injured in so doing;²⁷ where a boy employed to work about a mill in a safe position, voluntarily, or without direction, exposes himself to dangerous machinery, having such knowledge as to enable him to know the danger;²⁸ where one employed on a railway train voluntarily and for his own convenience performs a more hazardous duty than his own employment, devolving upon another employe,—and this although he does so at the request of the foreman of the yard in which he works;²⁹ where a car-inspector undertook to uncouple cars, in order to help the conductor;³⁰ where a servant is injured while working in a place of danger beyond the scope of his employment, without the direction of any person having authority to assign him to such work;³¹ and where a servant is injured while acting outside the scope of his employment without the master's orders, even though the machinery or appliance causing the injury may be defective and dangerous.³²

²⁴ *Indiana Natural &c. Gas. Co. v. Marshall*, 22 Ind. App. 121; s. c. 1 Repr. (Ind.) 427; 52 N. E. Rep. 232.

²⁵ *Baker v. Chicago &c. R. Co.*, 95 Iowa 163; s. c. 63 N. W. Rep. 667.

²⁶ *Bequette v. St. Louis &c. R. Co.*, 86 Mo. App. 601.

²⁷ *Maltbie v. Belden*, 167 N. Y. 307; s. c. 60 N. E. Rep. 645; 54 L. R. A. 52; rev'g s. c. *sub nom.* *Maltby v. Belden*, 60 N. Y. St. Rep. 824 (where the danger is obvious).

²⁸ *Evans v. American Iron &c. Co.*, 42 Fed. Rep. 519; s. c. 24 Ohio L. J. 140.

²⁹ *Texas &c. R. Co. v. Skinnem*, 4 Tex. Civ. App. 661; s. c. 23 S. W. Rep. 1001.

³⁰ *Devoe v. New York &c. R. Co.*, 70 App. Div. (N. Y.) 495; s. c. 75 N. Y. Supp. 136.

³¹ *Giordano v. Brandywine Granite Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332.

³² *Boyd v. Blumenthal*, 3 Pen. (Del.) 564; s. c. 52 Atl. Rep. 330. It has been held, in an action for the death of an employe, alleged to have occurred while in the discharge of his duties in uncoupling cars, that, in the absence of a rule prescribing

§ 4679. Employés Acting to Accomplish their Own Purposes.—Where the employé steps outside the line of his duty or the scope of his employment to accomplish some purpose of his own, he stands in the position of a volunteer and accepts the risk. It was so held where a servant, not working overtime, was injured while alighting from his master's wagon by reason of a defect therein, while being driven for his own accommodation after hours by a fellow servant to a point near his home;³³ where a section-hand, with others, was injured while taking the "boss" on a hand-car, after the end of the day's work, to a town off their section;³⁴ and where an employé of a railroad company rode on the top of a freight-train voluntarily and outside the line of his employment, and, while there, was struck and killed by a low bridge, with the situation and character of which he was acquainted,—the conclusion being that his contributory negligence prevented a recovery of damages.³⁵ So, where an employé of a railroad company, not being required to do so by his duty, goes on the main track of a railroad on a hand-car without any invitation on the part of the company, but without objection, he is a mere *licensee*, and is subject to all the risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted.³⁶

§ 4680. Strangers and Outsiders Volunteering to Assist Servants of the Master.—A person who volunteers to assist the servant of another, without being employed so to do by that other, is deemed to assume all the ordinary risks incident to the situation; his position

the method of coupling cars, it cannot be affirmed as matter of law that the use of the hands is outside the line of the employé's duty, but that the question is to be determined from evidence showing the habit, custom and duty of employés in making couplings: *Louisville & C. R. Co. v. York*, 128 Ala. 305; s. c. 30 South. Rep. 676.

³³ *Wink v. Weiler*, 41 Ill. App. 346.

³⁴ *Hurst v. Chicago & C. R. Co.*, 49 Iowa 76.

³⁵ *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276; s. c. 37 Am. Rep. 684. Compare *Rains v. St. Louis & C. R. Co.*, 71 Mo. 164; s. c. 36 Am. Rep. 459. It has been held that a brakeman who, in accordance with a prevailing custom, leaves his working-clothes upon a caboose, although he knows that such car will probably not be attached to the next out-

going train to which he is assigned, has license to visit the caboose to obtain his clothing; but where he is injured while alighting from a moving train on which he has gone in search of his apparel he is not acting within the license, or in the line of his duty, and cannot recover for the injuries sustained: *Olson v. Minneapolis & C. R. Co.*, 76 Minn. 149; s. c. 6 Am. Neg. Rep. 90; 14 Am. & Eng. R. Cas. (N. S.) 770; 78 N. W. Rep. 975. See also, *Hoehmann v. Moss Engraving Co.*, 4 Misc. (N. Y.) 160; s. c. 53 N. Y. St. Rep. 195; 23 N. Y. Supp. 787 (employé injured while riding on a freight-elevator at invitation of a co-employé, or for his own pleasure and convenience).

³⁶ *Cleveland & C. R. Co. v. Workman*, 66 Ohio St. 509; s. c. 64 N. E. Rep. 582.

is that of a volunteer, and is analogous to that of a trespasser or bare licensee; he takes things as he finds them, and, in case of his being injured,—unless the injury occurs under such circumstances as to create a liability if he were regarded as a trespasser, intruder, or bare licensee,—he cannot recover damages from the master of the servant whom he has volunteered to assist.³⁷

§ 4681. Who are Not Volunteers within the Foregoing Rule.—Under the following circumstances, the injured employé has been held to be, at the time of receiving the injury, in the line of his duty, and not a volunteer:—Where an employé, proceeding to a town near by, under the direction of his employer, to find lodging, fell into an open well dug by the employer on the premises near a tent where his employés were boarded and lodged;³⁸ where the employés of a railroad company voluntarily organized themselves into a fire company for the protection of the railroad property, the fire company not being under the control of the railroad company, but being allowed to drill upon its premises and its chief being allowed by the railroad company to take an hour from his duties as employé to inspect the premises of the company,—with the conclusion that the chief of the fire company owed the duty to the railroad company to aid in extinguishing a fire, and that, in so doing, he acted as its employé, and not as a mere volunteer assuming all the risks of such action;³⁹ where an employé in a sawmill, while on his way to discharge a duty which he had been ordered to perform, in passing along one of the open thoroughfares of the mill stopped to exchange a remark with a fellow employé concerning the operation of the machinery, and was injured by the breaking of a belt,—such action not being deemed

³⁷ *Evarts v. St. Paul & C. R. Co.*, 56 Minn. 141; s. c. 22 L. R. A. 663; 57 N. W. Rep. 459 (cannot recover from the master for injuries caused by defects in the instrumentalities used, or by the mere negligence of his servants); *Church v. Chicago & C. R. Co.*, 50 Minn. 218; s. c. 52 N. W. Rep. 647 (bystander attempting to assist in the switching of cars in a construction-train at the request of the head brakeman, left in charge of the switching while the conductor is temporarily absent attending to his usual duties at the station); *Wagen v. Minneapolis & C. R. Co.*, 80 Minn. 92; s. c. 82 N. W. Rep. 1107 (voluntarily assumed to act as a baggageman on a railroad-train); *Mickelson v. New East Tintic R. Co.*, 23 Utah 42; s. c. 64 Pac.

Rep. 463 (engineer, without authority, undertook to employ a brakeman to assist him in the management of the train, for his own convenience); *Blair v. Grand Rapids & C. R. Co.*, 60 Mich. 124; s. c. 26 N. W. Rep. 855 (person not in the employ of a railway company, requested by its watchman to signal a train to stop, assumed the risk and could not recover against the company for injuries suffered in complying with the request).

³⁸ *Indiana Pipe Line & C. Co. v. Neusbaum*, 21 Ind. App. 361; s. c. 1 Repr. (Ind.) 500; 52 N. E. Rep. 471; 5 Am. Neg. Rep. 126.

³⁹ *Collins v. Cincinnati & C. R. Co.*, 13 Ky. L. Rep. 670; s. c. 11 S. W. Rep. 11 (no off. rep.).

inconsistent with the proper discharge of his duty;⁴⁰ where employ  s of a contractor engaged in taking earth away from cars for a consignee, to facilitate the work, assist in dumping the earth from a car on the request of the crew of the railroad company, and one of the consignee's employ  s, while so assisting, is injured by the tipping over of the car, due to defects therein and to improper loading,—with the conclusion that the railroad company is liable;⁴¹ where an employ   is injured while complying with the orders of the overseer of the room in which he is at work, who has authority to give such orders;⁴² where a female employ  , employed to remove work from a mangle as it comes through, is directed by her employer, as he sees her standing idle, to assist in putting wet clothes through the machine, and she subsequently puts dry clothes through the machine, in the absence of the servant employed for that purpose, and is injured by a defect in the machine;⁴³ where, although the employ   was engaged, at the time of his injury, on other work than that for which he was employed, he was doing so in accordance with a custom obtaining among the employ  s of the master of working upon other duties than those regularly assigned to them;⁴⁴ where a chambermaid in a hotel, with the consent, approval, or direction of the housekeeper or the manager, who has power to employ and discharge servants of this grade, elects to use the elevator in passing from one story to another in the performance of her duties, not knowing or having reason to believe that the housekeeper or manager has no right to allow her to use it, and is injured in consequence of so doing;⁴⁵ where a female employ   mounted a bench to open a window for the purpose of letting steam and hot air escape, in which attitude she was injured by her hair being caught by a revolving shaft, which passed through the room near the ceiling and in front of the window;⁴⁶ where an employ   was charged to keep a machine running and to tie in a bolt if it fell out, and was hurt while attempting to secure the bolt as instructed.⁴⁷

⁴⁰ *Moore v. Pickering Lumber Co.*, 105 La. 504; s. c. 29 South. Rep. 990.

⁴¹ *Welch v. Maine &c. R. Co.*, 86 Me. 552; s. c. 25 L. R. A. 658; 30 Atl. Rep. 116; 10 Am. R. & Corp. Rep. 293.

⁴² *Patnode v. Warren Cotton Mills*, 157 Mass. 283; s. c. 32 N. E. Rep. 161.

⁴³ *Fitzhenry v. Lamson*, 19 App. Div. (N. Y.) 54; s. c. 45 N. Y. Supp. 875.

⁴⁴ *East Line &c. R. Co. v. Scott*, 68 Tex. 694; s. c. 5 S. W. Rep. 501.

⁴⁵ *Oriental Invest. Co. v. Sline*, 17

Tex. Civ. App. 692; s. c. 41 S. W. Rep. 130.

⁴⁶ *McCloherly v. Gale Man. Co.*, 19 Ont. App. 117.

⁴⁷ *Greenville Oil &c. Co. v. Harkey*, 20 *Tex. Civ. App.* 225; s. c. 48 S. W. Rep. 1005. Circumstances under which the question whether an employ   without experience in milling and without instructions, who lost his hand by its coming in contact with the knives of the machine, was working within the scope of his employment when injured, was a *question for a jury*: *Bennett v. Warren*, 70 N. H. 564; s. c. 49 Atl. Rep.

§ 4682. **What Emergency will Justify the Servant in Quitting his Regular Duties without Assuming the Risks Arising from So Doing.**—Emergencies frequently arise where the servant, quitting his regular employment, is not imputable with contributory negligence nor barred from recovering damages from his master, as matter of law, provided that, while so acting, he is injured in consequence of some defect or danger imputable to the negligence of the master, although, but for the existence of such emergency, he would be barred from recovering, on the ground of being a volunteer and of having accepted the risk. It was so held where a fireman on a locomotive-engine knew, for some hours before a collision happened, that the engineer was falling asleep, and assumed the duties of the engineer;⁴⁸ where an employé in a mill stepped outside of the strict line of his duty, in good faith and in response to the call of the operator of a machine, to replace a chain on a wheel in order to prevent the suspension of the work of forty men, in the absence of the servants whose regular duty it was to replace the chain, in which operation the employé had assisted on previous occasions;⁴⁹ and where an employé of a coal-mining company climbed upon an empty box-car to fasten the brake for the purpose of preventing it from being driven against another car, which his employer was loading on the same track, by still other cars negligently switched by the railway company upon the same track and coming at a high rate of speed.⁵⁰

§ 4683. **Master under No Obligation to Use Diligence in Releasing Volunteer Caught in a Machine.**—The climax of the line of decisions noted in a preceding paragraph,⁵¹ which puts employés—even females and children—who deviate slightly from the strict line of their employment, although acting in good faith and in the supposed performance of their duties, into the category of trespassers, intruders, or bare licensees, and debars them from recovering damages for injuries proceeding from the plain negligence of their employer, is capped by a decision to the effect that where a servant thus acts, and, in so

105. See also, *Rosenbaum v. St. Paul & C. R. Co.*, 38 Minn. 173 (servant riding on construction-train over defective track).

⁴⁸ *Carroll v. East Tennessee & C. R. Co.*, 82 Ga. 452; s. c. 10 S. E. Rep. 163; 6 L. R. A. 214; 41 Am. & Eng. R. Cas. 307 (the conclusion being that the question of negligence of the fireman in failing either to notify the conductor or to telegraph as to his predicament, or both, was for the jury, and that the question

of his negligence in remaining upon the engine as he did would not be restricted, in point of time, to the moment of the collision which took place, or immediately previous thereto).

⁴⁹ *Mullin v. Northern Mill Co.*, 53 Minn. 29; s. c. 55 N. W. Rep. 1115.

⁵⁰ *Weatherford & C. R. Co. v. Duncan*, 10 Tex. Civ. App. 479; s. c. 31 S. W. Rep. 562.

⁵¹ *Ante*, § 4678.

doing, is caught in a machine, the master is under no legal duty to assist in extricating him from that position. In the opinion of the court by Lumpkin, J., it is said: "The only duty arising from such circumstances is one of humanity, and for a breach thereof, the law does not, so far as we are informed, impose any liability."⁵²

ARTICLE V. RISKS ASSUMED BY MINORS AND INEXPERIENCED PERSONS.

SECTION	SECTION
4685. Servant assumes only such risks as would be discernible by a person of his age and capacity.	service which he did not undertake to perform.
4686. When minors assume the risks of the employment.	4691. Minor assumes the risks of injuries from the negligence of fellow servants.
4687. When assumption of risk by a minor presents a question of fact for a jury.	4692. Parents assume what risks with respect to their children.
4688. Contributory negligence of minor employé.	4693. Effect of servant misrepresenting his age or competency in order to obtain employment.
4689. When minor servant does not assume the risk, but master liable.	4694. Risks assumed by inexperienced servants who are not minors.
4690. Rule where the minor is ordered into a dangerous	

§ 4685. **Servant Assumes Only Such Risks as would be Discernible by a Person of his Age and Capacity.**—It is a part of the doctrine of the assumption of risks that the servant assumes only such risks as are discernible by a person of his age, capacity and experience, in the exercise of ordinary or reasonable care for his own safety, and having due regard to all the conditions which surround him;¹ and it has been added that this includes only such risks as are inherent in the business and such as do not arise from the negligent failure of the master to discharge his personal duties.² But this cannot be affirmed as a general proposition of law with reference to permanent conditions, nor open and obvious dangers to the servant, although due to the negligence of the master.³ The doctrine just stated applies only to those unusual and extraordinary risks which the servant is not expected to

⁵² *Allen v. Hixson*, 111 Ga. 460; s. c. 36 S. E. Rep. 810.

¹ *Cherokee &c. Coal Co. v. Britton*, 3 Kan. App. 292; s. c. 45 Pac. Rep. 100.

² *Cherokee &c. Coal Co. v. Britton*, *supra*.

³ *Ante*, § 4618.

anticipate, but which it is the duty of the master to foresee and guard against.⁴

§ 4686. **When Minors Assume the Risks of the Employment.**—The rule that an employé assumes the ordinary risks of the employment applies to minors as well as to adults, provided the minor has sufficient age, intelligence and discretion to understand and appreciate the risks to which he is exposed, and provided he has been adequately instructed by the employer concerning the dangers of the employment, in the observance of the duty to warn and instruct which the law puts upon the employer,⁵ in cases requiring such instruction;⁶ or where

⁴ *Reed v. Stockmeyer*, 74 Fed. Rep. 186; s. c. 20 C. C. A. 381; 34 U. S. App. 727.

⁵ *Ante*, §§ 4055, *et seq.*, 4091, *et seq.*

⁶ *Hardman-Harrison Milling Co. v. Spehr*, 145 Ill. 329; s. c. 33 N. E. Rep. 944; *Chicago & C. R. Co. v. Eggman*, 59 Ill. App. 680 (and is informed of the dangerous nature of the work); *Nelson Man. Co. v. Stoltzenbury*, 56 Ill. App. 628; *Jones v. Roberts*, 57 Ill. App. 56 (or has acquired the knowledge otherwise than by instruction from the master); *McCarthy v. Mulgrew*, 107 Iowa 76; s. c. 77 N. W. Rep. 527 (boy fifteen years of age, without objection or promise of repair, worked for three years with a machine with revolving iron rollers placed within three-fourths of an inch of each other); *DeLozier v. Kentucky Lumber Co.*, 13 Ky. L. Rep. 818; s. c. 18 S. W. Rep. 451 (no off. rep.) (depends upon his capacity and fitness for the particular kind of labor upon which he is employed when injured); *Davis v. Forbes*, 171 Mass. 548; s. c. 51 N. E. Rep. 20; 4 Am. Neg. Rep. 289 (boy assumed risk from a defective stirrup-strap of a saddle provided for his use, where, upon calling the attention of the representative of the employer thereto, the strap was subjected to a test which was apparently satisfactory both to the representative and the boy, who had been riding horses for two years, and was presumably experienced in matters pertaining to saddles and riding-tackle); *Probert v. Phipps*, 149 Mass. 258; s. c. 21 N. E. Rep. 370 (boy fifteen years old, working in a mill, injured by passing be-

tween two machines which barely gave room to pass, of which he had been cautioned and the danger of which he knew); *Silvia v. Sagamore Man. Co.*, 177 Mass. 476; s. c. 59 N. E. Rep. 73; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35; s. c. 59 N. E. Rep. 645 (representative of master directed a boy of ordinary intelligence to feed scrap rubber into cylinders revolving closely together—told him that he might use his fingers to press down the rubber,—boy not thereby relieved of the duty to guard against the obvious danger of having his fingers caught between the cylinders); *McGinnis v. Southern Canadian Bridge Co.*, 49 Mich. 466; *Palmer v. Harrison*, 57 Mich. 182; s. c. 23 N. W. Rep. 624 (injury from machinery, the dangerous nature of which was manifest to any one); *Goins v. Chicago & C. R. Co.*, 37 Mo. App. 676 (injury from misshapen link and crooked coupling-pin fastened in a draw-head); *McMahon v. O'Donnell*, 32 Neb. 27; s. c. 48 N. W. Rep. 824; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; s. c. 80 N. W. Rep. 821; *Smith v. Irwin*, 51 N. J. L. 507; s. c. 18 Atl. Rep. 852; *Carrington v. Mueller*, 65 N. J. L. 244; s. c. 47 Atl. Rep. 564; *Dunn v. McNamee*, 59 N. J. L. 498; s. c. 37 Atl. Rep. 61; *Evans v. Vogt & C. Man. Co.*, 5 Misc. (N. Y.) 330; s. c. 55 N. Y. St. Rep. 212; 25 N. Y. Supp. 509; *Hickey v. Taaffe*, 105 N. Y. 26; s. c. 12 N. E. Rep. 286; *Malisky v. Schumacher*, 7 Misc. (N. Y.) 8; s. c. 56 N. Y. St. Rep. 840; 27 N. Y. Supp. 331; *Crown v. Orr*, 140 N. Y. 450; s. c. 55 N. Y. St. Rep. 834; 35 N. E. Rep. 648; *rev'g* s. c. 54 N.

the dangers are obvious, or as well known to him as to any others, although he is not specially instructed;⁷ or where the dangers are obvious alike to master and servant.⁸

Y. St. Rep. 308; 24 N. Y. Supp. 620; Monzi v. Friedline, 33 App. Div. (N. Y.) 217; s. c. 53 N. Y. Supp. 482 (boy seventeen years old injured in attempting to grease the cable of an elevator while in motion, contrary to a statute forbidding an employer to permit an employé so to do,—boy assumed the risk); McCann v. Mathison, 12 Misc. (N. Y.) 214; s. c. 66 N. Y. St. Rep. 855; 33 N. Y. Supp. 263; Schiermann v. Hammond Typewriter Co., 11 Misc. (N. Y.) 546; s. c. 32 N. Y. Supp. 748; Buckley v. Gutta Percha & Co. Man. Co., 113 N. Y. 540; s. c. 23 N. Y. St. Rep. 618; O'Keefe v. Thorn (Pa.), 24 W. N. C. (Pa.) 379; s. c. 16 Atl. Rep. 737 (no off. rep.); Sheetram v. Trexler Stave & Co., 13 Pa. Super. Ct. 219 (boy of seventeen presumed to have sufficient knowledge to appreciate patent dangers in the absence of proof to the contrary); Wojciechowski v. Spreckels Sugar Ref. Co., 177 Pa. St. 57; s. c. 35 Atl. Rep. 596 (boy who, in the performance of his duty, knowingly and voluntarily steps upon a grating under which he knows there is machinery, and upon which it is his duty to empty sugar from bags, assumes the risk of injury from the grating giving way and allowing him to fall into the machinery); Flick v. Jackson, 3 Pa. Super. Ct. 378; s. c. 39 W. N. C. (Pa.) 534; Zurn v. Tetlow, 134 Pa. St. 213; s. c. 19 Atl. Rep. 504; Williamson v. Sheldon Marble Co., 66 Vt. 427; s. c. 29 Atl. Rep. 669 (death of a boy sixteen years old, occasioned by his fall from a ledge in a quarry where he was working, the dangerous condition of which, from the accumulation of ice, was apparent); Schiefelbien v. Badger Paper Co., 101 Wis. 402; s. c. 77 N. W. Rep. 742; Luebke v. Berlin Mach. Works, 88 Wis. 442; s. c. 60 N. W. Rep. 711; 43 Am. St. Rep. 913 (boy sixteen years old assumes a risk incident to his employment, which is open and obvious, and which he is capable of perceiving and fully appreciating, whether he actually appreciates and comprehends it or not); Krieder v. Wiscon-

sin River Paper & Co., 110 Wis. 645; s. c. 86 N. W. Rep. 662; Goff v. Norfolk & Co. R. Co., 36 Fed. Rep. 299; E. S. Higgins Carpet Co. v. O'Keefe, 79 Fed. Rep. 900; s. c. 25 C. C. A. 220; 51 U. S. App. 74 (boy of fifteen who undertook to operate a machine having unguarded cog-wheels, with full knowledge of the risk incident to the feeding or working about the machine consequent upon the condition of the wheels and the absence of guards); Cudahy Packing Co. v. Marcan, 106 Fed. Rep. 645; s. c. 45 C. C. A. 515; 54 L. R. A. 258 (minor assumes to the same extent as an adult, the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them.

⁷ Toledo & Co. R. Co. v. Trimble, 8 Ind. App. 333; s. c. 35 N. E. Rep. 716; Greef v. Brown, 7 Kan. App. 394; s. c. 51 Pac. Rep. 926; Dillman v. Hamilton, 14 Mont. Co. L. Rep. (Pa.) 92 (boy *twelve years old* injured by set-screw projecting five-eighths of an inch from a revolving shaft—no recovery because machine was of the ordinary character in common use, and the danger, *if any*, was obvious, although he had not been warned); Day v. Achron, 23 R. I. 627; s. c. 50 Atl. Rep. 654 (girl sixteen years old, who had worked at a mangle having no guards to it once or twice a week for six or eight weeks, and who testified that she understood how her fingers could be caught, and what the effect would be if they were caught, but had not been warned of the danger, was held to have assumed the risk,—Tillinghast, J., *dissenting* on the ground that it is a question for a jury whether a child sixteen years old, although of ordinary intelligence, fully realizes and appreciates the extent of even visible dangers).

⁸ Evansville & Co. R. Co. v. Henderson, 134 Ind. 636; s. c. 33 N. E. Rep. 1021. So, where a boy twenty years old, though not an experienced

§ 4687. **When Assumption of Risk by a Minor Presents a Question of Fact for a Jury.**—In many cases it has been held to be a question of fact for a jury whether the minor employé had sufficient age, intelligence and experience to enable him to appreciate the danger so as to put him in a position of accepting the risks ordinarily incident to the service;⁹ and whether he had been sufficiently warned

miner, was engaged in removing rock which was falling at intervals, by means of a long hook; and a rock fell outside of the protecting timbers, but struck a pile of rock and was deflected underneath the timbers, killing him,—it was held that the cause of death was one of the dangers which he must have known, and the risk of which he assumed: *Moon-Anchor Consol. Gold Mines v. Hopkins*, 111 Fed. Rep. 298; s. c. 49 C. C. A. 347.

**Mary Lee Coal & C. Co. v. Chambliss*, 97 Ala. 171; s. c. 53 Am. & Eng. R. Cas. 254; 11 South. Rep. 897 (whether a railway fireman seventeen years old, who had been in the company's employ only two months and had never before undertaken to throw a switch, assumed the incidental risk of throwing a switch in the regular switchman's absence, in obedience to the order of the engineer by whom he was employed, and under whose orders he was); *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232; s. c. 19 S. W. Rep. 600; *Davis v. St. Louis & C. R. Co.*, 53 Ark. 117; s. c. 13 S. W. Rep. 801; 7 L. R. A. 283 (whether or not a youth employed in coupling cars had, or ought to have had, knowledge or appreciation of the danger incident to the use of guard-rails with no blocking between them and the main rails); *Wynne v. Conklin*, 86 Ga. 40; s. c. 12 S. E. Rep. 183 (minor thirteen years of age); *Ziegler v. Gotzian*, 86 Minn. 290; s. c. *sub nom.* *Zeigler v. Gotzian*, 90 N. W. Rep. 387 (where a boy sixteen and one-half years old was ordered to wash the outsides of windows in the third story of a factory where he had been employed for five months—question for jury whether he knew the place he was required to work was dangerous, and whether he understood the risks); *McCarragher v. Rogers*, 120 N. Y. 526; s. c. 24 N. E. Rep. 812; 31 N. Y. St. Rep. 595 (where the at-

tention of a boy employed in a paper-box factory to work at a printing and stamping press had been called to the fact of an injury sustained by another boy engaged in the same work, a few months before—question for jury whether the child was negligent in continuing to operate a machine although he knew it was out of repair); *Wyman v. Orr*, 62 N. Y. Supp. 195; s. c. 47 App. Div. (N. Y.) 136 (risk of injury from rollers generating electricity, which tended to draw paper between them, of which a fifteen-year-old boy was not aware and was not warned); *Latorre v. Central Stamping Co.*, 9 App. Div. (N. Y.) 145; s. c. 41 N. Y. Supp. 99 (danger of turpentine taking fire from dipping heated spoons therein, not, as matter of law, obvious to an ignorant Italian boy fourteen years old, who had been engaged in the work only three days); *Dingee v. Unrue*, 98 Va. 247; s. c. 35 S. E. Rep. 794; *Neilon v. Marinette & C. Paper Co.*, 75 Wis. 579; s. c. 44 N. W. Rep. 772 (whether the danger in wiping the gearing of machinery while in motion was so apparent to a young boy that in following the foreman's instructions he assumed the risks incident thereto, and whether he was properly cautioned as to such danger); *Renne v. United States Leather Co.*, 107 Wis. 305; s. c. 83 N. W. Rep. 473. Where a belt used for conveying oil-cake to a crusher became choked, and the foreman called an inexperienced minor, who was employed in trucking oil-cake to the crusher, to assist in unchoking it, and directed such servant to get on the crusher and press on the belt with his foot, in doing which his foot slipped into the crusher, it was held that, in view of his inexperience, and the fact that he was working under the immediate direction of the foreman, and had little opportunity to consider the act, a verdict in his favor should be sus-

and instructed concerning the danger to put upon him the acceptance of the risk;¹⁰ or whether he comprehended the risk sufficiently that warning or instruction was not necessary.¹¹

§ 4688. **Contributory Negligence of Minor Employé.**—In many cases the question will be dealt with from the standpoint of the contributory negligence of the minor employé; and the conclusion will be that he cannot recover damages from his employer merely because he is a minor, where the injury is caused by reason of his own negligence or inattention to what he is doing, whereby, in the prosecution of his work, he exposes himself unnecessarily to danger and is injured.¹² The test by which to determine whether the minor employé is imputable with contributory negligence has been already pointed out.¹³ It is to hold the minor servant responsible for the exercise of such care and attention as a minor of ordinary intelligence, of the same age, is capable of exercising under similar circumstances.¹⁴ Sometimes what is really contributory negligence is treated under the head of assumption of the risk, where the risk assumed by the servant was that arising from a special act or omission, and not a general risk of the employment.¹⁵

§ 4689. **When Minor Servant does Not Assume the Risk, but Master Liable.**—We may start out with the proposition that it is an actionable wrong for an employer to expose a minor to a hazardous

tained: *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334; s. c. 66 S. W. Rep. 226.

¹⁰ *Lynch v. Allen*, 160 Mass. 248; s. c. 35 N. E. Rep. 550 (risk of an embankment caving in; inexperienced employé supposed that the superintendent would warn him when there was danger of its falling).

¹¹ *Chopin v. Badger Paper Co.*, 83 Wis. 192; s. c. 53 N. E. Rep. 452 (whether a boy eighteen years old, injured while working around machinery, comprehended the risk from his previous experience with machinery, so that warning or instruction from his employer was unnecessary, is a question for the jury).

¹² *Morewood Co. v. Smith*, 25 Ind. App. 264; s. c. 57 N. E. Rep. 199; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Stewart v. Patrick*, 5 Ind. App. 50; s. c. 30 N. E. Rep. 814.

¹³ Vol. I, § 308.

¹⁴ *Phillips v. Michael*, 11 Ind. App. 672; s. c. 39 N. E. Rep. 669. The mere fact of working in a dangerous place by order of his superior, will not, it has been held, put upon a boy sixteen years of age the imputation of contributory negligence as matter of law: *Schultz v. Moon*, 33 Mo. App. 329.

¹⁵ For example, it was held that a boy over seventeen years old, employed to feed circular saws, assumed the increased risk arising from attempting to clean the machinery without stopping it, where he had had two years' experience, and knew that he was entitled to stop the machinery for the purpose of cleaning it: *Larson v. Knapp*, *Stout & Co.*, 98 Wis. 178; s. c. 73 N. W. Rep. 992. The real question was whether he was guilty of contributory negligence in attempting to clean the machine while it was in motion.

employment without giving him suitable warning and instruction;¹⁶ and, in cases of minors not possessing sufficient age and intelligence to understand the danger, although with instruction, that it is an actionable wrong to put them to a dangerous service however much they may have been instructed.¹⁷ With this premise we may take a step further, and, stating the rule in general terms, conclude that the *capacity* of the minor employé is the *measure* of his responsibility; and hence that, if he has not the capacity to foresee and to avoid the danger to which he may be exposed, negligence will not be imputed to him from the fact that he unwittingly exposes himself to the danger.¹⁸ Another proposition is, that a minor employé is not presumed—at least as matter of law—to have the same knowledge and appreciation of the risks attending the employment that an adult would have.¹⁹

§ 4690. Rule where the Minor is Ordered into a Dangerous Service which he Did Not Undertake to Perform.—If a minor servant is ordered to do work which he did not undertake to perform, or which his parent, in hiring him out, did not undertake that he should perform, then the dangers attending the new service are such as he does not necessarily assume.²⁰

§ 4691. Minor Assumes the Risks of Injuries from the Negligence of Fellow Servants.—Subject to the foregoing limitations, a minor employé assumes the risks of injuries from the negligence of fellow servants,—those risks being regarded as incident to the service,—where, under the same circumstances, an adult employé would be held to have assumed them.²¹

§ 4692. Parents Assume what Risks with Respect to their Children.—A parent who hires his minor child out to service assumes the

¹⁶ *Ante*, § 4091, *et seq.*

¹⁷ *Taylor v. Wootan*, 1 Ind. App. 188; s. c. 27 N. E. Rep. 502.

¹⁸ *Strawbridge v. Bradford*, 128 Pa. St. 200; s. c. 18 Atl. Rep. 346; 24 W. N. C. (Pa.) 536; 47 Phila. Leg. Int. 203; 20 Pitts. L. J. (N. S.) 143.

¹⁹ *White v. San Antonio Waterworks Co.*, 9 Tex. Civ. App. 465; s. c. 29 S. W. Rep. 252 (so reasoned with respect to a boy sixteen years old); *Kucera v. Merrill Lumber Co.*, 91 Wis. 637; s. c. 2 Am. & Eng. Corp. Cas. (N. S.) 590; 65 N. W.

Rep. 374 (another case where this was held of a boy sixteen years old, with good illustrative facts).

²⁰ *National Enameling Co. v. Brady*, 93 Md. 646; s. c. 49 Atl. Rep. 845.

²¹ *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471; s. c. 48 N. W. Rep. 1; *Stephen v. Stevens*, 66 Hun (N. Y.) 634; s. c. 49 N. Y. St. Rep. 850; 21 N. Y. Supp. 721 (minor employé put his hand into a dangerous place at the direction of a fellow workman, and it was caught in a buzz-saw).

ordinary risks of the service, in so far as it affects his own right to recover damages in case the child is injured therein.²²

§ 4693. Effect of Servant Misrepresenting his Age or Competency in Order to Obtain Employment.—If, in order to obtain employment, the servant, being a minor, represents to the master that he is of age, and there is nothing in the servant's appearance to indicate the contrary, and the master has no knowledge of the contrary nor any reason to believe that the representation is untrue, the master will not be blameworthy for acting upon such representation, and for treating the servant as being of full age, or competent to the extent represented by him.²³ Plainly, if a man applies for employment in a given service, he thereby impliedly represents that he is qualified to perform that service unless he notifies the employer of the contrary.²⁴

²² A father who suffers his child of tender years to engage, or to continue, in a dangerous service, is held to assume all the risks ordinarily incident thereto, including the risk of the indiscretion and rashness of the child due to his tender years, and cannot recover from the master for the loss of his services, if he is killed in consequence of going, without direction or command, to a dangerous place to comply with a proper order, where there is a perfectly safe place: *McCool v. Lucas Coal Co.* (Pa.), 24 Atl. Rep. 350 (no off. rep.). A father who consents to the employment of his minor son in a dangerous service cannot recover in an action under the statutes of Texas for the death of his son, resulting from his inexperience and the failure of the employer to instruct him against the dangers incident to the employment: *Missouri &c. R. Co. v. Evans*, 16 Tex. Civ. App. 68; s. c. 41 S. W. Rep. 80.

²³ *Lake Shore &c. R. Co. v. Baldwin*, 19 Ohio C. C. 338; s. c. 10 Ohio C. D. 333. To the contrary, see *Chicago &c. R. Co. v. Pettigrew*, 82 Ill. App. 33 (holding that the fact that a minor employé obtained employment by using deception and fraud as to his age will not prevent a recovery for injuries sustained by the negligence of the master). In this case the defendant urged the false statement of plaintiff as to his age as a ground for denying a recovery. The court say: "We are unwilling

to apply such a doctrine *to the facts* of the case. If it be true that appellee, by means of deception and fraud, entered the service of appellant, that would be no excuse for negligence on its part, if such negligence resulted in injury to appellee." Whether defendant was negligent in failing to warn and instruct plaintiff as to the dangers incident to the use of the machine was held to be a question for the jury, under the circumstances: *Chicago &c. R. Co. v. Pettigrew*, *supra*.

²⁴ But it has been held that an employé in a sawmill who applies to be retained as an oiler some time after he has been employed in that capacity, does not thereby impliedly represent himself as competent for the position so as to take upon himself an assumption of all its risks, where his request to be retained has no influence on the action of his employer: *Guinard v. Knapp, Stout & Co. Company*, 90 Wis. 123; s. c. 62 N. W. Rep. 625. A person applied for work in the boiler-makers' department of a railroad repair-shop, stating that he "had had experience in that kind of work." Thereupon he was employed, but only as a helper. The statement as to his experience did not, in the opinion of the court, justify the foreman in requiring him to do work which, in order to proceed with safety, demanded the skill and knowledge of an experienced boiler-maker, without giving him suitable instruction,—the con-

§ 4694. **Risks Assumed by Inexperienced Servants who are Not Minors.**—Recurring now to the duty of the master to *warn and instruct* his inexperienced servants concerning dangers which are known to him, but which are not known or apparent to them, or discoverable by them with that reasonable care which, under the circumstances, they ought to take for their own safety, we may conclude that a servant cannot be held to have assumed a risk of the employment the danger from which, owing to his inexperience, which is known to the master, he is incapable of understanding and appreciating, and as to which he is given no warning or instruction.²⁵

ARTICLE VI. RISK OF DANGERS IN PREMISES OR PLACE OF WORK.

SECTION

4697. Duty of master to keep his premises clear of dangerous holes, pitfalls, etc.

4698. When servant does assume risks of known defects in premises, place of working, etc.

4699. When servant does not assume risk of dangerous holes, pitfalls, etc., in master's premises.

4700. When employé does assume risk of holes, pits, etc.

SECTION

4701. Risk of injuries from noxious gases.

4702. Risk of injury in consequence of the absence of fire-escape.

4703. Risk of injuries from explosives.

4704. Assumes risks of exposed machinery.

4705. Risks assumed in the work of making a dangerous place safe.

§ 4697. **Duty of Master to Keep his Premises Clear of Dangerous Holes, Pitfalls, etc.**—This duty is considered in a former Subdivision;¹ but it may be said here, by way of preface to what follows, that the master is bound, in favor of his servant, to exercise reasonable care to the end of keeping his premises clear of dangerous holes, pitfalls, etc., which may not be obvious to his servant, or known to him from his experience; and that the servant may, in the absence of reasonable ground to believe that this duty has not been performed, assume that

clusion being that he did not, as matter of law, assume the risk of doing such work: *Felton v. Girardy*, 43 C. C. A. 439; s. c. 104 Fed. Rep. 127.

²⁵ *Western U. Tel. Co. v. Burgess*, 108 Fed. Rep. 26; s. c. 47 C. C. A. 168; *Campbell v. Eveleth*, 83 Me. 50; s. c. 21 Atl. Rep. 784; *Strabler v. Toledo Bridge Co.*, 11 Ohio C. D.

87 (servant not chargeable with negligence unless the defect and danger by reason of which he is injured is obvious, or he has been advised of the failure of the master to perform his duty, or of such facts as would cause a reasonably prudent man to investigate).

¹ *Ante*, § 3888, *et seq.*

it has been, and act upon the assumption, without incurring the imputation of having accepted the risk, or of having been guilty of contributory negligence. Where the master is a *railroad company*, the mere fact that a hole in its railroad-track, into which a brakeman steps to his injury, is concealed from sight by slush, will not excuse the company from liability to the brakeman, since it is the duty of the company to maintain such an inspection of its track as will discover such dangers, although the track may be covered with slush.² On the other hand, the master is not required, in keeping his premises clear of pits, holes, etc., to do unreasonable or impracticable things. For example, a railroad company will not be required to erect barriers in its round-house to protect its employés from pits which are necessarily made therein, where such barriers would render it impossible to do the necessary work to the engines, brought there for repairs, which is intended to be done when pits are used.³

§ 4698. When Servant Does Assume Risks of Known Defects in Premises, Place of Working, etc.—On the same principle, an employé assumes risks of dangers proceeding from known or obvious defects in the buildings, premises, or place where he is required to work.⁴

§ 4699. When Servant Does Not Assume Risk of Dangerous Holes, Pitfalls, etc., in Master's Premises.—With the foregoing statement for a premise, we may advance to the conclusion that the servant does not necessarily assume the risk of dangerous holes, pits, pitfalls, man-traps, etc., in the premises of his master, of the existence of which he has no knowledge, and the existence of which he has no good reason to expect; but that, in the absence of such knowledge or reasonable ground of suspicion, he may justly assume that his master has done his duty in keeping his premises clear of such dangers, and may act upon the assumption, without incurring the imputation of having accepted the risk of the danger, or of having been guilty of contribu-

² *Northern Pac. R. Co. v. Teeter*, 63 Fed. Rep. 527; s. c. 11 C. C. A. 332.

³ *McDonnell v. Illinois & C. R. Co.*, 105 Iowa 459; s. c. 11 Am. & Eng. R. Cas. (N. S.) 534; 75 N. W. Rep. 336.

⁴ *Consolidated Coal Co. v. Bonner*, 43 Ill. App. 17; *Lindvall v. Woods*, 44 Fed. Rep. 855 (servant assumes risk of unsafe structure if he could have discovered defect by the exercise of ordinary care and caution).

For example, an employé who works near a long and irregular stairway without a railing, which he is called upon to go up and down, and which is intended for employés, is chargeable with knowledge of the obvious defects in the stairway, and cannot recover of his employer for damage to himself by reason of such defects: *Sweet v. Ohio Coal Co.*, 78 Wis. 127; s. c. 47 N. W. Rep. 182.

tory negligence.⁵ Upon the same ground, an inexperienced employé, set at work with a pick to undermine a high embankment of earth, was held not, as matter of law, to have assumed the risk attendant upon the temporary absence of the superintendent, from the mere fact of continuing in the work, although he knew of the absence of the superintendent, and knew that the superintendent was no longer watching the bank; since he had the right to assume, and to act upon the assumption, that the superintendent would return to his post of duty in time to warn him of the danger of the falling of the bank.⁶

§ 4700. When Employé Does Assume Risk of Holes, Pits, etc.—

But in by far the greater number of cases, the employé is held to have assumed the risk of dangerous holes, pits, pitfalls, etc., upon his employer's premises, into which the employé falls to his injury. We may commence with the case of an experienced employé of full age, who is neither hurried, coerced, deceived nor surprised, but who voluntarily works near an *uncovered pit by candle-light*, in which case he assumes the risk of falling into it.⁷ So, if an employé knows of an *opening in the floor* of the building in which he is employed, but nevertheless falls into it as the result of his own inattention, he cannot make his own negligence the ground of recovering damages from his employer.⁸ And generally, employés have been held to assume the risks under the following circumstances:—Where a railway employé knew of the existence of *pits in a round-house*, but nevertheless walked into one of them at night, while going to the place assigned to him for his work;⁹ where a subcontractor of a carpenter remained at his work until it was so *dark* that he could not see objects in the passage through which it was necessary for him to go upon leaving his work, but nevertheless went forward and *fell through an opening*,—the cause of his injury being, in the opinion of the court, an ordinary risk of the business;¹⁰ where an employé of a cordage company,

⁵ Eastland v. Clarke, 165 N. Y. 420; s. c. 59 N. E. Rep. 202; rev'g s. c. 51 N. Y. Supp. 1140 (servant employed to carry firewood into a cellar,—right to believe that it was reasonably safe).

⁶ Lynch v. Allen, 160 Mass. 248; s. c. 35 N. E. Rep. 550. When servant does not assume the risk of danger from *leaving a hatchway open* for a short time, while a workman oils the machinery below,—see Pullman Palace Car Co. v. Connell, 74 Ill. App. 447. Circumstances under which servant does not assume the risk of *crawling into a barrel of hot water*, used to

receive waste steam and water from the engine in a factory, the servant never having worked there before,—see Johnson v. Tacoma Mills Co., 22 Wash. 88; s. c. 60 Pac. Rep. 53.

⁷ McAleenan v. Myrick, 68 Ill. App. 225.

⁸ Clark v. Murton, 63 Ill. App. 49; s. c. 1 Chic. L. J. Wkly. 117.

⁹ McDonnell v. Illinois & C. R. Co., 105 Iowa 459; s. c. 11 Am. & Eng. R. Cas. (N. S.) 534; 75 N. W. Rep. 336.

¹⁰ Murphy v. Greeley, 146 Mass. 196; s. c. 5 New Eng. Rep. 751; 15 N. E. Rep. 654.

working in the basement of its factory, slipped and *fell into an open well* containing scalding water formed by the condensation of steam, while he was getting washers out of a barrel near by, which were to his knowledge frequently placed near the well,—the danger being obvious to him;¹¹ where an employé went to work in a cellar, knowing the condition of an *elevator-shaft*, and that there were no barriers between it and an alley, and that men in the alley were receiving from the elevator, boxes which he and others were loading on the elevator in the cellar, and hoisting to the first floor, and a plank slipped and fell upon him;¹² where an employé entered upon an employment in a tunnel, where he was required to walk backwards in dragging hides from vats to a wash-wheel, on a slippery floor, across a space about sixteen inches wide, along the edge of a vat,—with the conclusion that he assumed the risk of *falling into the vat*, and that there could be no recovery for his death based upon negligence on the part of his employer, in failing to remove a box beside the passageway, and to give a wider space;¹³ and in the other cases cited in the marginal note.¹⁴

§ 4701. **Risk of Injuries from Noxious Gases.**—Whether a servant assumes the risk of injuries from noxious gases, fumes, etc., depends upon the principles already considered,¹⁵ though some differences may arise in their applications, growing out of the subtle nature of such agencies. If the dangers from this source are obvious and apparent,¹⁶ and as well known to the servant as to the

¹¹ *Feeley v. Pearson Cordage Co.*, 161 Mass. 426; s. c. 37 N. E. Rep. 368.

¹² *Alford v. Metcalf*, 74 Mich. 369; s. c. 42 N. W. Rep. 52.

¹³ *Balle v. Detroit Leather Co.*, 73 Mich. 158; s. c. 41 N. W. Rep. 216.

¹⁴ *Holloran v. Union Iron & Co.*, 133 Mo. 470; s. c. 35 S. W. Rep. 260; *Garety v. King*, 9 App. Div. (N. Y.) 443; s. c. 41 N. Y. Supp. 633; 75 N. Y. St. Rep. 1030; *Preston v. Ocean S. S. Co.*, 33 App. Div. (N. Y.) 193; s. c. 53 N. Y. Supp. 444; *Schwartz v. Cornell*, 36 N. Y. St. Rep. 646; s. c. 13 N. Y. Supp. 355; 59 Hun (N. Y.) 623 (*mem.*); *Rick v. Cramp* (Pa.), 12 Atl. Rep. 495 (no off. rep.). In a few cases, the question whether the servant assumed the risk of working near an uncovered hole, pit, or the like, has been held to be a *question for a jury*,—as where an employé consented to work in plain sight of and within seven feet from an uncov-

ered hole, leading down to a coal-bunker, at night, and without sufficient light: *Boyle v. Degnon-McLean Const. Co.*, 61 N. Y. Supp. 1043; s. c., appeal denied, 63 N. Y. Supp. 1105. So, the question whether or not a hole in the plank between the rails over a street-crossing was so obvious that an employé ought to have known of it, so as to make his continuance in the employment an assumption of the risk, has been held a question for a jury, where the evidence was conflicting as to the size of the hole, as to whether there were others like it in the yard, and as to the cause of it: *Monsarrat v. Keegan*, 87 Fed. Rep. 849; s. c. 40 Ohio L. J. 167; 58 U. S. App. 377; 11 Am. & Eng. R. Cas. (N. S.) 507; 31 C. C. A. 255.

¹⁵ *Ante*, § 4640, *et seq.*

¹⁶ *Meany v. Standard Oil Co.* (N. J.), 47 Atl. Rep. 803 (no off. rep.) (proprietor of a still-house having

master;¹⁷ or if either has a knowledge of them, or a means of knowledge arising from the circumstances of his situation, and from his opportunity of observing the precautions adopted by other employes,—then the servant assumes the risk of injury from them.¹⁸ On the other hand, under principles already considered,¹⁹ the risk of injury proceeding from such agencies is *not assumed* by a *common laborer* who is employed in the mere drudgery of the work, especially where he is assured by the superintendent of the establishment that the poisonous fumes are not injurious.²⁰

§ 4702. Risk of Injury in Consequence of the Absence of Fire-Escapes.—It was held in one cold and brutal decision, that if a manufacturing company has a mill properly constructed for its ordinary business, it is not, in the absence of a statutory requirement, responsible to an employe for not providing or maintaining in safe condition a means of escape from a fire, where the fire is not caused by the negligence of the company.²¹ If the foregoing decision expresses the

no defect in the apparatus used to keep it free from noxious gases, not liable to a servant employed therein for injuries resulting from the presence of such gases).

¹⁷ *Hauk v. Standard Oil Co.*, 38 App. Div. (N. Y.) 621; s. c. 56 N. Y. Supp. 273.

¹⁸ *Berry v. Atlantic White-Lead Co.*, 30 App. Div. (N. Y.) 205; s. c. 51 N. Y. Supp. 602 (injury from fumes of white-lead). Or if, having been injured from an explosion of gases, he has worked for a long time in the establishment, and has always opened the tank in the same manner as the manner in which he opened it when the explosion took place, it being caused by a failure to shut off the steam at the proper time: *Benfield v. Vacuum Oil Co.*, 75 Hun (N. Y.) 209; s. c. 27 N. Y. Supp. 16; 58 N. Y. St. Rep. 663. Much to the same effect, see *State v. Lazaretto Guano Co.*, 90 Md. 177; s. c. 44 Atl. Rep. 1017, where the servant died from the effects of inhaling poisonous gases while repairing a leak in a sulphuric-acid tank, having when his turn came made preparations for protecting himself from the acids and gases. — — — Circumstances under which a pilot on a steamship, who went to sleep in a small room, heated by a stove, having no connection with the outer

air, assumed the risk of asphyxiation from gas emanating from the stove: *Murch v. Wilson*, 168 Mass. 408; s. c. 47 N. E. Rep. 111. Owner of a blast furnace not liable to an employe for an injury arising from his inhalation of gas not sufficient in quantity to affect an ordinary man, because his lungs were oversensitive and weak from a previous illness: *Parlin & Co. v. Finfrouck*, 65 Ill. App. 174. Circumstances under which carpenter twice driven from a room by the fumes of ammonia, entering the room to try it again under orders of the superintendent, assumed the risk of being injured by a blast of ammonia: *Beittenmiller v. Bergner & Co. Brewing Co. (Pa.)*, 12 Atl. Rep. 599 (no off. rep.).

¹⁹ *Ante*, § 4640, *et seq.*

²⁰ *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; s. c. 1 Pa. Adv. Rep. 368; 23 Atl. Rep. 772; 11 Rail. & Corp. L. J. 212; *ante*, § 4664.

²¹ *Jones v. Granite Mills*, 126 Mass. 84. In this case it appeared that the plaintiff and other employes worked on the upper floor of a six-story factory building. There was no fire-escape above the fifth floor, nor any exit from the sixth floor except by a winding stairway in a tower at the corner of the building. The fire occurred through the over-

doctrine of the common law, then the servant necessarily assumes the risk of being burned to death through the negligence of the master in failing to provide suitable fire-escapes or to keep his apparatus for extinguishing fire in proper order. If the master is not bound, under the principles of the common law, to afford his servants suitable means of egress from the building by means of fire-escapes in case of a fire breaking out therein, the servant necessarily assumes the risk of the situation, however dangerous it may be.²² But all courts have not bowed to this doctrine, or at least have not applied it under all circumstances. One court has held that a boy of nineteen, employed in an upper story of a factory, the means of escape from which are insufficient in case of fire, is not presumed, as matter of law, to have assumed the risk, but that whether he has done so is a question of fact.²³ A

heating of a spindle of a spinning-mule. The fire-apparatus was out of order. Ignoring the obvious conclusion that it was a primary duty of the master to keep the fire-apparatus in order, the court assumed, in the absence of evidence speaking upon the question, that it was out of order in consequence of the negligence of a fellow servant of the plaintiff. It was a cold and brutal assumption, indulged in for the purpose of putting money and property above life and humanity. This has been called "the Moloch decision." It is not creditable to the head or to the heart of the court that rendered it, or of the judge who consented to be its mouth-piece. It is opposed to the settled principles of the common law. No reasoning could properly result in the conclusion that the failure to perform a duty primarily resting upon the master, that of taking reasonable measures to render his premises safe for his servants, could be shuffled off as the duty of some fellow servant. This dreadful holocaust, in which a great many people, some of them women and children, were burned to death, and this miserable decision, exonerating the proprietors of the building where their negligence was absolutely plain, recall to mind that passage of Milton in which he describes:—

"First Moloch, horrid king, besmear'd with blood
Of human sacrifice, and parents' tears,

Though for the noise of drums and
timbrels loud
Their children's cries unheard,
that past through fire
To his grim idol. Him the Am-
monite worshipp'd."

The last sentence must have been a slip of the tongue of the great blind poet in dictating the famous passage. In view of the Massachusetts decision above quoted, it should read, "Him the *Mammonite* worshipp'd."

²² For example, there is a decision to the effect that negligence on the part of the proprietor of a factory cannot be predicated of the fact that the *windows* leading to the fire-escapes were *screwed down*, where such windows were light structures and could easily have been *kicked out*, with as little delay as would be occasioned by raising them if unfastened, and propping them up: *Huda v. American Glucose Co.*, 154 N. Y. 474; aff'g s. c. 13 Misc. (N. Y.) 657; 34 N. Y. Supp. 931. A servant can kick the window out if he happens to think of it, and is not smothered by smoke, and if his faculties are not overwhelmed in the dreadful position in which he suddenly finds himself placed,—a conclusion which might impress the minds of the judges could they be placed in such a situation and be kept there for a brief period and then "kicked out."

²³ *Schwandner v. Birge*, 33 Hun (N. Y.) 186.

Canadian court, taking an enlightened and humane view of the subject, has dealt with it in the manner indicated by the abstract of its decision in the marginal note.²⁴ It should be kept in mind that the conclusion may be different where there is a *statute* requiring the building to be equipped with fire-escapes and where the statute is violated by the proprietor of the building, whereby his servants are burned to death or injured. In such a case, to hold that the servants accept the risk of the statutory negligence of the master would be, in effect, to repeal the statute. Such, it has been held by an enlightened court, is not the law.²⁵ Even here a judicial tendency has been discovered to fritter away the protection of such a statute. Where such a statute required "*factories*" to be equipped with fire-escapes, it was held that the existence of a *chemical laboratory*, the entire output of which was less than two per cent. of the business, which was that of a wholesale drug company, did not constitute the place a factory, within the meaning of the statute.²⁶ But it is submitted that statutes which are designed to conserve human life ought to be liberally construed in the application of civil remedies, so as to promote the end intended. A building which is in part devoted to the manufacture of chemicals, and which, owing to the nature of the business, is more liable to fire than if it were some other kind of "factory," is within the very policy and meaning of such a statute, and none the less so because the larger part of the building may be devoted to the storage and sale of such chemicals.

§ 4703. Risk of Injuries from Explosives.^a—An employé who engages upon any kind of work which requires the use of explosives assumes the risk ordinarily incident to the use of such dangerous agencies.²⁷

²⁴ A foreman on the top floor of a factory, who, knowing that a fire had commenced in one of the lower stories, directed the employés in his story to return to their work, assuring them that there was no danger, when they would easily have escaped if they had not been thus prevented, was guilty of such negligence, even though he acted in good faith and in the belief that there was no danger, as to render the employer liable for the death of one of the employés who, when the fire subsequently reached such story, cast herself out of the window under the belief that she could not otherwise be saved, although she could readily have escaped by the stairway: McDonald v.

Thibaudeau, Rap. Jud. Que. 8 B. R. 449 (opinion and syllabus in French). Compare with this case *Hernischel v. Texas Drug Co.*, 26 Tex. Civ. App. 1; s. c. 61 S. W. Rep. 419 (where, on a somewhat similar state of facts, there being no contention that the fire was caused by the negligence of the defendant or that it could have been extinguished, it was held not error to direct a verdict for the defendant).

²⁵ *Landgraf v. Kuh*, 188 Ill. 484; s. c. 59 N. E. Rep. 501.

²⁶ *Hernischel v. Texas Drug Co.*, 26 Tex. Civ. App. 1; s. c. 61 S. W. Rep. 419.

^a See *ante*, § 4615.

²⁷ *Prentice v. Wellsville*, 66 Hun (N. Y.) 634; s. c. 50 N. Y. St. Rep.

§ 4704. **Assumes Risks of Exposed Machinery.**—The doctrine that a servant accepts the risks of obvious and unconcealed dangers has been often applied in cases where servants have been injured while working about exposed, unguarded, or unfenced machinery.²⁸ Al-

557; 21 N. Y. Supp. 820 (although he is required to engage in the work on pain of losing his employment); *Bennett v. Tintic Iron Co.*, 9 Utah 291; s. c. 34 Pac. Rep. 61 (assumes the risk of injury from the fall of rocks shaken loose by blasting in a mine, in the absence of negligence on the part of the employer). Circumstances under which, in the case of the death of an engineer from an *explosion of a boiler*, it was held that either there was no negligence on the part of the employer, or the engineer assumed the risk: *Kramer v. Willy*, 109 Wis. 602; s. c. 85 N. W. Rep. 499. It has been held that an employé in a quarry does not assume the risk of finding *unexploded dynamite* in the rock which he is required to break: *Alton Lime & Co. v. Calvey*, 47 Ill. App. 343.

²⁸ *Arkadelphia Lumber Co. v. Bethea*, 57 Ark. 76; s. c. 20 S. W. Rep. 808 (fingers of servant cut off by revolving knives while under a planing-machine, oiling it); *Willingham v. Rockdale Oil & Co.*, 101 Ga. 713; s. c. 29 S. E. Rep. 30 (servant injured while trying to keep a running belt in place); *Atlas Engine Works v. Randall*, 100 Ind. 293; s. c. 50 Am. Rep. 798 (servant injured by wiping off machine while in motion, allowing the waste which he is using to hang down and get caught in the cogwheels below,—contributory negligence as matter of law); *Becker v. Baumgartner*, 5 Ind. App. 576; s. c. 32 N. E. Rep. 786 (servant knowing that there is no "shifter" for a belt which he is required to shift from one pulley to another, assumes all the risks); *Sanborn v. Atchison & Co. R. Co.*, 35 Kan. 292 (unboxed cogwheels; boy seventeen years old); *Hood v. Argonaut Cotton-Mill Co.*, 23 Ky. L. Rep. 460; s. c. 62 S. W. Rep. 1043 (no off. rep.) (covering of machinery removed, but evidence did not show when or by whom); *Kelly v. Barber Asphalt Co.*, 93 Ky. 363; s. c. 14 Ky. L. Rep. 356; 20 S. W. Rep. 271 (boy of seventeen

years injured while leaning over a revolving shaft, by his loose shirt catching upon the shaft); *Reis v. Struck*, 23 Ky. L. Rep. 1113; s. c. 64 S. W. Rep. 729 (no off. rep.) (danger of having hands pushed into knives of planing-machine by reason of board turning over held to be an obvious risk and assumed, though plaintiff had asked for an assistant and was assured he could do the work safely alone); *Demers v. Deering*, 93 Me. 272; s. c. 44 Atl. Rep. 922; *Jones v. Manufacturing & Co.*, 92 Me. 565; s. c. 43 Atl. Rep. 512 (risk of injury from logs slipping from hooks and falling); *Demers v. Marshall*, 178 Mass. 9; s. c. 59 N. E. Rep. 454 (sleeve caught in a set-screw while oiling machinery, which set-screw could be seen from the floor); *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156; s. c. 39 N. E. Rep. 787 (servant, duly cautioned, slipped and fell while the machinery was in motion); *Gleason v. Smith*, 172 Mass. 50; s. c. 51 N. E. Rep. 460 (guard made by workman too narrow and did not cover the entire sweep of the knives—danger obvious when machine at rest—employé experienced); *Henry v. King Philip Mills*, 155 Mass. 361; s. c. 29 N. E. Rep. 581; *Gilbert v. Guild*, 144 Mass. 601 (boy nineteen years of age, understanding the danger); *Ford v. Mount Tom Sulphite Pulp Co.*, 172 Mass. 544; s. c. 52 N. E. Rep. 1065; *Kleinest v. Kunhardt*, 160 Mass. 230; s. c. 35 N. E. Rep. 458; *Connelly v. Eldredge*, 160 Mass. 566; s. c. 36 N. E. Rep. 469 (female servant injured while adjusting a cloth to a steam ironing-machine or mangle, her fingers being caught between two inwardly revolving cylinders); *Daigle v. Lawrence Man. Co.*, 159 Mass. 378; s. c. 34 N. E. Rep. 458 (employé injured while removing waste from a slowly revolving cylinder); *Richstain v. Washington Mills Co.*, 157 Mass. 538; s. c. 2 N. E. Rep. 907; *Cluny v. Cornell Mills*, 160 Mass. 218; s. c. 35 N. E. Rep. 772 (saw with guard improperly

though there may be a statute with which the employer neglects to comply, enjoining upon him the duty of guarding cogs, gearing, and

placed); *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; s. c. 5 N. E. Rep. 719; 15 N. E. Rep. 576 (experienced machinist injured by revolving set-screw); *Pratt v. Prouty*, 153 Mass. 333; s. c. 26 N. E. Rep. 1002 (boy fifteen years of age injured by having his hand drawn into a machine and against a knife); *Tinkham v. Sawyer*, 153 Mass. 485; s. c. 27 N. E. Rep. 6 (boy over sixteen years of age placed himself too near a dangerous machine, and slipped and thrust his arm into it); *Downey v. Sawyer*, 157 Mass. 418; s. c. 32 N. E. Rep. 654 (boy sixteen years old injured in consequence of obeying an order to put a belt on a machine, by getting his arm caught in the gearing, though he did not appreciate the whole extent of the risk); *Donahue v. Washburn & Co. Man. Co.*, 169 Mass. 574; s. c. 48 N. E. Rep. 842 (experienced workman caught his glove on set-screw of machine while reaching into it to remove a reel); *Middaugh v. Mitchell*, 120 Mich. 581; s. c. 6 Det. Leg. N. 272; 79 N. W. Rep. 806 (injury from revolving set-screw—employé specially warned); *Journeaux v. E. H. Stafford Co.*, 122 Mich. 396; s. c. 81 N. W. Rep. 259 (employé working about a sawmill, got too near the saw); *Schroeder v. Michigan Car Co.*, 56 Mich. 132 (employé caught his hand in the exposed cogs in an ordinary planing-machine, with which he was familiar); *Craver v. Christian*, 36 Minn. 413; s. c. 31 N. W. Rep. 457 (neglect of master to fence or cover complicated and dangerous machinery not enough to make him liable to employé who works about the same with full knowledge of the danger); *Blom v. Yellowstone Park Assn.*, 86 Minn. 237; s. c. 90 N. W. Rep. 397 (experienced employé, familiar with the operation of the machine and the risks thereof, injured while operating unguarded mangle in laundry); *Cagney v. Hannibal & Co. R. Co.*, 69 Mo. 416; *Glover v. Kansas City Nut & Co.*, 153 Mo. 327; s. c. 55 S. W. Rep. 88; *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656; s. c. 75 N. W. Rep. 1097 (employé worked near a re-

volving shaft without removing his coat or protecting it from coming in contact with the shaft); *Coyle v. Griffing Iron Co.*, 62 N. J. L. 540; s. c. 41 Atl. Rep. 680; s. c. aff'd, 63 N. J. L. 609; 44 Atl. Rep. 665 (master not liable for an injury to servant received while oiling a machine, in consequence of the machine starting owing to unexplained and sudden displacement of a bolt); *Graves v. Brewer*, 4 App. Div. (N. Y.) 327; s. c. 38 N. Y. Supp. 566 (employé undertook to clean a machine operated by cogwheels, while in motion); *Bond v. Smith*, 39 N. Y. St. Rep. 124; s. c. 14 N. Y. Supp. 932; *Carlson v. Monitor Iron Works*, 38 App. Div. (N. Y.) 38; s. c. 55 N. Y. Supp. 992 (employé stumbled against a revolving tumbler from which flanges and rivet-heads projected, so as to catch his clothing and throw him between the tumbler and the shafting, killing him—was familiar with the machine and the risk was obvious); *Roth v. Northern & Co. Lumbering Co.*, 18 Or. 205; s. c. 22 Pac. Rep. 842; *Kelley v. Silver Spring & Co.*, 12 R. I. 112 (unboxed driving-gear, operated by a servant for several weeks without complaint); *Morancy v. Hennessey*, 24 R. I. 205; s. c. 52 Atl. Rep. 1021 (girl operating a mangle, who had been warned to keep her hands out of the rollers, which were unguarded, was injured by a sheet sticking on a rough place in the table and giving way suddenly); *Brown v. Tabor Mill Co.*, 22 Wash. 317; s. c. 60 Pac. Rep. 1126 (clothing caught in rapidly-revolving shaft); *Helmke v. Thilmany*, 107 Wis. 216; s. c. 83 N. W. Rep. 360; *Stephenson v. Duncan*, 73 Wis. 404; s. c. 41 N. W. Rep. 337 (saw projecting over its frame); *Muenchow v. Theodore Zschetzsche & Son Co.*, 113 Wis. 8; s. c. 88 N. W. Rep. 909 (experienced and intelligent man working in close proximity to rapidly revolving shaft in plain view, assumed risk as matter of law); *Peterson v. Sherry Lumber Co.*, 90 Wis. 83; s. c. 62 N. W. Rep. 948 (skilled employé working at a machine called an "edger" assumes the risk of the improper location of the iron band or guard placed above

other exposed machinery, yet the servant is deemed to accept the risk if the conditions are such that he would be put under this disadvantage in the absence of any such statute.²⁹

§ 4705. Risks Assumed in the Work of Making a Dangerous Place Safe.—The rule that the master must exercise ordinary care to provide a reasonably safe place in which the servant is to work, does not apply to cases in which the very work which the servant is employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses.³⁰ On the other hand, the very nature of such work conveys to the servant an obvious suggestion of peculiar danger, and charges him with an assumption of the ordinary risks attendant upon the service in which he is engaged.³¹

ARTICLE VII. RISK OF INJURY FROM DANGEROUS OR DEFECTIVE TOOLS, MACHINERY, APPLIANCES, ETC.

SECTION

4707. Assumes risks of known defects in tools, appliances, etc.

4708. Assumes risks of injuries from defects in appliances in known and common use.

SECTION

4709. Assumes risks of injuries from defects in machines of ordinary construction, although other and safer machines are in use.

4710. Risk of injuries from dangerous machinery.

§ 4707. Assumes Risks of Known Defects in Tools, Appliances, etc.—It is a part of this doctrine that the servant assumes the risks of known defects in machinery, tools, appliances, etc.,¹ or of improper

the saws to prevent boards or fragments from being thrown back); *Townsend v. Langles*, 41 Fed. Rep. 919; *The Maharajah*, 40 Fed. Rep. 784 (uncovered cogwheels).

²⁹ *Knisley v. Pratt*, 148 N. Y. 372; rev'g s. c. 75 Hun (N. Y.) 323; 58 N. Y. St. Rep. 213; 31 Abb. N. Cas. (N. Y.) 289; 26 N. Y. Supp. 1010. Somewhat opposed to the doctrine of the text is a case where it appeared that the rods protecting the gearing of machinery had become bent, so as to produce an opening, and that the plaintiff, in passing around the machinery, slipped on the floor, rendered slippery by the spraying of oil from the machinery, and that her hand passed through

the opening and was crushed in the cogwheel. It was held that the contention that she assumed the risk of falling on the floor, and that such fall was the proximate cause of the injury, was untenable, since she would not have been injured had it not been for the negligence of the master in failing properly to guard the gearing, as required by statute: *Lore v. American Man. Co.*, 160 Mo. 608; s. c. 61 S. W. Rep. 678.

³⁰ *Finalyson v. Utica Min. & c. Co.*, 67 Fed. Rep. 507; *ante*, §§ 3876, 3877.

³¹ *Finalyson v. Utica Min. & c. Co.*, 67 Fed. Rep. 507. See also, *Gulf & c. R. Co. v. Jackson*, 65 Fed. Rep. 48; s. c. 12 C. C. A. 507.

¹ *Bell v. Western & c. R. Co.*, 70

appliances furnished for the performance of a particular task, or where no proper appliance is furnished,² although the defect or dan-

Ga. 566; *Atlanta &c. R. Co. v. Ray*, 70 Ga. 674 (knew of defect in stove and yet continued to work about it without communicating the fact to the company); *Reid v. Central R. &c. Co.*, 81 Ga. 694; s. c. 8 S. E. Rep. 629 (had a better opportunity to know how good the rope was than any one else had); *Baker v. Western &c. R. Co.*, 68 Ga. 699 (used tools known to be defective and dangerous, there being no others); *Nelson v. Central &c. R. Co.*, 88 Ga. 225; s. c. 14 S. E. Rep. 210; *East St. Louis &c. R. Co. v. Shannon*, 52 Ill. App. 420 (no right to presume safety where he has knowledge to the contrary); *Louisville &c. R. Co. v. Allen*, 47 Ill. App. 465; *Bedford Belt R. Co. v. Brown*, 142 Ind. 659; s. c. 42 N. E. Rep. 359; *Jackson v. Kansas City &c. R. Co.*, 31 Kan. 761; *Ashland Coal &c. Co. v. Wallace*, 101 Ky. 626; *Mundle v. Hill Man. Co.*, 86 Me. 400; s. c. 30 Atl. Rep. 16; *Michael v. Stanley*, 75 Md. 464; s. c. 23 Atl. Rep. 1094 (boy eighteen years old injured by a saw with which he was familiar); *Pingree v. Leyland*, 135 Mass. 398; *Coullard v. Tecumseh Mills*, 151 Mass. 85; s. c. 23 N. E. Rep. 731; *Foley v. Pettee Mach. Works*, 149 Mass. 294; s. c. 4 L. R. A. 51; 21 N. E. Rep. 304; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; *Richards v. Rough*, 53 Mich. 212; *Eichler v. Hauggi*, 40 Minn. 263; s. c. 41 N. W. Rep. 975; *Bartley v. Howell*, 82 Minn. 382; s. c. 85 N. W. Rep. 167; *Scharenbroich v. St. Cloud Fiber-Ware Co.*, 59 Minn. 116; s. c. 60 N. W. Rep. 1093; *Alexander v. Tennessee &c. Min. Co.*, 3 N. M. 173; s. c. 3 Pac. Rep. 735; *Reynolds v. Kneeland*, 63 Hun (N. Y.) 283; s. c. 44 N. Y. St. Rep. 458; 17 N. Y. Supp. 895; *Monaghan v. New York &c. R. Co.*, 45 Hun (N. Y.) 113; s. c. 9 N. Y. St. Rep. 672; *Healey v. Smith*, 63 Hun (N. Y.) 631; s. c. 43 N. Y. St. Rep. 804; 17 N. Y. Supp. 851; *Howey v. Lake Shore &c. R. Co.*, 13 Misc. (N. Y.) 641 (brakeman attempted to remedy the defect, the danger from which was obvious); *Windover v. Troy City R. Co.*, 4 App. Div. (N. Y.) 202; s. c. 38 N. Y.

Supp. 591; *Horrigan v. New York &c. R. Co.*, 7 App. Div. (N. Y.) 377; s. c. 39 N. Y. Supp. 938; *Pleasants v. Raleigh &c. R. Co.*, 95 N. C. 195 (section-master used a defective dump-car after he had been ordered to get another); *National Malleable Castings Co. v. Luscomb*, 19 Ohio C. C. 673; *Kelley v. Silver Spring Bleaching &c. Co.*, 12 R. I. 112; *Morancy v. Hennessey*, 24 R. I. 205; s. c. 52 Atl. Rep. 1021 (employé guiding cloth through mangle injured by reason of roughness of table of machine, such roughness having always been present); *Nashville &c. R. Co. v. Gann*, 101 Tenn. 380; s. c. 47 S. W. Rep. 493; *Missouri &c. R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. Rep. 879 (no off. rep.); *Texas &c. R. Co. v. Bradford*, 66 Tex. 732; *St. Louis &c. R. Co. v. Threat*, 12 Tex. Civ. App. 375; s. c. 34 S. W. Rep. 152; 3 Am. & Eng. R. Cas. (N. S.) 358; *Week v. Fremont Mill Co.*, 3 Wash. 629; s. c. 29 Pac. Rep. 215 (an employé in a sawmill, who continues to operate a saw held back by a wire rope, knowing it to be old and worn and required to sustain a weight of 150 pounds, and knowing that if the rope should break the saw will swing forward and strike him,—assumes the risk); *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65; s. c. 65 S. W. Rep. 693 (employé knew that platform sagged down close to rollers of oil-cake crusher, and that force was necessary to feed oil-cake through slot in platform on to rollers—assumed risk of cake giving way suddenly and letting his hand go through into the rollers); *Erdman v. Illinois Steel Co.*, 95 Wis. 6; s. c. 69 N. W. Rep. 993.

² *Henry Wrape Co. v. Huddleston*, 66 Ark. 237; s. c. 50 S. W. Rep. 452; *Yates v. McCullough Iron Co.*, 69 Md. 370; s. c. 19 Md. L. J. 837; 16 Atl. Rep. 280; *Price v. United States Baking Co.*, 130 Mich. 500; s. c. 9 Det. Leg. N. 122; 90 N. W. Rep. 286 (employé injured while using her foot to shift a belt, no belt-shifter having been provided—risk assumed).

ger results from the negligence of the master,³ or from his violation of a statute,⁴ or a municipal ordinance.⁵

§ 4708. Assumes Risks of Injuries from Defects in Appliances in Known and Common Use.—A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood.⁶ It is a part of this doctrine that the *duty of inspection*, by an employer, of the appliances used by his employes, does not extend to the small and common tools in every-day use, of the fitness of which the employes using them may reasonably be supposed to be competent judges.⁷ The rule that a workman assumes the risks from defects in simple tools, of which the workmen are as good judges as the master, does not apply to defects in tools used by *fellow servants*, the reason being that the injured servant does not have an opportunity to inspect them.⁸

§ 4709. Assumes Risks of Injuries from Defects in Machines of Ordinary Construction, although Other and Safer Machines are in Use.—A servant assumes the risks incident to the use of a machine of ordinary construction, similar to other machines in use for the same purpose, where the defect is open and visible, although other and safer machines are in use,⁹ and although the injury might have been prevented by a contrivance sometimes applied to similar machines.¹⁰

§ 4710. Risk of Injuries from Dangerous Machinery.—Under many circumstances, the master will not be blameworthy for not knowing more about the machinery than the servant knows,—as where a servant is an experienced machinist, who has worked about the

³ *Hunt v. Kile*, 98 Fed. Rep. 49; s. c. 38 C. C. A. 641.

⁴ *Williams v. Wagner Co.*, 110 Wis. 456; s. c. 86 N. W. Rep. 157; *ante*, § 4620. Compare *ante*, § 4621.

⁵ *Swift & Co. v. Fue*, 66 Ill. App. 651.

⁶ *Sims v. East & Co. R. Co.*, 84 Ga. 152; s. c. 10 S. E. Rep. 543; *Foster v. Kansas Salt Co.*, 60 Kan. 859; s. c. 57 Pac. Rep. 961; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; s. c. 80 N. W. Rep. 821; *Henggler v. Cohn*, 68 N. J. L. 240; s. c. 52 Atl. Rep. 280 (defective hinge connecting two parts of ladder); *Plunkett v. Donovan*, 36 N. Y. St. Rep. 91; s. c. 12 N. Y. Supp. 454; *Olson v. Doherty Lumber Co.*, 102 Wis. 264; s. c. 78 N. W. Rep. 572.

⁷ *Wachsmuth v. Shaw Electric Crane Co.*, 118 Mich. 275; s. c. 76 N. W. Rep. 497; 5 Det. Leg. N. 510. See also, *Miller v. Erie R. Co.*, 47 N. Y. Supp. 285; s. c. 21 App. Div. (N. Y.) 45; *Marsh v. Chickering*, 101 N. Y. 396.

⁸ *Daly v. Lee*, 167 N. Y. 537 (*mem.*); s. c. 60 N. E. Rep. 1109; *aff'g* s. c. 39 App. Div. (N. Y.) 188; 57 N. Y. Supp. 293; 6 Am. Neg. Rep. 150.

⁹ *French v. Aulls*, 72 Hun (N. Y.) 442; s. c. 54 N. Y. St. Rep. 866; 25 N. Y. Supp. 188.

¹⁰ *Ross v. Pearson Cordage Co.*, 164 Mass. 257; s. c. 41 N. E. Rep. 284; 2 Am. & Eng. Corp. Cas. (N. S.) 585; 49 Am. St. Rep. 459.

machinery for fourteen months, without anticipating a particular danger, such as the danger of bolts projecting from the flywheel coming in contact with a pipe running near the wheel;¹¹ but this cannot be affirmed of those dangers and defects which would be discoverable by such an *inspection* as the law requires of the master, but not by such inspection and observation as may fairly be expected of the servant.¹² So, although the servant may have equal opportunities with the master to discover defects in a machine about which he is required to work, yet where the duty of inspection rests upon another servant, and the defect is one which would not be discovered from the mere fact of using the machine, the employé injured by the defect will not be conclusively presumed to have assumed the risk of injury from it.¹³ Again, it may be a matter of skill to determine whether a machine or appliance is in fact dangerous,—as, to determine how much strain a wheel which has been worn will stand, in which case an employé who is not an expert will not be conclusively held to have assumed the risk from the fact of working about it.¹⁴ So also, if the timber used as a lever is sound and suitable for the purpose, but not large enough for the strain put upon it, the risk of its breaking by reason of not being large enough has been held to be a danger assumed by the servant, it being obvious.¹⁵ On the other hand, if the machinery or appliance is unusually dangerous, it is said that the employé assumes only such risk from using it as a reasonably prudent and careful man would expect to proceed therefrom.¹⁶ Again, it has been held that the mere fact that an employé is willing to operate a machine which he knows is lacking in safety-appliances which have come into general use, does not, of itself, put upon him the assumption of the risk.¹⁷ Dismissing theories, it has been held that the risk was not assumed as matter of law, under the following circumstances:—Where a *machine started* from a dead stop while being operated in the manner recognized in the defendant's factory, and cut off both the arms of a workman employed thereon,¹⁸—the view of this and other courts being that the likelihood of the *sudden starting of machinery*, when the

¹¹ *Detroit Crude-Oil Co. v. Grable*, 94 Fed. Rep. 73; s. c. 36 C. C. A. 94.

¹² *Ante*, §§ 3801, 4643, 4650.

¹³ *Nicholds v. Crystal Plate-Glass Co.*, 126 Mo. 55; s. c. approved by court *in banc*, 28 S. W. Rep. 991. This rule was applied, although the injured employé was himself a foreman of the shop and had helpers working under him, it not being his duty to see that the appliances were kept in order: *Nicholds v. Crystal Plate-Glass Co.*, *supra*.

¹⁴ *Bridges v. St. Louis &c. R. Co.*, 6 Mo. App. 389.

¹⁵ *Bohn v. Chicago &c. R. Co.*, 106 Mo. 429; s. c. 17 S. W. Rep. 580.

¹⁶ *Kerns v. Chicago &c. R. Co.*, 94 Iowa 121; s. c. 62 N. W. Rep. 692.

¹⁷ *Lloyd v. Hanes*, 126 N. C. 359; s. c. 35 S. E. Rep. 611 (must be so grossly or clearly defective that employé must know the extra risk).

¹⁸ *Packer v. Thomson-Houston Electric Co.*, 175 Mass. 496; s. c. 56 N. E. Rep. 704.

agencies furnished to keep it at rest are in the proper position, is not one of the ordinary risks of the employment voluntarily assumed by the servant;¹⁹ where an employé was set at work at night near a *gearing not protected* as required by statute, and was not informed of it when instructed concerning it, but was injured by being caught in it before he had an opportunity to become familiar with his surroundings;²⁰ where an experienced machinist left the head of his machine and went to a lunch-box some eight or ten feet distant, and then, turning around and facing the machine, which worked regularly, and which threw chips only occasionally, and not then without giving warning by its irregular action, was injured from a *flying chip of steel*, and chips had never before struck at the point where he was standing to his knowledge;²¹ where an employé fifteen years old had his *sleeve caught* while holding a belt on a pulley made of rags, to assist in its repair.²²

ARTICLE VIII. RISK OF INJURY FROM THE UNFITNESS OR NEGLIGENCE OF FELLOW SERVANTS.

SECTION

4712. Risk of injury from the incompetency or negligence of fellow servants.

4713. When risks of incompetent or unfit fellow servants not assumed: knowledge of master, ignorance of servant.

4714. Assumes such risks by remaining in the service without complaint after acquiring

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knowledge of the dangerous habits of the co-servant.

4715. Effect of giving notice of the incompetency of a fellow servant and then remaining in the service.

4716. Right of servant to presume that master has done his duty in selecting fit and competent fellow servants.

§ 4712. **Risk of Injury from the Incompetency or Negligence of Fellow Servants.**—By the principles of the common law, and always keeping in mind that in several American jurisdictions the rule has been more or less modified by the statute law, a servant is deemed to assume the risk of injury from the negligence of his fellow servants engaged with him in the same common employment, although—ac-

¹⁹ *Blanton v. Dold*, 109 Mo. 64; s. c. 18 S. W. Rep. 1149.

²⁰ *Peterson v. Johnson-Wentworth Co.*, 70 Minn. 538; s. c. 73 N. W. Rep. 510. See also, *Johansen v. Eastmans Co.*, 60 N. Y. Supp. 708; s. c. 44 App. Div. (N. Y.) 270 (employé charged with the duty of shovelling fat in the vicinity of a revolving shaft not guarded as re-

quired by statute, did not assume risk of injury from touching the shaft, he being unfamiliar with the machinery and not employed in connection with it).

²¹ *Denning v. Midvale Steel Co.*, 192 Pa. St. 182; s. c. 44 W. N. C. (Pa.) 399; 43 Atl. Rep. 965.

²² *Dodd v. Bell*, 15 App. Div. (N. Y.) 258; s. c. 44 N. Y. Supp. 198.

cording to the doctrine obtaining in many jurisdictions—the servant inflicting the injury is a servant superior to the servant injured, but not where he is deemed to be, in the performance of the particular act or in the conduct of the particular work, the *alter ego* or vice-principal of the common master. This subject is especially dealt with in a separate Subdivision of the present Title, and is treated here for the purpose of rounding out the chapters on the ACCEPTANCE OF THE RISK BY THE SERVANT and of showing that the risk of injury from the incompetency or negligence of his fellow servants is, in theory of the law, accepted by him in common with other risks which are incident to the service,¹—but with the further proviso that the master himself has not been negligent in putting the injured servant at work together with an incompetent or habitually negligent fellow servant, whose incompetency or habitual negligence is unknown to the injured servant. Subject to these and to other possible qualifications, an employé who is killed or injured by the incompetency or negligence of a fellow employé has no cause of action against the common master.²

¹ Wabash &c. R. Co. v. Conkling, 15 Ill. App. 157; Webster Man. Co. v. Schmidt, 77 Ill. App. 49 (servant who knows of the incompetency of a fellow servant, but continues to work with him, is guilty of such contributory negligence as will bar recovery for an injury sustained through such incompetency).

² Stucke v. Orleans R. Co., 50 La. An. 188; s. c. 23 South. Rep. 342; Ackerson v. Dennison, 117 Mass. 407 (risk of injury from scaffolding constructed by coemployés previously to plaintiff's employment); Elwell v. Hacker, 86 Me. 416; s. c. 30 Atl. Rep. 64; Jungnitsch v. Michigan Malleable Iron Co., 105 Mich. 270; s. c. 2 Det. Leg. N. 107; 63 N. W. Rep. 296 (workman in a foundry who accepts without objection the service of an assistant whose strength is known to him better than to the employer, cannot charge the latter with employing one who is not strong enough for the work); O'Neil v. Great Northern R. Co., 80 Minn. 27; s. c. 82 N. W. Rep. 1086; Missouri &c. R. Co. v. Lyons, 54 Neb. 633; s. c. 76 N. W. Rep. 31 (provided the master has not been guilty of negligence); Olsen v. Nixon, 61 N. J. L. 671; s. c. 4 Am. Neg. Rep. 515; 40 Atl. Rep. 694 (risk of injury from scaffolding constructed by coemployés previously to plaintiff's employment); Hogan v. Smith, 125

N. Y. 774 (same point); Van Sickle v. Atlantic Ave. R. Co., 12 Misc. (N. Y.) 217; s. c. 66 N. Y. St. Rep. 857; 33 N. Y. Supp. 265 (where the injured servant is familiar with the fellow servant and with his methods of doing the work allotted to him); Lake Shore &c. R. Co. v. Litz, 7 Ohio C. D. 282 (where the injured employé knows of the habitual and continual negligence of the superior fellow servant, and continues in the service without objection or effort toward the correction of such negligence); Somer v. Harrison (Pa.), 8 Atl. Rep. 799 (no off. rep.); Walton v. Bryn Mawr Hotel Co., 160 Pa. St. 3; s. c. 28 Atl. Rep. 438; Reusch v. Groetzinger, 192 Pa. St. 74; s. c. 16 Lanc. L. Rev. (Pa.) 241; 43 Atl. Rep. 398 (injury which is the result of the manner in which a fellow workman handles his crowbar); Boatwright v. Northeastern R. Co., 25 S. C. 128; Texas &c. R. Co. v. Johnson (Tex. Civ. App.), 34 S. W. Rep. 186 (no off. rep.); rehearing denied, 14 Tex. Civ. App. 566; s. c. 37 S. W. Rep. 973; writ of error denied, 90 Tex. 304; s. c. 38 S. W. Rep. 520 (risk of collision with another railway-train in charge of an incompetent conductor); Bonnet v. Galveston &c. R. Co. (Tex. Civ. App.), 31 S. W. Rep. 525 (no off. rep.); s. c. rev'd on other grounds, 89 Tex.

§ 4713. When Risks of Incompetent or Unfit Fellow Servants Not Assumed: Knowledge of Master, Ignorance of Servant.—A tendency is discovered in the decisions to assimilate the doctrine of the assumption of the risk of the incompetency, unskillfulness, negligence or drunkenness of the fellow servant, and the doctrine of the assumption of the risk of defects and dangers in premises, machinery and appliances. This doctrine, stated in the briefest form, balances the knowledge of the master against the ignorance of the servant, and is formulated in the proposition that where the master knows, or has reasonable cause to believe, or in the exercise of his proper duty of care and inspection ought to know, of the incompetency, unskillfulness, habitual negligence, drunkenness, or other unfitness of the fellow servant; and the servant who is injured from this source does not know nor have reasonable cause to believe, or, in the exercise of that reasonable care for his own safety which his situation admits of, does not acquire knowledge of the incompetency, unskillfulness, habitual negligence, drunkenness, or other unfitness of the fellow servant,—the injured servant is not put to the disadvantage of having accepted the risk, but may recover damages from the common master.³

72; 33 S. W. Rep. 334 (servant had just as good an opportunity to know of the unfitness of the fellow servant as his master); *Latremouille v. Bennington &c. R. Co.*, 63 Vt. 336; s. c. 48 Am. & Eng. R. Cas. 265; 22 Atl. Rep. 656 (when he does not complain or make known to his employer the fact of such incompetency or unskillfulness); *Chicago &c. R. Co. v. Ross*, 112 U. S. 377; s. c. 28 L. ed. 787; *The Antonio Zambrana*, 89 Fed. Rep. 60 (seaman knowing of the intoxication of the mate, but who nevertheless endeavors to overcome the intoxication before it comes to the master's notice, assumes the risk of injury therefrom); *Barton's Hill Coal Co. v. Ried*, 3 Macq. H. L. Cas. 266; *McNaughton v. Railroad Co.*, 19 Court of Sess. Cas. 271. Under a statute of Pennsylvania making, let us say, the servant of A., at work in connection with the servant, or servants, of B., a railway company, subject to the so-called "fellow-servant doctrine" the same as if he were himself a servant of B., he must exercise care proportionate to the risks of the employment, and cannot recover damages for an injury sustained by being run upon by a train propelled by the servant

of B. while he is crossing the track: *Baltimore &c. R. Co. v. Colvin*, 118 Pa. St. 230; s. c. 12 Atl. Rep. 337; 20 W. N. C. (Pa.) 531. See further, as to this statute, *post*, § 5305.

³ See, in general support of the doctrine of the text: *Alabama &c. R. Co. v. Waller*, 48 Ala. 459; *Murphy v. Hughes*, 1 Pen. (Del.) 250; s. c. 40 Atl. Rep. 187; *Hall v. Bedford Quarries Co.*, 156 Ind. 460; s. c. 60 N. E. Rep. 149 (holding that the wrongful hiring of incompetent servants is not of the common obvious hazards of the employment which is assumed by other servants); *Chicago &c. R. Co. v. Champion*, 9 Ind. App. 510; s. c. 36 N. E. Rep. 221; 37 N. E. Rep. 21 (where the injured employé is ignorant of the incompetency of the employé inflicting the injury, and such incompetent employé is knowingly employed and retained by the employer, even though it is necessary to employ an inexperienced and incompetent employé for the work, of which necessity the injured employé does not know or have the means of knowing); *Toledo &c. R. Co. v. Trimble*, 8 Ind. App. 333; s. c. 35 N. E. Rep. 716 (doctrine applied so as to defeat a recovery by the plaintiff for an injury to his minor son

Some of the decisions say, in direct language or in substance, that the risk of the negligence of the master in employing unfit fellow servants is not one of the ordinary risks of the employment which another

through the incompetency or negligence of a fellow servant, with the conclusion that there could be no recovery unless it could be shown that the injured servant had no knowledge of such incompetency or negligence); *Chicago & C. R. Co. v. Harney*, 28 Ind. 28; s. c. 92 Am. Dec. 282; *Western Stone Co. v. Whalen*, 151 Ill. 472; s. c. 38 N. E. Rep. 241; *Charles Pope Glucose Co. v. Bryne*, 60 Ill. App. 17; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; s. c. 35 N. E. Rep. 162; aff'g s. c. 48 Ill. App. 115 (holding that the risks resulting from the failure of the master to furnish suitable machinery and prudent servants to operate the same are not assumed by a servant as part of his contract of service, where he is suddenly called upon to assist in work outside the usual line of his employment); *Dixon v. Pittsburg & C. Lumber Co.*, 52 La. An. (pt. 2) 1109; s. c. 27 South. Rep. 654 (injury from bursting of pulley, caused by excessive speed of an engine with a defective governor, which failed to work, combined with negligence of incompetent and drunken engineer in failing to stop the engine—risk not assumed); *Davis v. New York & C. R. Co.*, 159 Mass. 532; s. c. 34 N. E. Rep. 1070 (section-man engaged upon a railroad-track does not take the risk that a foreman stationed to give him warning of the approach of trains will be negligent in the discharge of that duty, under Mass. St. 1887, ch. 270); *Hall v. Chicago & C. R. Co.*, 46 Minn. 439; s. c. 49 N. W. Rep. 239; *Jenson v. Great Northern R. Co.*, 72 Minn. 175; s. c. 4 Am. Neg. Rep. 59; 11 Am. & Eng. R. Cas. (N. S.) 253; 75 N. W. Rep. 3 (holding that the rule of acceptance of the risk does not apply where the negligence is that of a servant whom the master was negligent in employing or retaining in his employ); *Chandler v. Atlantic Coast Elec. R. Co.*, 61 N. J. L. 380; s. c. 4 Am. Neg. Rep. 189; 39 Atl. Rep. 674 (responsibility rests upon the employer who knowingly employs or retains an unskillful or incompetent workman); *Mann v.*

Delaware & C. Canal Co., 91 N. Y. 495; *Postal & C. Co. v. Coote* (Tex. Civ. App.), 57 S. W. Rep. 912 (no off. rep.) (master employing men to assist in erection of telegraph-poles without making any inquiry as to their competency for such work, makes himself liable to another servant for an injury resulting from the incompetency of a servant so selected); *Norfolk & C. R. Co. v. Nuckols*, 91 Va. 193; s. c. 21 S. E. Rep. 342. For a case where a brakeman concluded that an engineer who had just been assigned to duty was incompetent, but the superintendent of the road went on the engine, and thereafter the engineer acted under his orders; under which circumstances the brakeman had a right to assume that the superintendent would see that the duties of the engineer were properly performed,—see *Bell v. Globe Lumber Co.*, 107 La. 725; s. c. 31 South. Rep. 994. That a servant cannot recover damages from his master for personal injuries due to the incompetency of a fellow servant, to which his own negligence contributed, see *Murphy v. Hughes*, 1 Pen. (Del.) 250; s. c. 40 Atl. Rep. 187. The mere inexperience of a servant is not such evidence of his incompetency as will render the employer liable to another servant for an injury through the negligence of such fellow servant: *National Fertilizer Co. v. Travis*, 102 Tenn. 16; s. c. 49 S. W. Rep. 832. It has been held that a master who knowingly employs a servant of intemperate habits: *Maxwell v. Hannibal & C. R. Co.*, 85 Mo. 95; or who, after acquiring the knowledge that he is of intemperate habits, retains him in his employ: *Hilts v. Chicago & C. Co.*, 55 Mich. 437,—renders himself liable to another servant who is injured from this cause, unless the injured servant acquires knowledge of the dangerous habits of the servant inflicting the injury and accepts the risks. — — — That a new employé assumes the risk of any existing negligence of his fellow servants, as well as any negligence on their part which may thereafter occur,—see

servant accepts, by reason of entering into or remaining in the service.⁴ Others hold that the rule that a servant cannot recover for injuries received in the employment of the master, if he has equal facilities with the master for ascertaining the dangers of the employment, is not applicable to an injury received through the negligence of an incompetent fellow servant.⁵ Carrying out the analogy already indicated, it is held that if the workman complains of the incompetency or other disqualification of a fellow servant, and his master or the vice-principal of his master promises to replace the fellow servant with another man, the employé is not put to the disadvantage of having assumed the risk of injury from the fellow servant merely by remaining in the master's employment, provided the circumstances are such that he might reasonably think that by the use of extra care, he might safely perform his duties in connection with such fellow servant;⁶ but, under such circumstances, he may remain in the service for a reasonable time to await the performance of the promise on the part of the master.⁷ Another expression of the same doctrine is to say that it is ordinarily a question for the jury whether, by remaining in the service without complaint, the servant puts himself in the category of having accepted the risk, unless the danger of so remaining is so glaring and obvious that the court can pronounce upon it as matter of law.⁸

§ 4714. Assumes such Risks by Remaining in the Service without Complaint after Acquiring Knowledge of the Dangerous Habits of

Burns v. Sennet, 99 Cal. 363; s. c. 33 Pac. Rep. 916.

⁴Galveston &c. R. Co. v. Arispe, 81 Tex. 517; s. c. 48 Am. & Eng. R. Cas. 350; 17 S. W. Rep. 47 (holding that incompetency of the servants or managers of a railroad company is not one of the ordinary risks assumed by one entering its employ); Cincinnati &c. R. Co. v. Thompson, 21 Ohio C. C. 778; s. c. 12 Ohio C. D. 326; Jenson v. Great Northern R. Co., 72 Minn. 175; s. c. 4 Am. Neg. Rep. 59; 11 Am. & Eng. R. Cas. (N. S.) 253; 75 N. W. Rep. 3 (holding that the rule of acceptance of the risk does not apply where the negligence is that of a servant whom the master was negligent in employing or retaining in his employ); Consolidated Coal Co. v. Haenni, 146 Ill. 614; s. c. 35 N. E. Rep. 162; aff'g s. c. 48 Ill. App. 115; Southern Pac. Co. v. Burke, 13 U. S. App. 110; s. c. 60 Fed. Rep. 704.

⁵Lawrence v. Texas &c. R. Co., 25 Tex. Civ. App. 293; s. c. 61 S. W. Rep. 342.

⁶Curran v. A. H. Stange Co., 98 Wis. 598; s. c. 74 N. W. Rep. 377; distinguishing Erdman v. Illinois Steel Co., 95 Wis. 6. So, where a servant complained of the incompetency of a fellow servant, and the master *neither discharged nor promised to discharge him*, it was held that the risk was not assumed unless the danger of continuing in the service was so glaring that a prudent man would not have remained; and whether he could reasonably suppose that he could continue in the service by the exercise of great care was a *question for a jury*: Adams v. McCormick &c. Mach. Co., 95 Mo. App. 111; s. c. 68 S. W. Rep. 1053.

⁷Maitland v. Gilbert Paper Co., 97 Wis. 476; s. c. 72 N. W. Rep. 1124.

⁸Hughes v. Fagin, 46 Mo. App. 37.

the Co-Servant.—The injured servant assumes the risk of injury from the negligence, incompetency, drunkenness, or other dangerous habits of his co-servant, where, after acquiring knowledge of such dangerous propensity, he continues in the service without making objection or complaint to his employer.⁹

§ 4715. Effect of Giving Notice of the Incompetency of a Fellow Servant and then Remaining in the Service.—As in the case of defects or dangers in premises, tools, machinery or appliances,¹⁰ so here, where the employé gives notice to the employer of the incompetency of another employé, he is not bound at once to leave the service, but may remain a reasonable time with the expectation that the employer will do his duty in the premises.¹¹

§ 4716. Right of Servant to Presume that Master has done his Duty in Selecting Fit and Competent Fellow Servants.—Carrying out the analogy between the assumption of this species of risk and the assumption of risk of injury from defective premises, machinery, tools and appliances,¹² we find it to be a part of the doctrine now under consideration that a servant has the right to presume that his master has performed the duty of exercising reasonable care in ascertaining the qualifications of other servants, and is not bound, at his peril, himself to investigate their qualifications.¹³

⁹ *Smith v. Sibley Man. Co.*, 85 Ga. 333; s. c. 11 S. E. Rep. 616; *Hatt v. Nay*, 144 Mass. 186; s. c. 4 N. Eng. Rep. 173; 10 N. E. Rep. 807; *McDermott v. Hannibal & C. R. Co.*, 87 Mo. 285 (*Norton and Black, JJ.*, dissenting); *Johnson v. Portland Stone Co.*, 40 Or. 436; s. c. 67 Pac. Rep. 1013; 68 Pac. Rep. 425.

¹⁰ *Ante*, § 4657, *et seq.*

¹¹ *Ross v. Chicago & C. R. Co.*, 2 McCrary (U. S.) 235.

¹² *Ante*, § 4654.

¹³ *United States Rolling-Stock Co. v. Wilder*, 116 Ill. 100; s. c. 5 N. E. Rep. 92; *Chicago & C. R. Co. v. Beatty*, 13 Ind. App. 604; s. c. 40 N. E. Rep. 753 (servant not bound to institute inquiry as to the qualification of a fellow servant to perform the duties for which he is employed, in the absence of anything to put him on inquiry); *Warn v. New York & C. R. Co.*, 80 Hun (N. Y.) 71; s. c. 61 N. Y. St. Rep. 585; 29 N. Y. Supp. 897; *Cincinnati & C. R. Co. v. Thompson*, 21 Ohio C. C. 778; s. c. 12 Ohio C. D. 326; *Hughes v. Baltimore & C. R. Co.*, 164 Pa. St. 178; s. c. 44 Am. St. Rep. 597; 30 Atl. Rep. 383 (neglect of a habitu-

ally careless flagman, whose unfitness was known to the company long enough beforehand to have enabled the company to procure some one else in his place); *Galveston & C. R. Co. v. Eckles*, 25 Tex. Civ. App. 179; s. c. 60 S. W. Rep. 830 (switchman had complained of the incompetency of a fireman and had received a promise that he should be removed); *Galveston & C. R. Co. v. Arispe*, 81 Tex. 517; s. c. 48 Am. & Eng. R. Cas. 350; 17 S. W. Rep. 47 (holding that incompetency of servants or managers of a railroad company is not one of the ordinary risks assumed by one entering its employ); *Texas & C. R. Co. v. Johnson*, 89 Tex. 519; s. c. 35 S. W. Rep. 1042; 4 Am. & Eng. R. Cas. (N. S.) 441. It was held in one case that, although a servant knew of a custom to allow incompetent men to practice with engines, he would not be presumed to know that *wholly* incompetent men would be permitted to do so, or to have assumed the risk of a peril which he did not appreciate: *Morbey v. Chicago & C. R. Co.*, 116 Iowa 84; s. c. 89 N. W. Rep. 105.

CHAPTER CXIX.

ACCEPTING THE RISKS OF RAILWAY SERVICE.

- ART. I. Accepting Risks of Injuries in Coupling and Uncoupling Cars, §§ 4718-4731.
- ART. II. Accepting Risks of Injuries from Unblocked Frogs, Switches, Guard-Rails, Defective Cattle-Guards, Culverts, and Other Defects in the Railway-Track, §§ 4734-4744.
- ART. III. Risk of Injury from Objects Too Near the Track, Engine, or Cars, §§ 4747-4762.
- ART. IV. Accepting or Not Accepting the Risk of Other Injuries in Railway Service, §§ 4765-4797.

ARTICLE I. ACCEPTING RISKS OF INJURIES IN COUPLING AND UNCOUPLING CARS.

SECTION	SECTION
4718. General statement of doctrine as to acceptance of risks in coupling and uncoupling cars.	4723. Failing to use a safety coupler, coupling-stick, etc.
4719. Risks of injuries from coupling or uncoupling cars of different construction, or different height, or having different coupling-appliances.	4724. Effect of the brakeman being ordered by the conductor to make the coupling or uncoupling.
4720. Isolated decisions exonerating the brakemen from the assumption of the risk in such cases.	4725. Assumption of risk of injury arising from attempting to couple or uncouple cars while in motion.
4721. Risk of injury in coupling or uncoupling cars from the manner in which the cars are loaded.	4726. Stepping between cars to couple or uncouple them while in motion.
4722. Where the brakemen or other trainmen proceed to couple or uncouple cars in a manner prohibited by known rules of the company.	4727. Risk of injury from the sudden starting, stopping or jolting of cars.
	4728. Risk of injury from attempting to couple or uncouple cars which are dangerously defective.
	4729. Risk of injury from coupling, uncoupling or moving "crippled" cars left for repair.

SECTION

4730. Other circumstances under which trainmen have been held to have accepted the risk of injury in coupling or uncoupling cars.

SECTION

4731. Other circumstances under which brakemen not deemed to assume the risk.

§ 4718. **General Statement of Doctrine as to Acceptance of Risks in Coupling and Uncoupling Cars.**—Generally speaking, a railway brakeman, switchman, yardman, or other servant who knows that he may, in the discharge of his duties, be required to couple and uncouple cars, and who is familiar with the dangers attending that service, or who has had time and opportunity to become familiar with such dangers, accepts the risk of injury from such dangers, as herein-after stated.¹ He cannot, for example, recover damages from the company for an injury received in consequence of using a certain kind or description of coupling-appliance on the ground that it was more dangerous than those of another sort, if such appliances were in use when he entered the service, and if he informed himself as to the manner of using them;² especially where they are shown by the evidence to be as good as any in common use.³ The risks accepted by

¹Alabama &c. R. Co. v. Carroll, 52 U. S. App. 442; s. c. 84 Fed. Rep. 772; 28 C. C. A. 207; 9 Am. & Eng. R. Cas. (N. S.) 759, per Pardee, J.; Brooks v. Northern &c. R. Co., 47 Fed. Rep. 687; Woodworth v. St. Paul &c. R. Co., 18 Fed. Rep. 282; Texas &c. R. Co. v. Rogers, 13 U. S. App. 547; s. c. 57 Fed. Rep. 378; 6 C. C. A. 403; Southern R. Co. v. Arnold, 114 Ala. 183; Louisville &c. R. Co. v. Boland, 96 Ala. 626; s. c. 18 L. R. A. 260; 11 South. Rep. 667; Peoria &c. R. Co. v. Puckett, 42 Ill. App. 642; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Wabash &c. R. Co. v. Deardorff, 14 Ill. App. 401; Toledo &c. R. Co. v. Black, 88 Ill. 112 (the "deadwoods" and "drawbars" being proved to be as good as any in common use); Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22; s. c. 45 N. E. Rep. 76, 1121 (aprons projecting twelve inches from ends of flat-cars which an inexperienced brakeman attempts to couple, leaving only an inch of space between them when the cars are shoved together, where they are in plain view, clearly to be seen, he has abundant opportunity to see them, his attention is directed to

them, and he is warned to keep from between them); Muldowney v. Illinois &c. R. Co., 39 Iowa 615; Michigan &c. R. Co. v. Smithson, 45 Mich. 212; s. c. 7 N. W. Rep. 791; Brewer v. Flint &c. R. Co., 56 Mich. 620; Dysinger v. Cincinnati &c. R. Co., 93 Mich. 646; s. c. 53 N. W. Rep. 825 (assumes risk of having his arm caught between two deadwoods while he is between two cars attempting to draw a coupling-pin); Puffer v. Chicago &c. R. Co., 65 Minn. 350; McLaren v. Williston, 48 Minn. 299; Hannigan v. Lehigh &c. R. Co., 157 N. Y. 244; s. c. 12 Am. & Eng. R. Cas. (N. S.) 605; 51 N. E. Rep. 992; rev'g s. c. 91 Hun (N. Y.) 300; 71 N. Y. St. Rep. 61; 36 N. Y. Supp. 293; Renninger v. New York &c. R. Co., 11 App. Div. (N. Y.) 565; Arnold v. Delaware &c. Canal Co., 125 N. Y. 15 (brakeman injured while coupling cars in order to place them on repair-track).

²Hatter v. Illinois &c. R. Co., 69 Miss. 642.

³Toledo &c. R. Co. v. Black, 88 Ill. 112 (the "deadwoods" and "drawbars" being proved to be as good as any in common use).

the servant include, of course, the risk of injuries visited upon him without negligence, but from mere accidents or casualties, while engaged in coupling or uncoupling cars.*

§ 4719. **Risks of Injuries from Coupling or Uncoupling Cars of Different Construction, or Different Height, or having Different Coupling-Appliances.**—As a general rule, a railway brakeman, or other railway servant, a part of whose duty it is to couple or uncouple cars, assumes the *increased risk* arising from the fact that the cars may be of different construction;⁵ or that their drawheads may be of different makes or of different height;⁶ or that their coupling-appliances may be of different patterns, some of them having double deadwoods or double buffers, while others have not;⁷ or that some of the cars may have coupling-appliances different from those in ordinary use, the difference being open and manifest to observation;⁸ or that the coupling-appliances of a car may be out of repair or defective,⁹ so that its drawhead has become lower than it should be, the defect being discoverable by the exercise of ordinary care;¹⁰ or that one of the cars to be coupled together may be lower than the other, where the brakeman knows this fact;¹¹ or, in case of cars received from other roads,—especially where there is a constitutional mandate requiring railroad companies to receive and haul cars of other companies,—that a car so received may have couplings of a different kind or pattern from the cars used upon the road upon which the switchman is employed;¹² always assuming that the defect or the difference of construction is *not latent* or concealed,¹³ but is *open* to the observation of the brakeman or other trainman, and discoverable by him by the exercise of reasonable care for his own safety, under principles already stated.¹⁴

*Viets v. Toledo &c. R. Co., 55 Mich. 120.

⁵Hodge v. Kimball, 44 C. C. A. 193; s. c. 104 Fed. Rep. 745.

⁶Henry v. Bond, 34 Fed. Rep. 101.

⁷Louisville &c. R. Co. v. Boland, 96 Ala. 626; s. c. 18 L. R. A. 260; 53 Am. & Eng. R. Cas. 169; 11 South. Rep. 667.

⁸Boland v. Louisville &c. R. Co., 106 Ala. 641; s. c. 18 South. Rep. 99.

⁹Elgin &c. R. Co. v. Eselin, 68 Ill. App. 96 (assumes risk only where he is negligent in not knowing of defects); Fordyce v. Yarbrough, 1 Tex. Civ. App. 260; s. c. 21 S. W. Rep. 421 (assumes risk of such defects as are reasonably open to his ordinary inspection).

¹⁰Texas &c. R. Co. v. Rhodes, 71

Fed. Rep. 145; s. c. 30 U. S. App. 561; 18 C. C. A. 9.

¹¹St. Louis &c. R. Co. v. Higgins, 44 Ark. 293.

¹²Thomas v. Missouri &c. R. Co., 109 Mo. 187; s. c. 18 S. W. Rep. 980.

¹³For the rule where the injury is due to a defect which is *not obvious*,—see Louisville &c. R. Co. v. Howell, 147 Ind. 266; Chesapeake &c. R. Co. v. Lash (Va.), 3 Am. & Eng. R. Cas. (N. S.) 569; s. c. 24 S. E. Rep. 385 (no off. rep.); Sabine &c. R. Co. v. Ewing, 7 Tex. Civ. App. 8; Missouri &c. R. Co. v. Murphy, 59 Kan. 774; s. c. 52 Pac. Rep. 863.

¹⁴*Ante*, § 4640, *et seq.*; Kohn v. McNulta, 147 U. S. 238; s. c. 37 L. ed. 150; 13 Sup. Ct. Rep. 298;

§ 4720. **Isolated Decisions Exonerating the Brakemen from the Assumption of the Risk in such Cases.**—Isolated decisions¹⁵ exonerating the brakemen or other trainmen from the assumption of such risks have been found, and will be here noted. One holds that a brakeman is not, as a matter of law, guilty of negligence in failing to discover that the drawbars of two cars which he is required to couple are of different height, where, before making the coupling, his duties

Woodworth v. St. Paul &c. R. Co., 18 Fed. Rep. 282; Texas &c. R. Co. v. Rhodes, 30 U. S. App. 561; s. c. 71 Fed. Rep. 145; 18 C. C. A. 9; Louisville &c. R. Co. v. Boland, 96 Ala. 626; s. c. 18 L. R. A. 260; Boland v. Louisville &c. R. Co., 106 Ala. 641; St. Louis &c. R. Co. v. Higgins, 44 Ark. 293; Holmes v. Southern Pac. Co., 120 Cal. 357; s. c. 52 Pac. Rep. 652 (drawheads of unequal height); Murphy v. Lake Shore &c. R. Co., 67 Ill. App. 527; Van Winkle v. Chicago &c. R. Co., 93 Iowa 509; Coffman v. Chicago &c. R. Co., 90 Iowa 462; Box v. Chicago &c. R. Co., 107 Iowa 660; s. c. 78 N. W. Rep. 694 (drawbars of different make from ordinary improved bars); Ellsburry v. New York &c. R. Co., 172 Mass. 130; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; McLaren v. Williston, 48 Minn. 299; s. c. 51 N. W. Rep. 373 (logging-train, low cars, drawbars of cars much lower than that of the engine); Hulett v. St. Louis &c. R. Co., 67 Mo. 239; Thomas v. Missouri Pacific R. Co., 109 Mo. 187 (risk assumed if cars come to switchman in good condition, no matter how peculiar their couplings are); Moore v. Kansas City &c. R. Co., 146 Mo. 572 (drawheads of unequal height,—switchman guilty of negligence in attempting to force the link of the higher drawhead down to the lower one as the cars came together); Chicago &c. R. Co. v. Curtis, 51 Neb. 442; s. c. 71 N. W. Rep. 42 (brakeman on a road whose cars are equipped with single deadwoods assumes the risk in attempting to couple a car of another company equipped with double deadwoods); Cleary v. Long Island R. Co., 66 N. Y. Supp. 568; s. c. 54 App. Div. (N. Y.) 284 (drawheads of unequal height and one with a lateral movement); Pittsburg &c. R. Co. v. Henly, 48 Ohio St. 608; s. c. 15 L. R. A. 384; 11 Rail. &

Corp. L. J. 129; 29 N. E. Rep. 575 (couplings of different types); Simms v. South Carolina R. Co., 26 S. C. 490; s. c. 2 S. E. Rep. 486 (although some of the cars may be of an old pattern and so constructed that an attempt to couple them may be exceedingly dangerous); Gulf &c. R. Co. v. Abbott (Tex. Civ. App.), 24 S. W. Rep. 299 (no off. rep.) (evidence that the drawhead of one of the cars was three inches higher than that of the other does not entitle plaintiff to a verdict, where the testimony of nine experienced witnesses shows that such differences are common in the service, and occasion no extra hazard to employes); Norfolk &c. R. Co. v. McDonald, 88 Va. 352; s. c. 15 Va. L. J. 699; 13 S. E. Rep. 706 (mismatched couplings, and especially where they are arranged by the brakeman in a peculiarly dangerous manner); McDonald v. Norfolk &c. R. Co., 95 Va. 98; s. c. 27 S. E. Rep. 821; 8 Am. & Eng. R. Cas. (N. S.) 552 (mismatched couplings, in the absence of reliance on a promise of the company to remove the danger); Norfolk &c. R. Co. v. Emmert, 83 Va. 640; Norfolk &c. R. Co. v. Brown, 91 Va. 668; Kelly v. Abbot, 63 Wis. 307; s. c. 53 Am. Rep. 292 (couplers of different height, which was apparent). It is even held that a railroad employé assumes the risk of coupling cars while an iron rail is projecting from one of the cars, to his knowledge, although the danger therefrom is increased by an inequality in the height of the two cars to be coupled, of which he has no knowledge at the time: Ely v. San Antonio &c. R. Co., 15 Tex. Civ. App. 511; s. c. 40 S. W. Rep. 174.

¹⁵ Such as Goodrich v. New York &c. R. Co., 116 N. Y. 398; s. c. 5 L. R. A. 750; Thompson v. Missouri &c. R. Co., 51 Neb. 527; s. c. 71 N. W. Rep. 61.

require him to open and shut switches, to procure a link and pin, and then to overtake the moving portion of the train and to adjust the link and pin in it.¹⁶ Another holds that a brakeman does not, as matter of law, assume the risk of coupling a freight-car equipped with link-and-pin couplers to a coach equipped with a Miller hook, which permits the coupling-bars to slip by each other, leaving a space of only about a foot between the ends of the cars, where there is on the freight-car a bolt projecting several inches from the end of the car and beyond the nut, and he is not familiar with the construction of such car with reference to the bolt.¹⁷ Where a railroad company received from another road a train of *tourists' sleepers* having couplers which were so mismatched that they were liable to slip past each other and let the platforms come together when they were being coupled, it was held that a *freight-brakeman* who was required to brake on such train, and who appeared to be wholly unfamiliar with the style of couplers used, which were not ordinarily used on freight-trains, did not assume the risk of being crushed through their use while making a coupling, where he was not warned of the hazard.¹⁸ Still another case held that where the evidence showed a continued use by the different railroad companies of a defective and dangerous car, an instruction that the plaintiff, who was suing for an injury proceeding from that source, was justified in going in to uncouple the car, under the conductor's orders, even though he knew of its defective condition, unless the danger was so glaring that no prudent person would have attempted it under the existing conditions,—was properly given.¹⁹ There are also decisions which exonerate the brakeman from making an inspection of the coupling-appliances before proceeding to use them;²⁰ although it is conceded that he is bound to use such care and caution as a reasonably prudent man would use under like circumstances,²¹ and that he is negligent if the coupling-appliances contain defects of such a nature that he ought to have seen them in time to have avoided being injured by them.²²

¹⁶ Ohio &c. R. Co. v. Wangelin, 43 Ill. App. 324.

¹⁷ Thompson v. Missouri &c. R. Co., 51 Neb. 527; s. c. 71 N. W. Rep. 61.

¹⁸ Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503; s. c. 66 S. W. Rep. 477.

¹⁹ Harney v. Missouri Pac. R. Co., 80 Mo. App. 667; s. c. 2 Mo. App. Repr. 675. See also, Laporte v. Cook, 21 R. I. 158; Norfolk &c. R. Co. v. Ampey, 93 Va. 108; s. c. 25 S. E. Rep. 226.

²⁰ Jennings v. New York &c. R. Co.,

12 Misc. (N. Y.) 408; s. c. 33 N. Y. Supp. 585; 67 N. Y. St. Rep. 408 (car sent to repair-yard, repaired and returned to ordinary track); Galveston &c. R. Co. v. Briggs, 4 Tex. Civ. App. 515; s. c. 30 S. W. Rep. 933; Texas &c. R. Co. v. King, 14 Tex. Civ. App. 290; s. c. 37 S. W. Rep. 34.

²¹ Galveston &c. R. Co. v. Briggs, 4 Tex. Civ. App. 515; s. c. 30 S. W. Rep. 933.

²² Texas &c. R. Co. v. King, 14 Tex. Civ. App. 290; s. c. 37 S. W. Rep. 34.

§ 4721. **Risk of Injury in Coupling or Uncoupling Cars from the Manner in which the Cars are Loaded.**—In the case of cars loaded with stone we have two seemingly conflicting decisions, one to the effect that where a brakeman on a freight-train has the same opportunity of knowing the manner in which certain cars have been loaded with stone as any other employé of the company has, he assumes any risk which may arise from the manner in which such cars have been loaded, and cannot recover damages for an injury proceeding from this source.²³ The other is to the effect that the risk arising from the want of stakes or cleats on a car loaded with stone, which is to be coupled to another car, is not so obvious as to be deemed a risk incident to the employment which the servant accepts as matter of law.²⁴ A most frequent source of injury to employés engaged in coupling and uncoupling cars, growing out of the manner in which the cars have been loaded, arises in cases where they have been so loaded with timbers or with rails that the timbers or rails project over the ends of the cars. Where the servant injured from these projecting timbers or rails while attempting to make a coupling or uncoupling understands the danger, he cannot, according to the weight of authority, recover damages for an injury proceeding therefrom, the reason being that he has accepted the risk,²⁵—as where cars loaded

²³ Toledo &c. R. Co. v. Beard, 20 Ohio C. C. 681; s. c. 11 Ohio C. D. 406.

²⁴ Austin v. Fitchburg R. Co., 172 Mass. 484; s. c. 52 N. E. Rep. 527.

²⁵ Day v. Toledo &c. R. Co., 42 Mich. 523 (owing to his stooping position, his fingers were caught and injured in the coupling-link); Jackson v. Missouri &c. R. Co., 104 Mo. 448; Boyle v. New York &c. R. Co., 151 Mass. 102; s. c. 23 N. E. Rep. 827; Atchison &c. R. Co. v. Plunkett, 25 Kan. 188 (railroad company not chargeable with negligence in permitting an experienced hand to couple cars so loaded, in broad daylight, though during a rain-storm); Jackson v. Missouri &c. R. Co., 104 Mo. 448; s. c. 14 S. W. Rep. 54 (although the brakeman, riding on the brakebeam of the tender while the engine was backing along a side-track to get some box-cars, was struck and killed by rails projecting over the ends of a flat-car, which could not be seen because of the darkness); Nash v. Chicago &c. R. Co., 95 Wis. 327; s. c. 70 N. W. Rep. 293 (especially where the attention of the brakeman has been

specially called to a printed notice warning brakemen of the danger of coupling cars thus loaded); McIntosh v. Missouri &c. R. Co., 58 Mo. App. 281 (where it is customary for rails so to project, brakemen must be held to the exercise of ordinary care in performing such coupling); Tucker v. Northern Terminal Co., 41 Or. 82; s. c. 68 Pac. Rep. 426; 11 Am. Neg. Rep. 629 (injury while coupling a flat-car kicked toward a stationary car loaded with projecting rails—view of cars was unobstructed, and evidence tended to show that deceased had seen the danger and stooped to avoid it); Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. Rep. 151 (no off. rep.) (knowing the dangerous manner in which the car is loaded). Compare the following decisions not quite in accord with the doctrine thus stated: Northern &c. R. Co. v. Everett, 152 U. S. 107; s. c. 38 L. ed. 373 (switchman making coupling not imputable with negligence as matter of law in not discovering the projecting timber); Atchison &c. R. Co. v. Wells, 56 Kan. 222 (the same doctrine); Illinois &c. R. Co. v.

in this manner are frequently inserted in trains upon which the brakeman is employed.²⁶ One case deals with the question on the footing of *contributory negligence* of the servant, and holds that it is not such negligence, as matter of law, that he did not observe the projecting timbers on one of the cars which he undertook to couple, while he was in the discharge of his duty and while his attention was directed to the work in which he was engaged.²⁷ Another holds that mere knowledge on the part of a brakeman of a custom of the company to load cars with machinery without providing footboards to be used by the trainmen in passing over them, does not create an assumption of the risk arising therefrom, where it is not usual to place cars thus loaded in a position in the train where brakemen are required to pass over them.²⁸

§ 4722. Where the Brakemen or other Trainmen Proceed to Couple or Uncouple Cars in a Manner Prohibited by Known Rules of the Company.—If the brakeman or other trainman proceeds to couple or to uncouple the cars in a manner prohibited by a known rule of the company, and, in consequence of so doing, is killed or injured, no recovery can be had for his death or injury; and it is immaterial whether the conclusion is put upon his contributory negligence or upon his having voluntarily accepted the risk by violating a known rule of his master intended to promote his safety:—As where, in violation of a rule, he goes between moving cars to couple them;²⁹ or attempts to

Reardon, 56 Ill. App. 542; Redington v. New York & C. R. Co., 84 Hun (N. Y.) 231; s. c. 32 N. Y. Supp. 535.

²⁶ Jacksonville & C. R. Co. v. Galvin, 29 Fla. 636; s. c. 16 L. R. A. 337; 11 South. Rep. 231.

²⁷ Northern & C. R. Co. v. Everett, 152 U. S. 107; s. c. 38 L. ed. 373; 14 Sup. Ct. Rep. 474.

²⁸ Hosie v. Chicago & C. R. Co., 75 Iowa 683; s. c. 37 N. W. Rep. 963. In another case, timbers loaded upon a car had shifted, and, in consequence of this, had been reloaded; but no means were adopted to prevent them from shifting again. A railway employé, while engaged in coupling cars, was struck by timbers projecting from the car, in consequence of their shifting a second time, and was killed. It was held that the railway company was liable: Illinois Cent. R. Co. v. Reardon, 56 Ill. App. 542.

²⁹ Shorter v. Southern R. Co., 121

Ala. 158; s. c. 25 South. Rep. 853; Cleveland & C. R. Co. v. Ullom, 20 Ohio C. C. 512; s. c. 11 Ohio C. D. 321 (holding that the plaintiff may show that the rule has not been observed for a long time, and that the representatives of the company had knowledge of it). Another court has held that a rule of a railroad company against going between moving cars to uncouple them will not prevent recovery by a servant for injuries received while violating the same, if its violation was sanctioned by a custom so universal and notorious that the company was presumed to have known of and ratified it: Fluhrer v. Lake Shore & C. R. Co., 124 Mich. 482; s. c. 83 N. W. Rep. 149. Another court has held that a carefully prepared rule of a railroad company prohibiting brakemen from coupling or uncoupling cars except with a stick, and declaring that brakemen or others must not go between the cars, under any

make a coupling while standing between two cars on the short side of a curve, having ample time to observe that both drawheads are shorter than usual, in the face of a rule of the company known to him, requiring employ  s to take time to examine all drawheads before making couplings;³⁰ or where a brakeman is charged with notice of a rule requiring him to inspect the links and drawheads before attempting to make couplings, when an inspection would have revealed to him the defective character of a link which parted, causing an injury to him;³¹ or where a *conductor* attempted to uncouple cars, it being no part of his duty but a violation of the rules of the company, and there being no pressing emergency requiring him so to act, in consequence of which action he received an injury.³²

   4723. **Failing to Use a Safety-Coupler, Coupling-Stick, etc.**—Contributory negligence, or an acceptance of the risk, will generally be imputed to a railway servant who attempts to make a coupling without using a stick provided by the company, the use of which is required by its rules,³³ unless the rule has been abandoned or waived,³⁴ or, in conformity with a principle already considered,³⁵ unless the servant is commanded by his conductor or other superior to make the coupling without using the stick;³⁶ or unless his failure to use a safety-coupler in accordance with the rules of the company is not

circumstances, for the purpose of coupling or uncoupling them or adjusting pins when an engine is attached to such cars,—does not apply to the case of a brakeman stationed upon the footboard of the pilot on the tender, where the engine is not attached to any car or train, and, while there, attempting to draw the link from the coupling-apparatus without using a stick, while the engine and tender are moving backward toward a standing car for the purpose of being coupled thereto: *Richmond &c. R. Co. v. Mitchell*, 92 Ga. 77; s. c. 18 S. E. Rep. 290. Another court has held that a rule of a railroad company prohibiting employ  s from “entering between cars in motion” is not violated by an employ  s entering between cars while at rest for the purpose of uncoupling them, and remaining between them for a short distance after they are put in motion: *Galveston &c. R. Co. v. Pitts* (Tex. Civ. App.), 42 S. W. Rep. 255 (no off. rep.).

³⁰ *Bennett v. Northern &c. R. Co.*,

2 N. D. 112; s. c. 13 L. R. A. 465; 10 Rail. & Corp. L. J. 243; 49 N. W. Rep. 408; 48 Am. & Eng. R. Cas. 182.

³¹ *Alabama &c. R. Co. v. Carroll*, 84 Fed. Rep. 772; s. c. 52 U. S. App. 442; 28 C. C. A. 207; 9 Am. & Eng. R. Cas. (N. S.) 759.

³² *Kane v. Savannah &c. R. Co.*, 85 Ga. 858; s. c. 11 S. E. Rep. 493.

³³ *Richmond &c. R. Co. v. Pan-nill*, 89 Va. 552.

³⁴ *Newport News &c. R. Co. v. Campbell*, 15 Ky. L. Rep. 714; s. c. 25 S. W. Rep. 267 (no off. rep.); *Port Royal &c. R. Co. v. Davis*, 95 Ga. 292; *Finley v. Richmond &c. R. Co.*, 59 Fed. Rep. 419.

³⁵ *Ante*,    4630.

³⁶ *Mason v. Richmond &c. R. Co.*, 111 N. C. 482; s. c. 18 L. R. A. 845; and see also, *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108; s. c. 2 Va. L. Reg. 284; 25 S. E. Rep. 226 (ordered to make the coupling by hand by a conductor, and he believed that the coupling could be safely made by taking extraordinary precautions).

shown to have contributed to the accident, which proceeded from the negligence of the company, in that it was using an engine known to be defective.³⁷

§ 4724. Effect of the Brakeman being Ordered by the Conductor to Make the Coupling or Uncoupling.—Following a line of doctrine which seems to be well recognized in Missouri, it is held in that State that, although a brakeman may know of the defective condition of a car, yet he will be justified in attempting to uncouple it in obedience to an order of the conductor, unless the danger of so doing is so glaring that no prudent person would attempt the act under the existing conditions.³⁸ It is also to be observed that the order of the conductor may excuse the brakeman from making such an examination as the law might otherwise require of him, to the end of promoting his own safety, before attempting to couple cars in obedience to the order.³⁹

§ 4725. Assumption of Risk of Injury Arising from Attempting to Couple or Uncouple Cars while in Motion.—There are decisions which impute negligence to a railroad employé for attempting to couple or uncouple cars while in motion; but an examination of them will show that they are generally qualified by special circumstances or considerations:—As where the injury proceeded from a defect in the roadbed of which the employé had knowledge;⁴⁰ or where it was apparent to the employé that he could make the uncoupling without going between the engine and the car as he did;⁴¹ or where the employé failed to use a platform which might have been used, the use of which was obviously the safer way.⁴² But the better opinion is that there is no rule of law

³⁷ *Wabash & C. R. Co. v. Morgan*, 132 Ind. 430; s. c. 31 N. E. Rep. 661; *Richmond & C. R. Co. v. Rudd*, 88 Va. 648; s. c. 16 Va. L. J. 96; 14 S. E. Rep. 361 (conductor's negligence, and not the mode of uncoupling, was the proximate cause of the accident). It has been held that whether a bridge carpenter, while being transported on a wrecking-train, assumes the risk of the use of a *switch-rope* in coupling cars, instead of a *chain*, is a question for the jury: *Tabler v. Hannibal & C. R. Co.*, 93 Mo. 79; s. c. 11 West. Rep. 458; 5 S. W. Rep. 810.

³⁸ *Harney v. Missouri & C. R. Co.*, 80 Mo. App. 667; s. c. 2 Mo. App. Repr. 675. See also, *Norfolk & C. R. Co. v. Ampey*, 93 Va. 108; s. c. 25 S. E. Rep. 226.

³⁹ *Mason v. Richmond & C. R. Co.*,

111 N. C. 482; s. c. 53 Am. & Eng. R. Cas. 183; 16 S. E. Rep. 698; 18 L. R. A. 845. One court holds that a brakeman who goes between two cars to uncouple them, in violation of a rule of the company, cannot recover for an injury thereby received, although he was directed to do so by the conductor of the train: *Richmond & C. R. Co. v. Rush*, 71 Miss. 987; s. c. 15 South. Rep. 133,—a very doubtful holding.

⁴⁰ *Missouri & C. R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. Rep. 879 (no off. rep.).

⁴¹ *Mobile & C. R. Co. v. George*, 94 Ala. 199; s. c. 11 Rail. & Corp. L. J. 26; 10 South. Rep. 145.

⁴² *Memphis & C. R. Co. v. Graham*, 94 Ala. 545, 553; s. c. 10 South. Rep. 283. Circumstances under which an order to go between an en-

which conclusively imputes negligence to this act;⁴³ though where the circumstances are such as fairly to raise an inference of negligence, the question will be left to the jury,—as where a brakeman went in front of a car on a dark night for the purpose of making a coupling;⁴⁴ or where a switchman went between cars which he had been ordered to couple, although the engine was attached to the train and the train had been moved, it being the custom to give notice of such movements to those making couplings, and no notice having been given of any further movements.⁴⁵

§ 4726. Stepping Between Cars to Couple or Uncouple Them while in Motion.—The weight of judicial authority seems to be that there is no rule of law which conclusively imputes negligence to a railway employé because of the fact of his stepping between cars to couple or uncouple them while they are in motion.⁴⁶ But there are decisions to the contrary, which hold that a railway employé who attempts to couple or uncouple cars while they are in motion, and who is injured in consequence of making such an attempt, precludes himself, by reason of his own negligence or acceptance of the risk, from recovering damages from the company;⁴⁷ and this is especially true where the act is done in violation of a known rule of the company forbidding it.⁴⁸

§ 4727. Risk of Injury from the Sudden Starting, Stopping or Jolting of Cars.—A locomotive-engineer, in moving his train for the purpose of making a coupling, is under the duty of watching the

gine and a car to uncouple them may be implied from a mere order to uncouple them: *Mobile &c. R. Co. v. George*, 94 Ala. 199; s. c. 11 Rail. & Corp. L. J. 26; 10 South. Rep. 145.

⁴³ *Ashman v. Flint &c. R. Co.*, 90 Mich. 567; s. c. 51 N. W. Rep. 645; *Munch v. Great Northern R. Co.*, 75 Minn. 61; s. c. 12 Am. & Eng. R. Cas. (N. S.) 586; 77 N. W. Rep. 541.

⁴⁴ *Knapp v. Chicago &c. R. Co.*, 114 Mich. 199; s. c. 4 Det. Leg. N. 560; 13 Am. & Eng. R. Cas. (N. S.) 857; 72 N. W. Rep. 200.

⁴⁵ *Lee v. Michigan &c. R. Co.*, 87 Mich. 574; s. c. 49 N. W. Rep. 909.

⁴⁶ *Cleveland &c. R. Co. v. Baker*, 91 Fed. Rep. 224; s. c. 33 C. C. A. 468; 63 U. S. App. 553; *Eastman v. Lake Shore &c. R. Co.*, 101 Mich. 597; *Memphis &c. R. Co. v. Graham*,

94 Ala. 545; *Rebb v. East Tennessee &c. R. Co.*, 87 Ga. 631; s. c. 13 S. E. Rep. 566 (not negligence *per se* to attempt to couple cars while running fifteen miles an hour); *Hennesey v. Chicago &c. R. Co.*, 99 Wis. 109; s. c. 74 N. W. Rep. 554 (not negligence *per se* to attempt to uncouple cars while they are slowly moving, where such practice has been carried on with the knowledge and approval of the company, and there is no rule or regulation to the contrary).

⁴⁷ *Hudson v. Charleston &c. R. Co.*, 55 Fed. Rep. 248; *Peoria &c. R. Co. v. Puckett*, 42 Ill. App. 642.

⁴⁸ *Sedgwick v. Illinois &c. R. Co.*, 76 Iowa 340; *Schaub v. Hannibal &c. R. Co.*, 106 Mo. 74; *Johnson v. Chesapeake &c. R. Co.*, 38 W. Va. 206.

movements of the brakeman engaged in that office, and of using reasonable care and diligence to discover and guard against any danger in which he may be placed;⁴⁹ and the act of an engineer in starting the train suddenly and without a signal, immediately after a brakeman has made a coupling, and before he has had time to withdraw, has been denounced as *gross negligence*.⁵⁰ And where the condition of the local law is such that the railroad company is responsible to the brakeman for the negligence of the engineer, the brakeman is not deemed to assume the risk of such negligence, but may recover damages from the company if he is injured thereby.⁵¹ Assuming that the master is liable to the brakeman for the negligence of the engineer, the governing principle is that already considered,⁵² that the servant does not assume the risk of any special or unforeseen negligence of the master, but that, on the contrary, he may rightfully assume that the master, or the servant for whose conduct the master is responsible, will do his duty. For example, a brakeman may rightfully assume, after the speed of the train has been slowed down in response to his signal, to enable him to make a coupling, that it will not be suddenly increased thereafter without his orders and without notice to him.⁵³ So, a brakeman temporarily in charge of a train does not assume the risk of injury from being thrown from a moving car by the act of the engineer in suddenly stopping the engine and car with a violent jerk, without signal or necessity, when the car is moving at a considerable speed, and is a very considerable distance from the stationary portion of the train to which it is to be coupled under a signal from the brakeman.⁵⁴ So, the employé of a municipal corporation, who was at service on a railway-track, temporarily constructed for grading and improving public grounds, and which was in a rough condition, did not assume the risk of an injury caused by running the

⁴⁹ *Louisville &c. R. Co. v. Adams*, 106 Ky. 859; s. c. 21 Ky. L. Rep. 498; 51 S. W. Rep. 577; 6 Am. Neg. Rep. 524.

⁵⁰ *Louisville &c. R. Co. v. Slack*, 20 Ky. L. Rep. 1200; s. c. *sub nom.* *Louisville &c. R. Co. v. Grubbs*, 49 S. W. Rep. 3 (no off. rep.).

⁵¹ For example, a switchman engaged in coupling cars does not assume the risk of their being jammed together, while he is between them, by shoving other cars against them: *Missouri &c. R. Co. v. Crane*, 13 Tex. Civ. App. 246; s. c. 35 S. W. Rep. 797. And so, if the engineer knows that a brakeman is standing on the pilot of the engine, for the purpose

of making a coupling, and nevertheless, suddenly and without warning, increases the speed of the train when about six feet from the car to which the engine is to be coupled, this, in the absence of the operation of the so-called fellow-servant rule, will be imputed to the company as negligence: *Strong v. Iowa &c. R. Co.*, 94 Iowa 380; s. c. 62 N. W. Rep. 799.

⁵² *Ante*, § 4618.

⁵³ *Strong v. Iowa &c. R. Co.*, 94 Iowa 380; s. c. 62 N. W. Rep. 799.

⁵⁴ *Kansas City &c. R. Co. v. Murray*, 55 Kan. 336; s. c. 40 Pac. Rep. 646.

train at an unreasonable rate of speed over a switch, and then bringing it to a sudden stop.⁵⁵ And it has been well held that an employé of a lumber company, remaining, in pursuance of his duty, in a car while it is being moved by a railway company, assumes only the risk attending the shifting of the car in a careful and skillful manner, and not that of a sudden jolt caused by giving the car too strong a push.⁵⁶ The liability of the company rests on clearer grounds where the sudden and unnecessary movements of the cars result from defects in the engine, or appliances for controlling its motion, arising from, or not discovered and remedied because of, the negligence of the railroad company, or of its employé entrusted with the duty of discovering and remedying such defects.⁵⁷ The foregoing statements of doctrine are consistent with the conclusion that a brakeman assumes the risk of injury from the ordinary movements of the train,—such as the

⁵⁵ Coughlan v. Cambridge, 166 Mass. 268; s. c. 44 N. E. Rep. 218.

⁵⁶ Canada &c. R. Co. v. Hurdman, 25 Can. S. C. 205. See also, in support of the doctrine of the text, where the injury was to a brakeman injured through the lurching or jolting of cars: Lake Erie &c. R. Co. v. Mullcahy, 16 Ohio C. C. 204; s. c. 9 Ohio C. D. 82 (conductor negligently gave engineer a kick signal, instead of a slack signal); Louisville &c. R. Co. v. Woods, 105 Ala. 561; s. c. 17 South. Rep. 41 (holding that a brakeman whose duty requires him, in order to reach a brake, to traverse a car loaded with coal, does not as matter of law assume the risk of a lurching of the train, caused by the negligence of the engineer). See also, Houston &c. R. Co. v. Strycharski (Tex. Civ. App.), 35 S. W. Rep. 851 (no off. rep.); s. c. aff'd as to railroad company and rev'd as to receiver, 92 Tex. 1; 37 S. W. Rep. 415 (holding that an employé who cannot reasonably protect himself by watching out for the return of a switch-engine, is entitled to some warning more than a general instruction that he must look out for himself when cars are switched against the car at which he is working); Felice v. New York &c. R. Co., 14 App. Div. (N. Y.) 345 (a holding similar to the preceding); Missouri &c. R. Co. v. Felts (Tex.

Civ. App.), 50 S. W. Rep. 1031 (no off. rep.) (employés loading coal into the tender do not assume risk of negligence of engineer in failing to take precautions to prevent the involuntary movement of the engine); Bowes v. New York &c. R. Co., 181 Mass. 89; s. c. 62 N. E. Rep. 949 (brakeman engaged in *repairing a coupling* at the order of the conductor, does not, as matter of law, assume risk of cars being started without warning). When railroad company not liable to a brakeman for an injury caused by the conductor repeating a signal to back the train while the brakeman was attempting to release a coupling-pin, where the conductor had no knowledge of any trouble in releasing the pin: Hawks v. Lake Shore &c. R. Co., 16 Ohio C. C. 337; s. c. 8 Ohio C. D. 414.

⁵⁷ Highland Ave. &c. R. Co. v. Miller, 120 Ala. 535; s. c. 24 South. Rep. 955. It has been held that a brakeman engaged in making a coupling does not, as matter of law, assume the risk of the negligent management of the engine by a fireman, who is acting under the direction and supervision of the regular engineer, even though the brakeman knows that the fireman, and not the engineer, is handling the engine: Leonard v. Minneapolis &c. R. Co., 63 Minn. 489; s. c. 65 N. W. Rep. 1084.

usual jolting which accompanies a car on entering a switch;⁵⁸ or the jerk given to a freight-train by taking up the slack of the train.⁵⁹

§ 4728. **Risk of Injury from Attempting to Couple or Uncouple Cars which are Dangerously Defective.**—Although the coupling-apparatus of cars may be dangerously defective, yet the prevailing opinion is that if the brakeman has knowledge of the fact, or if he has had such experience as ought to have apprised him of it, and he nevertheless undertakes to couple or uncouple the cars, he accepts the risk and braves the danger,—as where a brakeman twenty-four years old, who had been warned of the danger of coupling cars, undertook to couple cars having double *deadwoods*;⁶⁰ or where a yard switchman, familiar with the duties and dangers of coupling cars, received an injury from a defective spring in a drawbar, of which neither the company nor its employes had, or in the exercise of reasonable and ordinary diligence might have had, knowledge;⁶¹ or where a brakeman, knowing that a particular car had lost the spring attached to a drawhead to prevent the cars from coming close together, nevertheless in the night-time attempted to make a coupling which happened to be that of that particular car to another, not knowing that it was that particular car, and was injured in consequence of the cars coming too near together and crushing him;⁶² or where a switchman accepts employment in a yard, where an engine is in use whose drawhead is so short as, manifestly and visibly, to make it dangerous to attempt to couple it to cars; especially where there is a rule of the company forming part of his contract of service, which requires him to inspect and take notice of the style, construction, and condition of the drawheads to be used in coupling engines and cars, and he controls the engineer in

⁵⁸ Rutledge v. Missouri &c. R. Co., 110 Mo. 312.

⁵⁹ Davis v. Baltimore &c. R. Co., 152 Pa. St. 314; s. c. 31 W. N. C. (Pa.) 300; 23 Pitts. L. J. (N. S.) 339; 25 Atl. Rep. 498. In another case, where it appeared that a brakeman was injured, while a "flying switch" was being made, by reason of a sudden jerk of the train, due to the signal to go ahead having been given directly to the engineer instead of to the brakeman to repeat, and the signal was shown to have been given in the customary way, he was held to have assumed the risk: Youll v. Sioux City &c. R. Co., 66 Iowa 346; s. c. 23 N. W. Rep. 736.

⁶⁰ Hathaway v. Michigan &c. R. Co., 51 Mich. 253; s. c. 47 Am. Rep. 569; Michigan &c. R. Co. v. Smithson, 45 Mich. 212 (state of facts under which brakeman could not recover from company for receiving a freight-car from another road having double deadwoods, nor because it did not notify him of the fact, where he had general notice that he would have to handle such cars).

⁶¹ Atchison &c. R. Co. v. Wagner, 33 Kan. 660; s. c. 7 Pac. Rep. 204.

⁶² Houston &c. R. Co. v. Burrager (Tex.), 14 S. W. Rep. 242 (no off. rep.).

the movements of the engine;⁶³ or where a brakeman, though inexperienced, attempted to couple two flat-cars having aprons projecting twelve inches from the ends so that there was only an inch of space between the cars when they were shoved together, where they were in plain view, clearly to be seen, he had abundant opportunity to see them, his attention was directed to them, and he was told the necessity of keeping from between them.⁶⁴ On the other hand, recoveries have been allowed where a "helper" of considerable experience in coupling cars was injured in attempting to couple a car constructed in a peculiar and dangerous manner, which he had never before seen;⁶⁵ and where a railroad company furnished a switchman with a coupling-pin which was too large, in attempting to use which the switchman was injured;⁶⁶ and where a brakeman was injured, while attempting to make a coupling, in consequence of a defect in the drawhead of a car, which permitted the ends of the car to come within from nine to thirteen inches of each other, instead of from sixteen to twenty inches, which would have been the case if there had been no defect.⁶⁷

§ 4729. **Risk of Injury from Coupling, Uncoupling or Moving "Crippled" Cars Left for Repair.**—Generally speaking, a brakeman or switchman who knows that he will be called upon to handle cars sent for repairs to the yard in which he is employed, and who is familiar with the dangers incident to such service, assumes the risks ordinarily incident to such extra-hazardous employment.⁶⁸ If the company maintains a track, usually called the "repair-track," upon which crip-

⁶³ Brooks v. Northern &c. R. Co., 47 Fed. Rep. 687; s. c. 19 Wash. L. Rep. 838.

⁶⁴ Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22; s. c. 45 N. E. Rep. 76, 1121.

⁶⁵ Missouri &c. R. Co. v. Galbreath, 66 Tex. 526.

⁶⁶ Missouri &c. R. Co. v. Hauer (Tex. Civ. App.), 43 S. W. Rep. 1078 (no off. rep.).

⁶⁷ Elgin &c. R. Co. v. Eselin, 68 Ill. App. 96. We also have a somewhat recent decision to the effect that the alleged contributory negligence of a brakeman in coupling cars with his hands, instead of with a stick, would not prevent a recovery of damages for injuries caused by the absence of self-couplers, the lack of which the court holds was negligence *per se*, and the proximate cause of the accident, and a continuing negligence of the master

existing subsequently to that of the servant: Greenlee v. Southern R. Co., 122 N. C. 977; s. c. 41 L. R. A. 399; 11 Am. & Eng. R. Cas. (N. S.) 45; 30 S. E. Rep. 115.

⁶⁸ Yeaton v. Boston &c. R. Co., 135 Mass. 418; Kelley v. Chicago &c. R. Co., 35 Minn. 490; Arnold v. Delaware &c. Canal Co., 125 N. Y. 15; Howery v. Lake Shore &c. R. Co., 13 Misc. (N. Y.) 641; s. c. 34 N. Y. Supp. 1089; 69 N. Y. St. Rep. 140; Barkdoll v. Pennsylvania R. Co. (Pa.), 13 Atl. Rep. 82; s. c. 21 W. N. C. (Pa.) 281 (no off. rep.) (car was marked "For the shop," and brakeman had been warned not to couple it in the ordinary way, but from the top, which warning he disregarded and was killed); Flannagan v. Chicago &c. R. Co., 50 Wis. 462; Watson v. Houston &c. R. Co., 58 Tex. 434.

pled, broken or disabled cars are placed, preparatory to being removed into the shops for repairs, a switchman who knows of the location and use of such track assumes the extra risk of handling cars which have been left thereon; and the fact that a car has been placed on the repair-track is of itself a warning to him.⁶⁹ If it is a part of the duty of the employé to handle disabled cars, he has no right to assume that the couplings of a car are perfect; but if he does not know the condition of a car, he is bound to assume that it may be disabled, and to act upon that assumption;⁷⁰ though he is not required to inspect a car which has been in the repair-yard and has been returned to the ordinary tracks, before attempting to couple it to another car.^{70a}

§ 4730. **Other Circumstances under which Trainmen have been Held to have Accepted the Risk of Injury in Coupling and Uncoupling Cars.**—Railway brakemen have been held to have accepted the risk, as an incident of their employment, of being injured in coupling cars, under the following circumstances:—Where one who was killed by being caught between a drawhead and a drawbar while attempting to make a coupling had been engaged for years in the work of shifting cars, and had made no complaint of the defective character of the appliances used or of the insufficiency of the crew employed,—the conclusion being that he assumed the risk of injury from either or both of these deficiencies;⁷¹ where a brakeman was killed in attempting to make a coupling on a railroad-track in a yard, where it curved so sharply as to be dangerous to one attempting to make a coupling from the inner side;⁷² where a brakeman stood with his left arm against a stationary car, waiting for the approach of a moving car, and, while feeling for the coupling-pin, had his arm caught between the deadwoods of the cars,—with the conclusion that he could not recover damages because the track was not ballasted, although this

⁶⁹ *Brown v. Chicago &c. R. Co.*, 59 Kan. 70; s. c. 11 Am. & Eng. R. Cas. (N. S.) 408; 52 Pac. Rep. 65.

⁷⁰ *Arnold v. Delaware &c. Canal Co.*, 125 N. Y. 15; s. c. 34 N. Y. St. Rep. 372; 25 N. E. Rep. 1064 (company not liable to a servant whose duty it was to aid in taking defective cars out of trains and setting them aside for repairs, for an injury received in coupling such a car which had a broken drawhead, where the defect was obvious). To the same effect, see *Albert v. New York &c. R. Co.*, 80 Hun (N. Y.) 152; s. c.

61 N. Y. St. Rep. 707; 29 N. Y. Supp. 1126 (not a "repair-yard" case; but brakeman making and breaking up trains in daytime injured by car obviously defective, though not marked as crippled).

^{70a} *Jennings v. New York &c. R. Co.*, 12 Misc. (N. Y.) 408; s. c. 33 N. Y. Supp. 585; 67 N. Y. St. Rep. 408.

⁷¹ *Creswell v. Wilmington &c. R. Co.*, 11 Marv. (Del.) 360; s. c. 14 Am. & Eng. R. Cas. (N. S.) 625; 43 Atl. Rep. 629.

⁷² *Tuttle v. Detroit &c. R. Co.*, 122 U. S. 189.

made it more difficult for him to reach the pin and drawbar;⁷³ where a brakeman attempted to couple an engine to a train of cars while standing on the footboard of the engine, stooping over, without having hold of the handrail, and lost his balance in consequence of the sudden stopping or jerking of the engine, which was no greater than ordinarily occurs in coupling cars;⁷⁴ where a brakeman was injured in consequence of a defective coupling, which he had habitually used for a long time with knowledge of the defect and without protest on his part or promise to repair on the part of the master;⁷⁵ where a brakeman attempted to couple a car without inspecting the coupling-pin and link to see whether the pin was loose, when he had the opportunity to do so,—with the conclusion that he assumed the risk of an injury caused by his inability to remove the pin from the drawhead;⁷⁶ where a railway employé was injured in consequence of attempting to make a coupling with a straight link, when he knew that a curved one was properly required;⁷⁷ where an engine-wiper was injured in consequence of attempting to make a coupling while the foreman of the yard, who, to the knowledge of the wiper, was a machinist, and not a regular engineer, and not well qualified to manage an engine in switching cars, was in charge of the engine;⁷⁸ where a switchman was required to supply himself with proper coupling-pins, for different drawheads on cars which he was to couple, from the pins which were scattered about in the yard,—with the conclusion that he assumed the risk of injury from using a pin too large for the drawhead of a particular car, which he found lying on the drawhead of the car;⁷⁹ where an engine-wiper was injured while attempting, by order of the yard foreman, to couple an ordinary road-engine to a car, notwithstanding the fact that the use of an ordinary road-engine for switching cars is more dangerous than the use of a switch-engine, where the danger was obvious to him;⁸⁰ where a fellow brakeman with the plaintiff signalled to the fireman to back to make a coupling, and two cars were coupled, one by such brakeman, and the other by the plaintiff, who then ran to a third car to adjust the coupling, and the

⁷³ *Mueller v. Lake Shore &c. R. Co.*, 105 Mich. 487; s. c. 2 Det. Leg. N. 160; 63 N. W. Rep. 416.

⁷⁴ *Puffer v. Chicago &c. R. Co.*, 65 Minn. 350; s. c. 68 N. W. Rep. 39.

⁷⁵ *Thompson v. Missouri &c. R. Co.*, 51 Neb. 527; s. c. 71 N. W. Rep. 61.

⁷⁶ *Renninger v. New York &c. R. Co.*, 11 App. Div. (N. Y.) 565; s. c. 42 N. Y. Supp. 813.

⁷⁷ *Welch v. New York Cent. &c.*

R. Co., 43 N. Y. St. Rep. 958; s. c. 17 N. Y. Supp. 342.

⁷⁸ *Gulf &c. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706.

⁷⁹ *Missouri &c. R. Co. v. Hauer* (Tex. Civ. App.), 33 S. W. Rep. 1010 (no off. rep.).

⁸⁰ *Gulf &c. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706.

engine continued backing, and injured plaintiff,—it appearing that there was a custom on the defendant's road for the engine to continue backing in such a case until signalled to stop, and that the plaintiff had been employed by the defendant for seven or eight years, and was familiar with its method of operating trains, and the fireman testifying that he did not know that the plaintiff was making a coupling;⁸¹ where a brakeman was told to uncouple a train of moving cars from the engine, and was given directions as to how the work was to be done, and how best to avoid the danger incident to the transaction;⁸² where a brakeman was injured by reason of the cars furnished by the company having defective drawheads and unsuitable link-pins,—it appearing that he had been employed as a brakeman for five or six months, that he knew the kind of cars used, that the link-pins were not of the proper kind, and that the drawheads differed in height, and it further appearing that the road was a short one and used only fifty-eight or fifty-nine cars, having only two kinds of drawheads and link-pins, of which the brakeman had knowledge.⁸³

§ 4731. **Other Circumstances under which Brakemen Not Deemed to Assume the Risk.**—Brakemen or other railway employes have not been deemed, as matter of law, to have assumed the risk of injury under the following circumstances:—Where a brakeman saw a defect in the coupling-apparatus of a car, but nevertheless attempted to couple the car to another, and was injured;⁸⁴ where a brakeman attempted to couple an engine to a car by means of a pilot-bar not properly supported, where he acted under the orders of a superior and knew that a delay in making the coupling might result in wrecking a passenger-train due at the station in a few minutes;⁸⁵ where a brakeman continued in the service and coupled cars in the course of his duty, although he knew that they were not furnished with self-couplers;⁸⁶ where a brakeman attempted to make a coupling which was unusually dangerous, and attempted to reduce the danger by having proper signals given to the engineer, which were either not given or not heeded,

⁸¹ *Zahn v. Milwaukee &c. R. Co.*, 114 Wis. 38; s. c. 89 N. W. Rep. 889.

⁸² *Gorman v. Minneapolis &c. R. Co.*, 117 Iowa 720; s. c. 90 N. W. Rep. 79 (and that the directions and warning were given by the engineer, and not by the conductor, did not affect the question).

⁸³ *Rio Grande &c. R. Co. v. Lynch* (Tex. Civ. App.), 66 S. W. Rep. 712 (no off. rep.).

⁸⁴ *Youngblood v. South Carolina &c. R. Co.*, 60 S. C. 9; s. c. 38 S. E. Rep. 232; *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108; s. c. 25 S. E. Rep. 226.

⁸⁵ *Strong v. Iowa &c. R. Co.*, 94 Iowa 380; s. c. 62 N. W. Rep. 799.

⁸⁶ *Greenlee v. Southern R. Co.*, 122 N. C. 977; s. c. 41 L. R. A. 399; 11 Am. & Eng. R. Cas. (N. S.) 45; 30 S. E. Rep. 115 (out of line with the current of authority).

and the plaintiff's testimony tended to show that the accident would not have happened if the signals had been obeyed,—the conclusion being that he did not thereby assume the risk as it would have been without signals;⁸⁷ where a raw hand, known to the foreman to be inexperienced, attempted to make a coupling between cars of different construction, which could only be coupled in a certain way, of which he was ignorant,—the conclusion being that a verdict for the plaintiff, based on the ground that the company had failed in its duty of giving him proper instruction, would not be disturbed;⁸⁸ and also in the cases noted in the margin.⁸⁹

ARTICLE II. ACCEPTING RISKS OF INJURIES FROM UNBLOCKED FROGS, SWITCHES, GUARD-RAILS, DEFECTIVE CATTLE-GUARDS, CULVERTS, AND OTHER DEFECTS IN THE RAILWAY-TRACK.

SECTION

4734. Circumstances under which railway employé assumes the risk of getting his foot caught in unblocked frogs, switches, guard-rails, etc.
4735. Circumstances under which railway employés do not assume such risks.
4736. Risk of injury from ashes, cinders, and other things thrown upon the track.
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SECTION

4739. Other risks assumed by railway yardmen, switchmen, etc.
4740. Risk of injury from unsafe cattle-guards, trestles, culverts, etc.
4741. Risk of injury from falling rock not assumed.
4742. Trainmen in general not required to inspect the track.
4743. Risk of injury from unballasted tracks, tracks not surfaced up, holes in tracks between the rails.
4744. Risk of injuries from other defects in railway-tracks.

⁸⁷ *Houston &c. R. Co. v. Kelly*, 13 Tex. Civ. App. 1; s. c. 34 S. W. Rep. 209; rehearing denied, 13 Tex. Civ. App. 25; s. c. 46 S. W. Rep. 863.

⁸⁸ *Louisville &c. R. Co. v. Miller*, 43 C. C. A. 436; s. c. 104 Fed. Rep. 124.

⁸⁹ Where a switchman was injured in consequence of a yardmaster having used as a coupling-pin a piece of brake-beam rod, bent over near the end, but not sufficiently so to stay in place when the cars bumped together,—this not being deemed one of the ordinary risks of the employment assumed by a

switchman who had no knowledge or notice of the facts: *Taylor v. Missouri &c. R. Co. (Mo.)*, 16 S. W. Rep. 206 (no off. rep.). Where a member of a switching-crew was making a coupling of a cut of cars on a certain side-track, at the direction of the foreman, and a second cut of cars was run in on such track by order of the foreman without warning to plaintiff: *Terre Haute &c. R. Co. v. Rittenhouse*, 28 Ind. App. 633; s. c. 62 N. E. Rep. 295 (under *Employers' Liability Act*).

§ 4734. **Circumstances under which Railway Employé Assumes the Risk of Getting his Foot Caught in Unblocked Frogs, Switches, Guard-Rails, etc.**—The prevailing doctrine seems to have been that, at common law, a railroad company is not under the duty, towards its employés, who are obliged to walk upon its tracks in its yards, or about its switches, in the discharge of their duty of coupling or uncoupling cars, or of other duties attending their service,—of blocking the frogs of its switches, or the guard-rails, wherever guard-rails are used, so as to prevent the frequently-recurring accident of the feet of its brakemen or other employés being caught in the unblocked frogs or between unblocked rails, whereby they are imprisoned, and run over and killed, or maimed, by moving engines or cars.¹ The judge-made law has complacently indulged railroad companies in the privilege of setting this species of mantrap, whereby to kill or maim their employés, and has put upon the employés the necessity, however limited their opportunities may be to that end, of discovering such dangers and avoiding them; failing in which they have been deemed to accept the risk of injury from them,—the risk of being so killed or maimed being regarded as one of the ordinary risks of the business which the employé impliedly agrees to accept by the fact of entering or continuing in the service, under principles already considered.²

¹Chicago &c. R. Co. v. Lonergan, 118 Ill. 41 (three judges dissenting); Illinois &c. R. Co. v. Campbell, 170 Ill. 163; s. c. 49 N. E. Rep. 314; rev'g s. c. 58 Ill. App. 275 (unblocked frogs in yard).

²*Ante*, § 4326; Southern Pac. Co. v. Seley, 152 U. S. 145; s. c. 38 L. ed. 391; 14 Sup. Ct. Rep. 530 (necessarily knew the form of frog in use, but did not complain); Craig v. Lake Erie &c. R. Co., 1 Toledo Leg. N. 326 (attempted to couple cars in motion, knowing that he was in the vicinity of frogs and switches, and got his foot caught in an unblocked frog); Narramore v. Cleveland &c. R. Co., 96 Fed. Rep. 298; s. c. 37 C. C. A. 499; 48 L. R. A. 68 (where, in general, there are no blocks used in such yards, and the servant has been employed therein for such a length of time that in the exercise of ordinary observation he must have known such fact); St. Louis &c. R. Co. v. Davis, 55 Ark. 462; s. c. 15 S. W. Rep. 895; Bourgeault v. Grand Trunk R. Co., Montreal L. Rep. 5 Super. Ct. 249; Central &c. R. Co. v. Edwards, 111 Ga. 528; s. c. 36 S. E. Rep. 810 (error to refuse

a nonsuit, since no negligence of the defendant causing the injury was shown); Peoria &c. R. Co. v. Ross, 55 Ill. App. 638 (employé who had worked for sixteen months in the yard presumed to have observed an unfilled space between a guard-rail and the main rail, and to have accepted the risk); Wabash R. Co. v. Ray, 152 Ind. 392; s. c. 1 Repr. (Ind.) 212; 12 Am. & Eng. R. Cas. (N. S.) 593; 51 N. E. Rep. 920 (skillful brakeman of mature years, attempting to make a coupling, had his foot caught between an unblocked rail and guard-rail, and was run over before he could extricate it—no recovery); Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440; (collection of special findings under which railroad company was held not liable to experienced brakeman well acquainted with the dangers); Mayes v. Chicago &c. R. Co., 63 Iowa 562; s. c. 14 N. W. Rep. 340; 19 N. W. Rep. 680 (omission to maintain a block between main rail and guard-rail at a switch is so obvious that a brakeman must be presumed to be aware of it, and also to appreciate the danger, where

§ 4735. **Circumstances under which Railway Employés do Not Assume such Risks.**—On the contrary, railway employés do not assume such risks where the *statute law* enjoins upon railway companies the duty of blocking such dangerous spaces in their tracks, since the employé may rightfully presume that the company has performed its duty; and, the question being one of public policy as determined by the Legislature, the railroad company will not be heard to say that, notwithstanding its disobedience of the law, the employé, knowing the danger, assumed the risk, or was guilty of contributory negligence in not providing against it, thus enabling the company to nullify a penal statute.³ The rule must be nearly the same where the judge-made or common law of the particular jurisdiction ascribes negligence to a railway company upon its failure to block its switches and guard-rails, so as to prevent such accidents to its employés,—in which

he has been at work for six weeks in the yard where he is injured); *Rush v. Missouri &c. R. Co.*, 36 Kan. 129 (switchman voluntarily working two months, knowing that the space between main rails and guard-rails is not blocked, assumes risk as matter of law); *Gillen v. Patten &c. R. Co.*, 93 Me. 80; s. c. 44 Atl. Rep. 361 (brakeman who has worked for two years on a railroad where the frogs or guard-rails are not filled or blocked, presumed to appreciate the danger of getting his foot caught); *Wood v. Locke*, 147 Mass. 604; s. c. 18 N. E. Rep. 578 (unblocked frog in the track of another company, on which servant went to work knowing its condition—deemed to have accepted the risk the same as if it had been in the track of his own employer—no recovery against owner of track); *Wilson v. Winona &c. R. Co.*, 37 Minn. 326; s. c. 33 N. W. Rep. 908; 5 Am. St. Rep. 851; *Smith v. St. Louis &c. R. Co.*, 69 Mo. 32 (foot of experienced brakeman caught between guard-rail and main rail—guard-rail in general use, though not of the safest kind—no recovery); *Missouri &c. R. Co. v. Baxter*, 42 Neb. 793; s. c. 60 N. W. Rep. 1044 (assumes risk of injury from unblocked guard-rail by remaining in service with knowledge, without any promise to repair); *Burnham v. Concord &c. R. Co.*, 68 N. H. 567; s. c. 44 Atl. Rep. 750 (foot caught between main rail and guard-rail, where the want of

blocking was patent); *Haas v. Buffalo &c. R. Co.*, 40 Hun (N. Y.) 145 (knew that there were no blocks between main rail and guard-rail); *Spencer v. New York &c. R. Co.*, 67 Hun (N. Y.) 196; s. c. 51 N. Y. St. Rep. 386; 22 N. Y. Supp. 100 (brakeman knew that most of the frogs on the line were unblocked, and could have discovered that the particular frog was unblocked by the slightest vigilance); *Appel v. Buffalo &c. R. Co.*, 111 N. Y. 550; s. c. 20 N. Y. St. Rep. 90; 19 N. E. Rep. 93; *Rice v. New York &c. R. Co.*, 55 App. Div. (N. Y.) 339; s. c. 67 N. Y. Supp. 136; *Missouri &c. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528; *Missouri &c. R. Co. v. Thompson*, 11 Tex. Civ. App. 658; s. c. 33 S. W. Rep. 718; *Richmond &c. R. Co. v. Risdon*, 87 Va. 335; s. c. 15 Va. L. J. 440; 12 S. E. Rep. 786 (caught his foot in a frog of standard make, where he could not fail to observe the possibility of danger from it); *Paine v. Eastern R. Co.*, 91 Wis. 340; s. c. 64 N. W. Rep. 1005 (assumes the risk of uniformly defective construction of the blocking used in the yard at guard-rails).

³ *Narramore v. Cleveland &c. R. Co.*, 96 Fed. Rep. 298; s. c. 37 C. C. A. 499; 48 L. R. A. 68. To the same effect,—see *Pittsburg &c. R. Co. v. Burroughs*, 6 Ohio N. P. 37; s. c. 9 Ohio Dec. 324. To the contrary, and unsound,—see *Johns v. Cleveland &c. R. Co.*, 7 Ohio N. P. 592; s. c. 10 Ohio Dec. 348.

case the employé may rightfully assume, in the absence of knowledge to the contrary, that the railway company has acted prudently and diligently.⁴ Some decisions go so far as to hold that it is not a part of the duties of a railway brakeman to inspect the track in a yard in which he has occasion to work, to see that it is free from holes or other defects which might render it dangerous.⁵ But this principle would seem to be better restricted to cases where, under his contract of employment, it is not the duty of the switchman to observe and make safe the condition of the yard, with respect, let us say, to the blocking of guard-rails.⁶ Clearly, if the employé who is required to make a coupling at night is not acquainted with the track, and it has the appearance of being properly constructed and in repair, he will not be held to assume the risk attendant upon its being out of repair.⁷ So, a brakeman who does not know of a steep grade in a track where he attempts to make a coupling, does not, as matter of law, assume the risk of danger arising therefrom.⁸ Nor, under sound and just conceptions, will mere *knowledge* of such a danger on the part of a switchman, in the absence of evidence that he has agreed with the company, either expressly or by implication, to assume the risk of it, prevent a recovery for an injury proceeding from it without negligence on his part.⁹ Even where, by reason of his length of service, a railroad yard-switchman is presumed to know the uniformly defective construction of the blocking used in the yard in connection with the guard-rails, yet this presumption will not be allowed to apply so as to put upon him an acceptance of the risk of a special negligence, resulting in a single block differing from the others.¹⁰ Nor in the case of a brakeman upon a train, as distinguished from a yardman or switchman, who is injured by having his foot caught in an un-

⁴ *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460; s. c. 70 N. W. Rep. 665.

⁵ *San Antonio &c. R. Co. v. Brook- ing* (Tex. Civ. App.), 51 S. W. Rep. 537 (no off. rep.).

⁶ *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460; s. c. 70 N. W. Rep. 665.

⁷ *International &c. R. Co. v. Bon- natz* (Tex. Civ. App.), 48 S. W. Rep. 767 (no off. rep.) (the defect was low joints in the track at the place of the coupling).

⁸ *Leonard v. Minneapolis &c. R. Co.*, 63 Minn. 489; s. c. 65 N. W. Rep. 1084.

⁹ *LeMay v. Canadian &c. R. Co.*, 18 Ont. Rep. 314; s. c. 41 Am. & Eng. R. Cas. 331; *Galveston &c. R. Co. v. Hughes*, 22 Tex. Civ. App. 134; s. c. 54 S. W. Rep. 264; *Mayes v. Chicago &c. R. Co.*, 63 Iowa 562;

s. c. 14 N. W. Rep. 340; 19 N. W. Rep. 680; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440; s. c. 10 West. Rep. 405; 4 S. W. Rep. 937 (provided it did not appear to be so dangerous to the employé as to threaten im- mediate injury, or provided he might have reasonably supposed that he could work safely about the dangerous place by the exercise of care and caution). Or where a rail- road company permits a track in one of its yards to get into such a condition that a brakeman catches his foot beneath one of the rails and it is crushed by a train: *San Antonio &c. R. Co. v. Brook- ing* (Tex. Civ. App.), 51 S. W. Rep. 537 (no off. rep.).

¹⁰ *Paine v. Eastern R. Co.*, 91 Wis. 340; s. c. 64 N. W. Rep. 1005.

blocked guard-rail, will the law presume knowledge of such a condition of the track on his part, because a brakeman on passing trains would not be likely to observe it.¹¹ Although the law may put upon a brakeman an assumption of the risk of having his foot caught in an open frog while attempting to couple cars, yet a conductor of a freight-train will not be conclusively held to have assumed such a risk from the mere fact of entering into the employment of the company which has the open frog in use, or by continuing in such employment after he knew that the use of a safety-block would avoid the danger from it, since conductors are not ordinarily called upon to discharge the duty of coupling cars.¹² So, a brakeman on a freight-train is not so connected with the work of improving the yards at a division station, as to charge him with having assumed the risk of injury arising from the defective condition of such yards, arising from the making of such improvements.¹³ Again, the rule which puts upon the servant the assumption of the risk is not applicable to a case where the company undertakes to maintain a blocking of its frogs, but allows the blocking to become defective, in consequence of which a switchman is injured.¹⁴

§ 4736. Risk of Injury from Ashes, Cinders, and Other Things Thrown upon the Track.—The railway employé assumes the risk of getting his foot caught by the brake-beam of a car, at a place where there are cinders on the track which do not extend above the tops of the rails, while he is attempting to make a coupling.¹⁵ He assumes the risk incident to the failure of the company to provide an ash-pit, by reason of which it is necessary to go under the engine to clean out the ash-pan, where he is aware of such failure and understands the risks incident thereto.¹⁶ It must be clear that there is no propriety

¹¹ Therefore, evidence was held not admissible that there were numerous other unblocked guard-rails at other points along the defendant's road, over which the plaintiff had worked: *Trott v. Chicago & C. R. Co.*, 115 Iowa 80; s. c. 86 N. W. Rep. 33; 87 N. W. Rep. 722.

¹² *Seley v. Southern Pac. R. Co.*, 6 Utah 319; s. c. 23 Pac. Rep. 751.

¹³ *Hurst v. Kansas City & C. R. Co.*, 163 Mo. 309; s. c. 63 S. W. Rep. 695.

¹⁴ *Hunt v. Kane*, 40 C. C. A. 372; s. c. 100 Fed. Rep. 256.

¹⁵ *Houston & C. R. Co. v. Smith* (Tex. Civ. App.), 38 S. W. Rep. 51; writ of error denied, 38 S. W. Rep. 985 (no off. rep.).

¹⁶ *Seldomridge v. Chesapeake & C. R. Co.*, 46 W. Va. 569; s. c. 14 Am. & Eng. R. Cas. (N. S.) 639; 33 S. E. Rep. 293. See also, *Carroll v. Pennsylvania Coal Co. (Pa.)*, 15 Atl. Rep. 688; s. c. 22 W. N. C. (Pa.) 439 (no off. rep.) (relating to risks assumed by men engaged in dumping coal from a railway-track upon trestles, knowing that the track is dangerous because the end of the trestle has become depressed, and understanding the means of preventing accidents proceeding from such a source, which are in their own hands and very simple).

in the view that a railway employé, whose duty it is to couple cars, assumes the risk of being thrown down by piles of ashes accumulated upon the track;¹⁷ unless, of course, the condition thereby produced is permanent and unless he has notice of it, or the means of knowledge, under principles already considered.¹⁸

§ 4737. Risk of Injury from Defective Tracks in Railway-Yards.—

A railway brakeman, switchman or yardman assumes the risk of injuries arising from defects in the surfaces of railway-yards, where he knows, or has the opportunity of knowing, of the same in the exercise of a reasonable care for his own safety, under principles already considered.¹⁹ On the other hand, a railway servant *does not assume the*

¹⁷ Kennedy v. Lake Superior &c. R. Co., 93 Wis. 32; s. c. 66 N. W. Rep. 1137 (dark day, sleet falling, piles of ashes four to eight inches high, covered with snow, which yard foreman had never seen before—company liable). See also, Huleban v. Green Bay &c. R. Co., 68 Wis. 528.

¹⁸ *Ante*, § 4640, *et seq.* Accordingly, it has been held that a switchman does not assume the risk of an injury from a clinker about one foot long and six inches thick, thrown with ashes on the track, and upon which he treads in the night while placing himself in position to make a coupling, and which turns and throws him, his hand being caught and mashed between the bumpers in his effort to protect himself from falling under the cars: Louisville &c. R. Co. v. Vestal, 105 Ky. 461; s. c. 20 Ky. L. Rep. 1288; 12 Am. & Eng. R. Cas. (N. S.) 633; 49 S. W. Rep. 204 [distinguishing Wallace v. Central Vermont R. Co., 138 N. Y. 302; disapproving Hughes v. Winona &c. R. Co., 27 Minn. 137].

¹⁹ *Ante*, § 4640, *et seq.* Among these are the following risks:—The risk of injury from the slippery condition of the surface of a switchyard due to the falling of snow, it being perfectly obvious to the senses of the injured switchman: Fay v. Chicago &c. R. Co., 72 Minn. 192; s. c. 4 Am. Neg. Rep. 167; 17 Am. & Eng. R. Cas. (N. S.) 641; 75 N. W. Rep. 15. The risk of injury from a railway-yard being *overcrowded with cars*, where such condition is permanent and well known to the injured employé: Bence v. New York

&c. R. Co., 181 Mass. 221; s. c. 63 N. E. Rep. 417. The risk of injury from the fact of railway-tracks in a yard being very close together, the injured brakeman being experienced in the business and having had an opportunity to observe the location of the tracks: McDugan v. New York &c. R. Co., 10 Misc. (N. Y.) 336; s. c. 63 N. Y. St. Rep. 516; 23 Wash. L. Rep. 537; 31 N. Y. Supp. 135; St. Louis Nat. Stock Yards v. Burns, 97 Ill. App. 175; Mobile &c. R. Co. v. Healy, 100 Ill. App. 586. The risk of injury from the fact of the tracks in a railway-yard being sharply curved,—the court holding that an employé in the freight-yard of a railroad company who accepts and continues in such employment, knowing that the sharp curves of the track in such yard are dangerous, assumes the risk of accident by reason of such curves, when no other question as to the condition of the track is presented by the evidence, and it is not incumbent upon the courts to lay down a rule of law to restrict the company as to the curves it shall use in its freight and depot-yards, where the safety of passengers and the public is not involved: Tuttle v. Detroit &c. R. Co., 122 U. S. 189. The risk of injury from side-tracks not being in the proper condition: Twitchell v. Grand Trunk R. Co., 39 Fed. Rep. 419. The risk of injury from falling into an *unguarded ash-pit* at night,—there being no allegation by plaintiff that he did not know of its existence, location, and alleged dangerous condition; or that it was defectively construct-

risk of a dangerous defect or obstruction in the surface of a railway-yard, due to the casual negligence of the company, or of some one for whose negligence the company is responsible, which it is not his duty to discover, remove, or repair,—in the absence of knowledge on his part of such a source of danger or of reason to believe that it exists:—As in the case of an *oil-box* which is left near a track in a yard, and which it is the duty of another workman to remove in the performance of his duty of keeping the track free from obstructions, and which, by reason of its nearness to the track, catches the foot of a switchman while slightly protruding from the footboard of an engine on which he is riding, whereby he is thrown down and killed;²⁰ or, in the case of a yardmaster, the risk of being thrown from the footboard of an engine by its coming into collision with a *rock on the track*, merely because he knows that rocks frequently fall from the cars upon the tracks, which, if not removed, render the yard dangerous;²¹ or, in the case of a yardman, the risk of injury from falling into a *ditch* ten inches wide and eight inches deep, situated between the ties at a switch in one of three railway-yards in which the injured employé works, all the other ditches in the same yard being much shallower and less dangerous, and there being no ditches in the other two yards;²² or, in the case of a yardmaster, the risk of injury from the fact of *ties* in the yard becoming *split and defective*, so as to increase the danger of making up trains, where he has no knowledge of such defects, and the duty has not been imposed upon him of inspecting the tracks to discover them;²³ or, in the case of a brakeman when engaged in coupling cars, the risk of injury from being tripped by a *sliver detached from a rail*, unless he has knowledge of its existence or might have known of it by the exercise of due care for his own safety;²⁴ or, in the case of a brakeman, the risk of injury in consequence of stepping into a *hole between the ties*, which hole was concealed by slush, it not being a part of the duty of a brakeman to search for holes under the slush;²⁵ or, in the case of a brakeman, the risk of injury from defects

ed, or was unnecessary for the purpose for which it was used: *Williams v. Louisville & C. R. Co.*, 111 Ky. 822; s. c. 23 Ky. L. Rep. 1124; 64 S. W. Rep. 738.

²⁰ *Louisville & C. R. Co. v. Boul-din*, 121 Ala. 197; s. c. 25 South. Rep. 903.

²¹ *Galveston & C. R. Co. v. Bohan* (Tex. Civ. App.), 47 S. W. Rep. 1050; s. c. 1 J. A. 83; 12 Am. & Eng. R. Cas. (N. S.) 490 (no off. rep.).

²² *Hennesey v. Chicago & C. R. Co.*,

99 Wis. 109; s. c. 74 N. W. Rep. 554.

²³ *Pennsylvania Co. v. Brush*, 130 Ind. 347; s. c. 28 N. E. Rep. 615.

²⁴ *San Antonio & C. R. Co. v. Wil-liams* (Tex. Civ. App.), 52 S. W. Rep. 89 (no off. rep.). Compare *Barrett v. Great Northern R. Co.*, 75 Minn. 113; s. c. 5 Am. Neg. Rep. 181; 12 Am. & Eng. R. Cas. (N. S.) 742; 77 N. W. Rep. 540.

²⁵ *Northern & C. R. Co. v. Teeter*, 63 Fed. Rep. 527; s. c. 11 C. C. A. 332.

in the *planking of a crossing*, it not being his duty, as matter of law, to know the condition of the planking of every crossing on his run where he is required to switch cars;²⁶ or, in the case of a freight-brakeman, the risk of injury from a dangerous *hole* in the roadbed of a side-track, although it is his duty to exercise a higher degree of care at a strange place, or on a side-track, than upon the main track, where it does not appear how long he had been employed by the railway company, or that he had ever seen the side-track before;²⁷ and in the case stated in the foot-note.²⁸

§ 4738. **Risk of Injury from Unlighted Switches.**—The risk is assumed by a *conductor* who continues in the service for more than a year with knowledge that a switch has no light or target upon it, or any lock or means of fastening it;²⁹ and by a *fireman* who knows that no lamps are supplied for switches generally, although he does not know that the particular switch has no lamp until he goes to use it.³⁰ The same court, however, has held that a *fireman* on a passenger-train does not, as matter of law, accept the risk of a *switch being left open* at night at a place where there is no switch-light to indicate whether the switch is open or closed.³¹

§ 4739. **Other Risks Assumed by Railway Yardmen, Switchmen, etc.**—According to various holdings, railway yardmen assume the following risks as being incident to the service:—When engaged in cleaning and taking out engines from a round-house, the risk of injury from the *fall of an icicle* from the eaves of such house, where he has equal means with his employer of knowing the danger;³² in case of a brakeman in a railway-yard, the risk of being *struck by freight-cars* moving in the yard with no brakeman on the front of them, contrary

²⁶ *Fluhrer v. Lake Shore &c. R. Co.*, 121 Mich. 212; s. c. 80 N. W. Rep. 23; s. c. aff'd, 124 Mich. 482.

²⁷ *Ragon v. Toledo &c. R. Co.*, 91 Mich. 379; s. c. 51 N. W. Rep. 1004.

²⁸ A brakeman did not assume the risk of injury from tripping over wires stretched across a path in a railway-yard about seven inches from the ground, although he had worked in the yard for many years and the wires were in full view, but he did not know that they were not boxed,—the conclusion being that, in view of the unequal nature of the duty of the master and the servant with respect to such dangers, the servant could not be said to have had equal knowledge and

equal opportunity with the master to discover them; and that it was erroneous to render a judgment for the defendant on special findings embodying these facts, notwithstanding a general verdict for the injured employé: *Flutter v. New York &c. R. Co.*, 27 Ind. App. 51; s. c. 59 N. E. Rep. 337.

²⁹ *Birmingham R. &c. Co. v. Allen*, 99 Ala. 359; s. c. 20 L. R. A. 457; 13 South. Rep. 8.

³⁰ *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611.

³¹ *Chicago &c. R. Co. v. House*, 172 Ill. 601; s. c. 50 N. E. Rep. 151; aff'g s. c. 71 Ill. App. 147.

³² *Johnson v. Oakes*, 70 Fed. Rep. 566.

to a long-observed custom known to the injured brakeman, where the yardmaster has assigned a sufficient number of competent men to do the switching;³³ in case of a railroad switchman, the risk of injury from attempting to pass from his switch on to a track on which an engine is slowly following cars which he has switched;³⁴ in case of an employé engaged in making up trains, the risk arising from running cars in upon the same track at the same time from both ends of the yard while trains are being made up, where such manner of making up trains is customary;³⁵ in case of an employé in a railroad-yard, the risk of an *opening between cars*, such as is usual and necessary from time to time in shifting cars in the yard, being *suddenly closed* without any warning or notice to him;³⁶ in case of a switchman in a railroad-yard, the risk of using a platform, appropriated to the transfer of freights, for the purpose of running along it on a dark night, it not appearing that the platform was intended for such a purpose, or that he had any reason to think that it was;³⁷ in case of a brakeman, the risk of pushing flat-cars ahead of an engine, where such is the custom on the road, of which custom, and the danger thereof, the injured servant has knowledge;³⁸ in case of a switchman in a railroad-yard, the risk of remaining at work where *loose stones and rock* were lying in the vicinity of the tracks to a dangerous extent, on being told by the foreman that he was going to clear away the obstructions; nor had he a right to rely absolutely on a statement of the foreman that a certain part of the yard had been cleared, where he had equal opportunity to see and know the fact.³⁹

§ 4740. **Risk of Injury from Unsafe Cattle-Guards, Trestles, Culverts, etc.**—A railway brakeman, who knows the location of a *cattle-guard*, is bound to guard against it in performing his duties, and assumes the risk of injury from it, although it may not be properly constructed,⁴⁰—and this whether the conclusion is put on the ground of accepting the risk, or of contributory negligence.⁴¹ So, it has been

³³ *Pennsylvania Co. v. Fox*, 10 Ohio C. C. 72.

³⁴ *Dering v. New York & C. R. Co.*, 67 Hun (N. Y.) 650; s. c. 50 N. Y. St. Rep. 832; 22 N. Y. Supp. 344.

³⁵ *Caron v. Boston & C. R. Co.*, 164 Mass. 523; s. c. 42 N. E. Rep. 112.

³⁶ *Plunkett v. Central & C. R. Co.*, 105 Ga. 203; s. c. 30 S. E. Rep. 728; 4 Am. Neg. Rep. 622; 13 Am. & Eng. R. Cas. (N. S.) 860.

³⁷ *Hamilton v. Richmond & C. R. Co.*, 83 Ga. 346; s. c. 9 S. E. Rep. 670.

³⁸ *Fordyce v. Lowman*, 57 Ark. 160; s. c. 20 S. W. Rep. 1090 (not a "railway-yard" case: cars wrecked out on the road).

³⁹ *Kansas City & C. R. Co. v. Billingslea*, 116 Fed. Rep. 335.

⁴⁰ *Peoria & C. R. Co. v. Puckett*, 52 Ill. App. 222.

⁴¹ *Ford v. Chicago & C. R. Co.*, 106 Iowa 85; s. c. 75 N. W. Rep. 650; 11 Am. & Eng. R. Cas. (N. S.) 489; 3 Am. Neg. Rep. 651; rev'g on rehearing s. c. 71 N. W. Rep. 332 (while attempting to pull a coupling-pin

held that a railway brakeman who enters and continues for three years in the service, with knowledge that the *culverts* upon the road are *without covering*, assumes the risk of injury therefrom, and cannot recover damages for an injury received by falling into an open culvert while alighting from the train to turn a switch.⁴² The general principles already considered will suggest limitations of the doctrine,—such as that the employé does not assume the risk of injury from an uncovered *cattle-guard*, of the existence of which he has no knowledge, or where he has reason to believe that it is protected.⁴³

§ 4741. **Risk of Injury from Falling Rock Not Assumed.**—Railway brakemen do not, as matter of law, assume the risk of being injured by superincumbent rock becoming detached and falling upon them; but where the failure properly to support such rock is due to the negligence of the company, there may be a recovery of damages.⁴⁴

§ 4742. **Trainmen in General Not Required to Inspect the Track.**—It is, in general, no part of the duty of a railway brakeman, fireman, or engineer to inspect the track for the purpose of ascertaining whether or not it has been safely constructed or is kept in a proper state of repair.⁴⁵ Their duties with respect to the safety of those on

he walked between two moving cars and fell into the cattle-guard, the position and unsafe condition of which he knew, and was run over and killed). See also, *Henderson v. Coons*, 31 Ill. App. 75 (brakeman fell into a cattle-guard while uncoupling cars, which was properly located and plainly visible—no recovery); *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192 (employé of bridge company fell from a trestle, no objection to its safety having been made to his employer—no recovery); *Fuller v. Lake Shore & C. R. Co.*, 108 Mich. 690 (circumstances under which servant assumes risk of danger from coupling cars at a cattle-guard).

⁴² *West v. Southern Pac. Co.*, 85 Fed. Rep. 392; s. c. 56 U. S. App. 323; 29 C. C. A. 219.

⁴³ *Galveston & C. R. Co. v. Slinkard*, 17 Tex. Civ. App. 585; s. c. 44 S. W. Rep. 35. Compare *McKee v. Chicago & C. R. Co.*, 83 Iowa 616; s. c. 13 L. R. A. 817; 50 N. W. Rep. 209 (although in passing over the road he was in a position where he might have known of the danger). See also, *Illinois & C. R. Co.*

v. Sanders, 166 Ill. 270 (circumstances under which employé does not assume such a risk).

⁴⁴ *Northern & C. R. Co. v. Beaton*, 64 Fed. Rep. 563; s. c. 12 C. C. A. 301 (rock falling from the roof of a tunnel); *Bean v. Western & C. R. Co.*, 107 N. C. 731; s. c. 12 S. E. Rep. 600 (rock falling on the track, injuring an employé on a freight-train); *Fish v. Illinois & C. R. Co.*, 96 Iowa 702; s. c. 65 N. W. Rep. 995 (stones falling from gravel-cars along the track, injuring brakeman who begins work at midnight, when he cannot see whether any stones are present).

⁴⁵ *Chicago & C. R. Co. v. Swett*, 45 Ill. 197; *Porter v. Hannibal & C. R. Co.*, 60 Mo. 160; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Smith v. Erie R. Co.*, 67 N. J. L. 636; s. c. 52 Atl. Rep. 634 (defects in roadbed not assumed unless known, or so obvious that they would be observed by ordinary care); *Goheen v. Texas R. Co.*, 3 Cent. L. J. 382; s. c. *sub nom.* *Gohen v. Texas & C. R. Co.*, 1 Tex. L. J. 97; 23 Int. Rev. Rec. 393; 10

board the train require them to devote their exclusive attention to the operation of it, and the public safety is not subserved by charging them with the additional duty of diverting their attention from the train by maintaining an inspection with the view of ascertaining the condition of the track. This is especially true with respect to lateral objects in dangerous proximity to the track. The trainmen ought not to be expected, while engaged in their proper duties, to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, by night as well as by day, with notice of the precise relation of the train to adjacent objects. If this is a correct view, it would seem that, in the absence of express notice of immediate danger, railway trainmen may perform their duty under a just assumption that they may do so without exposing themselves to extraordinary hazard,—that is, to danger not necessarily incident to the course of their employment.⁴⁶ On the contrary, “it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair, and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars. For their failure in this, and their employes not knowing the defects, and not contracting with express reference to them, the companies must be held liable for such injuries as their employes may suffer thereby.”⁴⁷ Nevertheless, a moment’s reflection will convey the suggestion to the mind that it is the plain duty of the engineer, or other man appointed and stationed upon the engine for

Fed. Cas. 537; *Mehan v. Syracuse &c. R. Co.*, 73 N. Y. 585.

⁴⁶ *Dorsey v. Phillips &c. Const. Co.*, 42 Wis. 583, 599. It was therefore held that the fact that the conductor of a freight-train had passed six times a week, for four or five months, a certain cattle-chute in dangerous proximity to the track, by which he was afterwards injured while on the side-ladder of a freight-car, did not of itself show knowledge of the danger, as matter of law, but was a circumstance from which the jury might find knowledge, or not: *Dorsey v. Phillips &c. Const. Co.*, *supra*. Accordingly, the refusal of an instruction asked by the defendant, going upon the theory that if the plaintiff had, in the course of his employment as conductor of one of the defendant’s freight-trains, sufficient opportu-

nity to know the general position of a cattle-chute by means of which he was injured, he was charged with knowledge of its dangerous character, was not error; for such mere knowledge, without opportunity for accurate knowledge, was not sufficient to charge him: *Dorsey v. Phillips &c. Const. Co.*, *supra*. So, where the accident happened to such a servant in consequence of the track being defective, the fact that he had, about a month before the accident, passed several times over it, observed that it was rough, and his apprehensions were thereby aroused, was not, as matter of law, to be taken as a voluntary assumption of the risk attending it, but the question was for the jury: *Dale v. St. Louis &c. R. Co.*, 63 Mo. 455.

⁴⁷ *Chicago &c. R. Co. v. Swett*, 45 Ill. 197, 203, per Breese, C. J.

that purpose, often called the "lookout," to keep such a lookout ahead of the advancing engine upon the track as will discover any dangerous defects in the track, or any object in dangerous proximity to it, in time to avert accidents from them. It has been held that trainmen on a *construction-train*, passing over a road which is not yet open for traffic, and which is in a general unfinished and incomplete condition, assume the risk of such defects as come directly within their observation, or are equally open to the observation of both the master and the servant.⁴⁸

§ 4743. Risk of Injury from Unballasted Tracks, Tracks Not Surfaced Up, Holes in Tracks between the Rails.—The question whether the employé assumes the risk of injury from such a source, rests upon somewhat different considerations from the question of the assumption of the risk of injuries from unblocked frogs, switches, guard-rails, etc. In those cases the risk of injury proceeds from the permanent condition of the track, the manner in which it has been made, of which the employé is presumed to take notice. But in the case now to be considered, the failure to keep the track ballasted or surfaced up, and the permitting of dangerous holes to form in it, and to remain there, may readily be ascribed to the negligent failure of the company to keep the surface of its track in proper repair, so as to promote the safety of its employés, who, in the discharge of their duties, may be required to walk over it both in the day and in the night. The risk of injury from this source may therefore well be regarded as a risk of danger from the *special or unforeseen negligence* of the employer, which, under a principle already considered,⁴⁹ the employé does not assume. Some courts have gone so far as to hold that mere knowledge on the part of the employé of the fact that the track is unballasted, will not, under all circumstances, put upon him an assumption of the risk of an injury therefrom.⁵⁰ For stronger

⁴⁸ *Baltimore &c. R. Co. v. Welsh*, 17 Ind. App. 505; s. c. 47 N. E. Rep. 182.

⁴⁹ *Ante*, § 4618.

⁵⁰ For example, where the brake-beams of a car were broken and defective, through the negligence of the railway company, and the road-bed was unballasted and uneven, and the two causes contributed to injure a brakeman attempting to couple the defective car, it was held that the knowledge of the brakeman that the track was unballasted would not preclude him from recovering damages: *Gulf &c. R. Co.*

v. Shearer, 1 Tex. Civ. App. 343; s. c. 21 S. W. Rep. 133. Another court has held, where a brakeman was injured by having his foot caught between the ties of an unballasted railway switch-yard, that the fact that the brakeman knew of the generally dangerous condition of the yard, in not having the spaces between the ties filled in, would not prevent him from recovering damages, on the ground that he had assumed the extra hazard thereby occasioned, where his injury occurred at a place where the exposure of the ties was *greater* than at

reasons, the fact that a switchman might, by the exercise of ordinary care, have known that the yard was unballasted, would not prevent a recovery of damages in a case where, by reason of such insufficient ballasting, he fell while engaged in the discharge of his duties, and was run over by a train; but, to defeat a recovery, it must appear that he had "equal opportunity" with the servants of the company having charge of the track, to know of its condition.⁵¹ On the other hand, it has been held that a brakeman required, in the discharge of his duties, to make a coupling at a small station, assumes the risk of injury from the fact that the track is not surfaced up, where it is in the same condition as in similar localities along the road.⁵² And, generally speaking, it must be regarded as a sound and just conclusion, that a railway employé will not, as matter of law, suffer the imputation of contributory negligence, because of his failure to discover the defective and dangerous condition of the track before stepping thereon to make a coupling at night, because he might have discovered its condition by examining it with a lantern.⁵³ It has been held in another case

other places: *St. Louis & C. R. Co. v. Robbins*, 57 Ark. 377; s. c. 21 S. W. Rep. 886.

⁵¹ *Louisville & C. R. Co. v. Ross*, 21 Ky. L. Rep. 1730; s. c. 56 S. W. Rep. 14 (no off. rep.). Compare *Louisville & C. R. Co. v. Bowcock*, 107 Ky. 223; s. c. 21 Ky. L. Rep. 383; 51 S. W. Rep. 580; 21 Ky. L. Rep. 896; 53 S. W. Rep. 262 (holding that a brakeman injured in making a coupling, in consequence of the removal of all the ballast between the ties shortly before, without notice to him, could recover damages, unless he failed to use ordinary care for his own safety, and but for such failure would not have been injured); *San Antonio & C. R. Co. v. Parr* (Tex. Civ. App.), 26 S. W. Rep. 861 (no off. rep.) (brakeman fell into hole five inches deep between the ties, while attempting to make a coupling—company liable); *Northern & C. R. Co. v. Teeter*, 63 Fed. Rep. 527; s. c. 11 C. C. A. 332 (holding that the fact that a hole in the track was concealed from sight by slush, would not excuse the company from liability to a brakeman injured by stepping into it). See further, *Lewis v. St. Louis & C. R. Co.*, 59 Mo. 495; s. c. 21 Am. Rep. 385; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; s. c. 85 Am. Dec. 720.

⁵² *Louisville & C. R. Co. v. Bow-*

cock, 107 Ky. 223; s. c. 21 Ky. L. Rep. 323; 51 S. W. Rep. 580; 21 Ky. L. Rep. 896; 53 S. W. Rep. 262. And so, where a switchman was injured by a passing train, by reason of his foot getting caught in a hole in the planking between the railroad-tracks, which was open to view, and which he could have seen every day for six weeks: *Gleason v. New York & C. R. Co.*, 159 Mass. 68; s. c. 34 N. E. Rep. 79. And so, where a switchman in a freight-yard while coupling cars, stepped into one of several drainage-slucies which were there when he entered the employment, and which, to his knowledge, remained there without alteration, and which were plainly visible, and was killed: *DeForest v. Jewett*, 88 N. Y. 264; aff'g s. c. 19 Hun (N. Y.) 509. See further, as to injuries to railway employes from *falling into ditches*: *Hollenbeck v. Missouri & C. R. Co.*, 141 Mo. 97; s. c. 8 Am. & Eng. R. Cas. (N. S.) 277; *Bird v. Long Island R. Co.*, 11 App. Div. (N. Y.) 134; s. c. 42 N. Y. Supp. 888; *San Antonio & C. R. Co. v. Parr* (Tex.), 26 S. W. Rep. 861 (no off. rep.).

⁵³ *Cleveland & C. R. Co. v. Sloan*, 11 Ind. App. 401; s. c. 39 N. E. Rep. 174. See also, *Ragon v. Toledo & C. R. Co.*, 97 Mich. 265; s. c. 56 N. W. Rep. 612; *Batterson v. Chicago & C. R. Co.*, 53 Mich. 125; s. c.

that, although a brakeman knows that his employer's tracks are unballasted, and consequently assumes the risk, he does not assume such risk when directed to make a coupling on the switch-track of *another road*, but he may presume that it is in proper condition.⁵⁴

§ 4744. Risk of Injuries from Other Defects in Railway-Tracks.—

It has been held, under various conditions of fact, that railway employes accept the risk of injury from the following sources:—A *projecting splinter* at one end of a rail on a side-track, extending inward five-eighths of an inch, for a distance of three inches along the rail, which caught in the trousers of the brakeman, preventing him from stepping off the track and out of the way of a slowly-moving engine, after an unsuccessful attempt to make a coupling;⁵⁵ a *spike in a railway tie* or sleeper, on which an employé, attempting to block the driving-wheel of a locomotive-engine, gets his hand caught so that he is injured by the engine before he is able to remove it, where he knows that the ties are second-hand, and that spikes are in some of them, although he does not know of the particular spike which causes the injury;⁵⁶ a *plank* used to cover an opening in a trestle used as a coal-chute, such planks being ordinarily used in keeping coal in freight-cars, but used, to the knowledge of the defendant, to cover such coal-chutes in the floor of the trestle,—the plank breaking and allowing an employé to fall through the trestle a distance of about forty feet, the employé having been in the employment a number of years and being familiar with the work and the dangers;⁵⁷ a *plank* at a highway-crossing which gradually worked loose and struck the

18 N. W. Rep. 584 (seemingly untenable decision holding that the employé must examine the road-bed). In this case it appeared that a side-track was built over the end of a shallow pond-hole over which the car to be coupled stood. Plaintiff, while trying to remove the link, stood on the ties and saw that the track was unballasted. Finding the link too fast to remove, he walked back to the approaching train, took the link from the end car, and walked back, with the link in his left hand and his lantern in the other. He slipped accidentally as he leaned over to make the coupling, causing his foot to slip between the ties. He caught hold of the link to support himself and his hand was crushed. The defect, if any, was held to be one of construction and not of maintenance. The

company had a right to expect that brakemen would use reasonable care in examining their footing and surroundings and would know what was generally to be seen by their own observation: *Batterson v. Chicago & c. R. Co.*, *supra*.

⁵⁴ *Arkansas Cent. R. Co. v. Jackson*, 70 Ark. 295; s. c. 67 S. W. Rep. 757.

⁵⁵ *Barrett v. Great Northern R. Co.*, 75 Minn. 113; s. c. 5 Am. Neg. Rep. 181; 12 Am. & Eng. R. Cas. (N. S.) 742; 77 N. W. Rep. 540. Compare *San Antonio & c. R. Co. v. Williams* (Tex. Civ. App.), 52 S. W. Rep. 89 (no off. rep.).

⁵⁶ *O'Neil v. Keyes*, 168 Mass. 517; s. c. 47 N. E. Rep. 416 (a seemingly untenable decision).

⁵⁷ *Warszawski v. McWilliams*, 64 App. Div. (N. Y.) 63; s. c. 71 N. Y. Supp. 680.

footboard of an engine, on which the employé receiving the injury was riding;⁵⁸ a *defective rail*, on which a brakeman, attempting to make a coupling, caught his foot, he knowing that the rails were worn and defective;⁵⁹ a *siding* which was *uneven and up-grade* toward a spur, where a brakeman, who was killed while making a flying switch by falling from a car while on the siding, had passed over the place a great many times.⁶⁰

ARTICLE III. RISK OF INJURY FROM OBJECTS TOO NEAR THE TRACK, ENGINE, OR CARS.

SECTION

4747. Generally.

4748. Distinction between dangerous structures near railway tracks which are necessary or convenient, and those which are unnecessary.

4749. Various risks of this nature deemed to have been assumed.

4750. Decisions which exonerate the employé from the assumption of such risks.

4751. Risk of injury from overhead bridges, when assumed.

SECTION

4752. Risk of injury from overhead bridges, when not assumed.

4753. Injury from overhead bridges while standing upon freight-cars of unusual height.

4754. Effect of failure of the company to maintain "whiplashes" or "tell-tales."

4755. Risk of lateral objects too near the track, when assumed.

⁵⁸ Peoria &c. R. Co. v. Hardwick, 53 Ill. App. 161; s. c. on former appeal, 48 Ill. App. 562 (defect, if any, had not existed for a sufficient time to charge railway company with notice, in the opinion of the court—doubtful holding).

⁵⁹ Arnold v. Louisville &c. R. Co., 22 Ky. L. Rep. 511; s. c. 58 S. W. Rep. 370 (no off. rep.).

⁶⁰ Skinner v. Central Vermont R. Co., 73 Vt. 336; s. c. 50 Atl. Rep. 1099. But it has been held that a railroad company which permits a portion of its *road-bed* to become *soaked and soft* because of water allowed to run across it from a hydrant on the railway premises, so that the rails and cross-ties sink down when the weight of a car is placed upon them, is liable to a brakeman for an injury to his foot while attempting to couple cars, which, by reason of a defective coupling-link on one of them, come suddenly together and rebound, settling the track, and causing plain-

tiff's foot to slip from a pile of cinders above the track, on to the rail, where it is crushed by the car running down the depression occasioned by the settling of the track: Louisville &c. R. Co. v. Kemper, 153 Ind. 618; s. c. 1 Repr. (Ind.) 1100; 53 N. E. Rep. 931. So, where the outer rail of a switch-track was too low, and there was a space of three or four inches between the rails of the main track and the ends of the switch-track rails, so that, in entering such switch-track, the engine dipped and threw a switchman off the pilot and killed him; and deceased had passed over the switch daily, but such defects could be noticed only when entering the side-track, which was only used once or twice a month,—it was held that such facts did not necessarily show knowledge of the defective condition of the side-track: San Antonio &c. R. Co. v. Waller, 27 Tex. Civ. App. 44; s. c. 65 S. W. Rep. 210.

SECTION

4756. Risk of lateral objects too near the track, when not assumed.

4757. Risk of injury from cars negligently left standing on side-tracks.

4758. Risk of injury from coming into contact with the walls and roofs of tunnels.

SECTION

4759. Risk of injury from being brought into contact with mail-cranes.

4760. Risk of injury from overhead wires.

4761. Risk of injury from other overhead objects.

4762. Risk of injury from objects too near street-railway tracks.

§ 4747. **Generally.**—We find on this question seeming divergencies in the application of legal principles. In the first place, in jurisdictions where the so-called “fellow-servant doctrine” prevails, if the object consists of cars with which a moving train may come in contact in consequence of an open switch, of loose cars, or cars standing on side-tracks in dangerous proximity to the main track, trainmen injured by such obstructions may be deemed to accept the risk, on the ground that they accept the risk of negligence of fellow servants, and that these sources of danger arise from such negligence.¹ Some courts perhaps exhibit too great a tendency to put such risks upon the servant, where he had a general knowledge of the source of danger; neglecting the consideration that, owing to being absorbed in his duties, or to temporary lapses of memory, he may fail to guard himself from being brought into contact with such objects.² A distinction must also obviously be taken between cases where the object too near the track is a part of the permanent structure of the track or its appurtenances,—as, for example, a cattle-chute, the framework of a bridge, the floor of an overhead bridge, and the like,—and those cases where the object is casually placed near the track as the result of some special negligence of the railroad company which ought to have been guarded against, and which the employé is not required to anticipate at his peril, while engaged in the ordinary discharge of his duties.³ Even in case of obstructions of a permanent nature, negligently created or

¹ *Schaub v. Hannibal &c. R. Co.*, 106 Mo. 74; *Rutledge v. Missouri &c. R. Co.*, 110 Mo. 312.

² Examine the following decisions which hold that such risks are assumed by the employé: *Missouri &c. R. Co. v. Somers*, 78 Tex. 439; *Coombs v. Fitchburg R. Co.*, 156 Mass. 200; *Pennington v. Detroit &c. R. Co.*, 90 Mich. 505; *Bengtson v. Chicago &c. R. Co.*, 47 Minn. 486; *Fisk v. Fitchburg R. Co.*, 158 Mass.

238; *Train v. Old Colony R. Co.*, 161 Mass. 353.

³ *Louisville &c. R. Co. v. Bouldin*, 121 Ala. 197; s. c. 25 South. Rep. 903 (switchman thrown from engine because his foot slightly protruded from a footboard, striking an obstruction negligently placed so near the track that, in the natural and incidental movements of his person in the discharge of his duties, he would be likely to come into collision with it); *ante*, § 4618.

allowed to exist along the line of a railway, it is a sound conclusion that the law does not require the brakeman to know absolutely the fact of their existence and location, and does not oblige him to be on the constant lookout for them while at the same time discharging his proper duties.⁴ Turning to cases which put the question on the footing of *contributory negligence*, rather than on that of accepting the risk, we find decisions of a reputable court declaring that the test of the negligence of a railway company towards its trainmen, in the erection of a structure close to its track, is to consider whether or not the structure is dangerous or unsafe to persons operating its trains, when they are exercising, under the particular circumstances, ordinary care.⁵

§ 4748. **Distinction between Dangerous Structures near Railway-Tracks which are Necessary or Convenient, and those which are Unnecessary.**—Another distinction which does not seem to find expression in judicial decisions, but which is evidently in the minds of jurors in making up their verdicts, and often in the minds of judges in dealing with such verdicts on motions for new trials, or on appeals or writs of error,—is the distinction between dangerous structures near a railway-track which are placed or allowed to remain there for some necessary or convenient purpose, and such structures which are placed there unnecessarily, and hence negligently or even wantonly, seeing that they appear as death-dealing contrivances as against the trainmen when in the discharge of their duties. In the latter case the law clearly ought to put the risk upon the employer and not upon the employé; and this conclusion, often of controlling force in the breasts of the judges, ought to find expression in their opinions.⁶

§ 4749. **Various Risks of this Nature Deemed to have been Assumed.**—Under the application of this rule, a servant was deemed to assume the risk of injury from a *switch* situated near the main track, where it had existed since the time of his employment;⁷ from a *pile of*

⁴ Chicago &c. R. Co. v. Johnson, 116 Ill. 206; s. c. 2 West. Rep. 388; Gulf &c. R. Co. v. Darby, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446.

⁵ New York &c. R. Co. v. Ostman, 146 Ind. 452; s. c. 6 Am. & Eng. R. Cas. (N. S.) 588; 45 N. E. Rep. 651.

⁶ See, in this connection, Gulf &c. R. Co. v. Darby, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446 (where it is held that a railroad employé

owes no duty of inspection to discover obstructions dangerously near the track which are *due to the company's negligence*; and that he does not necessarily assume the risk of injury from such structures by his contract of employment, though they are permanent in character and exist when he enters the service).

⁷ Goodes v. Boston &c. R. Co., 162 Mass. 287; s. c. 38 N. E. Rep. 500.

stones situated beside the road, so near to it that a person passing on that side of a car might be struck by them, the brakeman receiving the injury having been notified of their existence, but not of the precise location of them;⁸ from an *oil-house* near a spur-track, near which the injured brakeman was required to uncouple cars, he having been brought into collision with it while riding on a ladder on the side of the car;⁹ from a *tie* which had originally been left in an inoffensive position alongside the track, but which had subsequently been moved without the knowledge of a flagman injured thereby,—it being considered that he assumed the *risk of its being moved* as an incident of his employment;¹⁰ and from structures in *railroad-yards*, when the servant entered into the employment with knowledge of their character and position.¹¹

§ 4750. **Decisions which Exonerate the Employé from the Assumption of such Risks.**—On the other hand, decisions are not wanting, nor few, which exonerate the railway employé from an assumption of such risks.¹² One of these cases holds that a brakeman, making his first trip over the road, and who was not informed of *structures* so near the track as to render his occupation dangerous, which were few and exceptional, did not assume the risk of injury from them; nor was he bound, as matter of law, to know and appreciate the danger.¹³ Another case exonerated a switchman who was injured in attempting to jump on a moving engine, at a point where there was a *pile of stones* about two and one-half feet high near the track, there being no other similar piles of stones, and the switchman testifying that he had never seen the one in question,—the court proceeding upon the view that this source of danger was not sufficiently obvious to show that the plaintiff had assumed the risk as matter of law, though he did not in fact know of its presence.¹⁴ Another court reached the same conclusion where a brakeman was injured in attempting to climb on the side-ladder of a car, while the train was in motion, without looking to see whether he

⁸ *Smith v. Winona &c. R. Co.*, 42 Minn. 87; s. c. 43 N. W. Rep. 968; 41 Am. & Eng. R. Cas. 289.

⁹ *Chicago &c. R. Co. v. McGinnis*, 49 Neb. 649; s. c. 68 N. W. Rep. 1057.

¹⁰ *Neider v. Illinois Cent. R. Co.*, 108 La. 154; s. c. 32 South. Rep. 366.

¹¹ *Anderberg v. Chicago &c. R. Co.*, 98 Ill. App. 207.

¹² See, for example, *Pidcock v. Union Pac. R. Co.*, 5 Utah 612; s. c. 1 L. R. A. 131; *Scanlon v. Boston &c. R. Co.*, 147 Mass. 484; *Boss v.*

Northern &c. R. Co., 2 N. D. 128; *Nance v. Newport News &c. R. Co.*, 13 Ky. L. Rep. 554; s. c. 17 S. W. Rep. 570 (no off. rep.); *Darling v. New York &c. R. Co.*, 17 R. I. 708; s. c. 16 L. R. A. 643; *Colf v. Chicago &c. R. Co.*, 87 Wis. 273; *Gulf &c. R. Co. v. Darby*, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446.

¹³ *Scanlan v. Boston &c. R. Co.*, 147 Mass. 484; s. c. 7 N. Eng. Rep. 141; 18 N. E. Rep. 209.

¹⁴ *Donahue v. Boston &c. R. Co.*, 178 Mass. 251; s. c. 59 N. E. Rep. 663.

was in danger from a *pole* which stood too near the track, of which he had no actual knowledge.¹⁵

§ 4751. Risk of Injury from Overhead Bridges, when Assumed.—

This is a frequent source of danger resulting in death or injury to railway brakemen, when standing or walking upon the top of freight-cars, in the ordinary discharge of their duties, or when standing or sitting on the elevated portion of caboose-cars.¹⁶ In some cases the height of these bridges is prescribed by municipal ordinances,—as where railways pass under viaducts in cities.¹⁷ In others their height is optional with the railroad company. In these last cases a condition of the law which allows them to be built or to remain so low that brakemen are liable to be brushed off the tops of the cars and killed by coming in contact with them, presents a very disgraceful condition of the law, and the decisions which put upon the injured or murdered brakeman the imputation of accepting the risk of such dangers, fall very little short of the judicial murder of a meritorious and useful

¹⁵ Whipple v. New York & C. R. Co., 19 R. I. 587; s. c. 5 Am. & Eng. R. Cas. (N. S.) 517; 35 Atl. Rep. 305. See also, Pidcock v. Union Pac. R. Co., 5 Utah 612; s. c. 1 L. R. A. 131; 19 Pac. Rep. 191 (where it was held that a switchman whose duty it was to place cars in a railroad-yard and make up trains, did not assume the risk of danger arising from a *switch-stand* situated so near a track as to extend within nine or ten inches of passing trains); Murphy v. Wabash R. Co., 115 Mo. 111; s. c. 21 S. W. Rep. 862 (a close case where an engineer was injured by being struck by a *cattle-guard fence* while standing on the *outside of the tender* tightening a nut to prevent water escaping from the boiler). In an action against a railway company for injuries alleged to have been sustained by the plaintiff through the negligence of the company, the plaintiff offered to prove that he was the conductor of a freight-train of the defendant company; that the company had a siding on which coal-cars were to be run out for the purpose of emptying coal on the platform; that it was his duty, as conductor, to run out on the siding the coal-cars brought with his train; that by reason of the shortness of the curve of the siding, and its improper connection with the main road, it was danger-

ous to run the cars on the siding; that he had notified the superintendent and foreman of the road of such danger, and they had promised to avoid it, and requested the plaintiff to continue until the repair should be made; but that nothing was done towards the repair, and while the plaintiff was running his train on the siding, using due care, the forward car, by reason of the shortness of the curve, ran off the track, injuring the plaintiff. It was held error to refuse to admit such evidence: Patterson v. Pittsburgh & C. R. Co., 76 Pa. St. 389.

¹⁶ As in Baltimore & C. R. Co. v. Stricker, 51 Md. 47 (brakeman standing on top of a "house-car," so high that he could not pass under a bridge without stooping, struck by the "strut" of a bridge; held a natural risk of his employment—no recovery).

¹⁷ As in Myers v. Chicago & C. R. Co., 95 Fed. Rep. 406; s. c. 37 C. C. A. 137; 14 Am. & Eng. R. Cas. 749 (municipal authorities objected to the bridge being raised, and the grade was such that the tracks could not be lowered, and all employes were notified that the bridge was low—company exonerated); and in Lake Shore & C. R. Co. v. Shook, 16 Ohio C. C. 665; s. c. 9 Ohio C. D. 9.

class of citizens. Where the roofs of such bridges can be elevated so as to avoid this species of danger, their existence ought to be dealt with by the State on the footing of criminality: the railroad companies maintaining them should be indicted for maintaining public nuisances, and turned over to the justice and mercy of common juries; and they ought to be held liable to the injured brakeman, or to the representatives of the murdered brakeman, on the footing of negligence, unless contributory negligence is very clearly made to appear. Nevertheless, a numerous catalogue of judicial decisions, many of them cruel and wicked, affirm the proposition that the risk of being injured or killed through the negligence or criminality of the railway company in this particular, rests upon the brakeman, where he has knowledge or notice of the existence and height of the bridge, or where he has had such experience in the service that such knowledge or notice ought to be inferred.¹⁸ Many of the foregoing decisions empha-

¹⁸ *Myers v. Chicago &c. R. Co.*, 95 Fed. Rep. 406; s. c. 37 C. C. A. 137; 14 Am. & Eng. R. Cas. (N. S.) 749; *Louisville &c. R. Co. v. Hall*, 91 Ala. 112; s. c. 8 South. Rep. 371 (maintained on warning-signals or placards indicating approach to low bridge, but brakeman was expressly notified of it); *Louisville &c. R. Co. v. Banks*, 104 Ala. 508; s. c. 16 South. Rep. 547 (brakeman had passed under the bridge over a hundred times, and at the time of the accident his view was not obscured—deemed guilty of contributory negligence); *Schlaff v. Louisville &c. R. Co.*, 100 Ala. 377 (company not liable if bridge safe when employé careful); *Wells v. Burlington &c. R. Co.*, 56 Iowa 520; *Jones v. Louisville &c. R. Co.*, 82 Ky. 610 ("slight" and "gross" negligence doctrine—brakeman well knew location of bridge—no recovery); *Baltimore &c. R. Co. v. Stricker*, 51 Md. 47; s. c. 34 Am. Rep. 291; *Smith v. Winona &c. R. Co.*, 42 Minn. 87; *Devitt v. Pacific R. Co.*, 50 Mo. 302 (brakeman knew of the bridge—had passed through it every day for three weeks); *Rains v. St. Louis &c. R. Co.*, 71 Mo. 164; s. c. 36 Am. Rep. 459; *Allen v. Boston &c. R. Co.*, 69 N. H. 271; s. c. 39 Atl. Rep. 978; *Baylor v. Delaware &c. R. Co.*, 40 N. J. L. 23 (holding that the company were not under any obligation to build bridges so high that a man standing on the top of a car could pass under them with safety,

but that the brakeman must be presumed to have known of the danger upon entering upon his employment, and accepted the risk; especially where, as in this case, he had passed the bridge in daylight on previous occasions); *Owen v. New York &c. R. Co.*, 1 Lans. (N. Y.) 108; *Lynch v. New York &c. R. Co.*, 63 Hun (N. Y.) 635; s. c. 44 N. Y. St. Rep. 663; 18 N. Y. Supp. 417 (brakeman on a box-car sixteen or eighteen inches higher than the ordinary car—knew that the car was higher than the ordinary ones, his view of the bridge was not obscured, and he had been on the road for some time—no recovery); *Rock v. Retsoff Min. Co.*, 40 N. Y. St. Rep. 556; s. c. 15 N. Y. Supp. 872; *Williams v. Delaware &c. R. Co.*, 116 N. Y. 628; rev'g s. c. 39 Hun (N. Y.) 430 (holding that non-suit should have been granted—bridge in plain view; it was daylight; brakeman had often passed under the bridge while on top of cars); *Ryan v. Long Island R. Co.*, 51 Hun (N. Y.) 607 (holding that an employé who had passed for three months four low bridges in close proximity, which had a warning-signal in front of the east side of the east bridge, and also in front of the west side of the west bridge, and understood that these signals were a warning for all the bridges, assumed the risk of an omission of the signals from the intermediate bridges); *Wallace v. Central Vermont R. Co.*, 43 N. Y.

size the distinction between cases where the injured employé has, or ought to have, knowledge of the existence and height of the bridge, and cases where he is ignorant of it; and it has been held that in giving instructions to a jury, the court should, where the evidence warrants the distinction, distinguish between an employé having knowledge of the business and of the situation, and one having no such knowledge.¹⁹

St. Rep. 639; s. c. 18 N. Y. Supp. 280 (although the "tickler" was out of order, where the brakeman was ignorant of the existence of the tickler, but was familiar with the bridge, and had forgotten about it); *Fitzgerald v. New York & C. R. Co.*, 59 Hun (N. Y.) 225; s. c. 36 N. Y. St. Rep. 755; 12 N. Y. Supp. 932 (such risk assumed where brakeman knows of the existence and height of the bridge and continues in the employment); *Gibson v. Erie R. Co.*, 63 N. Y. 449; s. c. 20 Am. Rep. 552; *Lake Shore & C. R. Co. v. Shook*, 16 Ohio C. C. 665; s. c. 9 Ohio C. D. 9 (brakeman killed while standing on a refrigerator-car considerably higher than a common freight-car—had almost daily for two years been required to set the brakes upon the tops of the cars before approaching the particular bridge, and company had for a long time placed such refrigerator-cars in its trains together with common freight-cars); *Brossman v. Lehigh Valley R. Co.*, 113 Pa. St. 490; s. c. 57 Am. Rep. 479 (brakeman assumes the risk of injury from a bridge of insufficient height, of which he knows); *Hooper v. Columbia & C. R. Co.*, 21 S. C. 541; *Carbine v. Bennington & C. R. Co.*, 61 Vt. 348; s. c. 17 Atl. Rep. 491; 20 Cent. L. J. 10 (no recovery for the death of a brakeman by a blow from a board in the arch of a bridge while he was on the top of a coal-car, where he was frequently on such cars, knew of their height, had ridden on them, and passed through the bridge daily); *Clark v. Richmond & C. R. Co.*, 78 Va. 709; s. c. 49 Am. Rep. 394 (brakeman had been warned of the low bridges and had several times passed the particular bridge by daylight—no recovery); *Williamson v. Newport News & C. Co.*, 34 W.

Va. 657; s. c. 12 L. R. A. 297; 12 S. E. Rep. 824 (such risk assumed where brakeman knows of the existence and height of the bridge and continues in the employment).

¹⁹ *Baltimore & C. R. Co. v. Stricker*, 51 Md. 47. But in an action by a brakeman for injuries caused by a low covered bridge, the Supreme Court of Appeals of Virginia held it error to charge that, though plaintiff might have known of the existence of the bridge, and assumed the risk of being struck by it, yet he had the right to recover, if, owing to the escape of steam from the engine, or darkness, or fog, at the time of the accident, he could not, by ordinary care, discover his approach toward the bridge; the court holding these conditions to be ordinary incidents of his employment; *Norfolk & C. R. Co. v. Marpole*, 97 Va. 594; s. c. 34 S. E. Rep. 462. See also, *Devitt v. Pacific R. Co.*, 50 Mo. 302. In this case the accident occurred in the daytime. The plaintiff had passed through the bridge daily for three weeks; had been repeatedly warned to look out for this and other bridges; and when last seen, just before reaching the bridge, he was sitting on his brake, facing the bridge. A clear case of contributory negligence. As the court says, "it would almost seem that the deceased committed suicide." And see *Paylor v. Delaware & C. R. Co.*, 40 N. J. L. 23 (brakeman presumed to know, when he enters upon his employment, that such bridges are not high enough to pass under while in an erect position); *Owen v. New York & C. R. Co.*, 1 Lans. (N. Y.) 108 (danger from low bridge was open and obvious, and within plaintiff's personal knowledge).

§ 4752. Risk of Injury from Overhead Bridges, when Not Assumed.

—Contrary to the doctrine of the foregoing paragraph, we find a considerable class of cases, proceeding on more enlightened, just and humane grounds, which ascribe negligence to a railway company in maintaining overhead bridges so low that brakemen engaged in their ordinary duties upon the tops of the cars are liable to be brought in contact with them,²⁰ and which hold that railway trainmen *do not accept the risk* of death or injury from such negligence.²¹ One of these cases carries the doctrine so far as to hold that the experience of the trainman who has been injured or killed by coming in contact with the overhead bridge does not necessarily take the case out of the rule, but that a conductor or brakeman on a freight-train has the right to assume that the company has constructed its bridges sufficiently high to render them safe; and that, if injured by a collision with overhead timbers, of the condition of which he has no knowledge or reasonable means of knowledge, he is entitled to recover, although he may have passed over the road and through the bridge for several months preceding the accident.²² Here, as elsewhere, many of the decisions deal with the subject with reference to the knowledge, or means of knowledge, possessed by the employé, of the existence, height and character of the bridge, holding that he does not accept the risk if ignorant of the source of danger, and charging the railroad company with liability.²³ With reference to the question of the knowledge of the brakeman of this source of danger, it has been held that the fact of giving a brakeman a printed book of rules, when he is first employed, which advises him that it is dangerous to stand erect on the top of

²⁰ *Atchison &c. R. Co. v. Rowan*, 55 Kan. 270; s. c. 39 Pac. Rep. 1010; *Cincinnati &c. R. Co. v. Sampson*, 97 Ky. 65; *Gulf &c. R. Co. v. Knox*, 25 Tex. Civ. App. 450; s. c. 61 S. W. Rep. 969.

²¹ *Pennsylvania Co. v. Sears*, 136 Ind. 460; s. c. 48 Alb. L. J. 11; 34 N. E. Rep. 15; *Northern &c. R. Co. v. Mortenson*, 27 U. S. App. 313; s. c. 63 Fed. Rep. 530; 11 C. C. A. 335; *Chicago &c. R. Co. v. Carpenter*, 12 U. S. App. 392; s. c. 56 Fed. Rep. 451; 5 C. C. A. 551.

²² *St. Louis &c. R. Co. v. Irwin*, 37 Kan. 701; s. c. 16 Pac. Rep. 146.

²³ *Baltimore &c. R. Co. v. Rowan*, 104 Ind. 88; *Atlee v. South Carolina R. Co.*, 21 S. C. 550; s. c. 53 Am. Rep. 699. Thus, if he is a *new hand*, and has not been warned of the danger, the case should go to the jury: *Atlee v. South Carolina*

R. Co., 21 S. C. 550; s. c. 53 Am. Rep. 699, note. In Kentucky, balancing the negligence of the railroad company with that of the injured brakeman, it has been held that a railroad company is liable for injuries sustained by a brakeman by being brought in contact, while standing upon the top of a freight-car, with an overhead bridge maintained by the company, which, with *slight care*, could have been raised sufficiently to clear one in such a position, although he had been over the road several times, where his attention was diverted by the sudden necessity of warning those on the rear portion of the train that the train had become separated: *Cincinnati &c. R. Co. v. Sampson*, 97 Ky. 65; s. c. 30 S. W. Rep. 12; 16 Ky. L. Rep. 819.

cars, and especially on high cars, when passing under a certain bridge, and that there are no tell-tales on the bridge, is not sufficient, as matter of law, to show that the brakeman, killed by striking the bridge when standing erect on a high car, assumed the risk of the injury.²⁴ Again, railroad brakemen have been exonerated from an assumption of the risk of this source of danger under special circumstances,—as where the back of the brakeman was turned toward the bridge, in applying the brakes in the discharge of his duty, in an effort to stop the train, where the train would have stopped before it reached the bridge if the brakes had been in good order, but failed to stop by reason of their being out of order, and he was ignorant of their inefficiency.²⁵ Some of the cases deal with the question on the footing of negligence, and contributory negligence,—holding that it is negligence on the part of a railroad company to construct an overhead bridge so low as to be a constant peril to the lives of its employés, and that it cannot excuse itself simply by showing that the killed or injured employé knew that the structure was so low that he could not pass under it in safety, while standing on the top of the cars;²⁶ but that contributory negligence on his part must be shown, which will be a question for the jury. It is a part of this doctrine that negligence will not be conclusively imputed to him if, at the time when he came in contact with the overhead bridge, he was in the line of his duty, and his attention presumably absorbed by the work which he had in hand.²⁷

§ 4753. Injury from Overhead Bridges while Standing upon Freight-Cars of Unusual Height.—It is well known that railway freight-cars are not always of equal height, but that, since the introduction of steel in the manufacture of rails, enabling railways to sustain cars of much greater weight and tonnage, freight-cars are built which are much higher than those which were formerly in ordinary use,—sometimes exceeding the height of the old pattern of car by the distance of twelve or fourteen inches. The railway brakeman is in a position to be aware of this, and a strict and severe rule would put upon him an acceptance of the risk of injury from it, provided he

²⁴ *Gulf &c. R. Co. v. Knox*, 25 Tex. Civ. App. 450; s. c. 61 S. W. Rep. 969.

²⁵ *Beard v. Chesapeake &c. R. Co.*, 90 Va. 351; s. c. 18 S. E. Rep. 559.

²⁶ *Louisville &c. R. Co. v. Cooley*, 20 Ky. L. Rep. 1372; s. c. 5 Am. Neg. Rep. 399; 12 Am. & Eng. R. Cas. (N. S.) 553; 49 S. W. Rep. 339 (no off. rep.).

²⁷ *Chicago &c. R. Co. v. Johnson*,

116 Ill. 206; *Beard v. Chesapeake &c. R. Co.*, 90 Va. 351; *Maher v. Boston &c. R. Co.*, 158 Mass. 36 (was facing the rear, as his duties required, and depended on tell-tale, which was defective); *Wallace v. Central Vermont R. Co.*, 138 N. Y. 302 (similar circumstances); *Cincinnati &c. R. Co. v. Sampson*, 97 Ky. 65; s. c. 30 S. W. Rep. 12; 16 Ky. L. Rep. 819.

knows, or has means of knowledge, of the existence and height of the overhead bridges upon the road. But the tendency seems to be to hold that whether he accepts the risk of receiving such an injury, or, what is substantially the same thing, whether he is guilty of contributory negligence in standing on the top of a car of a higher pattern, which has been introduced into the train, will not be determined as a mere question of law, but will present a *question of fact for a jury*.²⁸

§ 4754. **Effect of Failure of the Company to Maintain "Whiplashes" or "Tell-tales".**—A well-known device adopted by railway companies to give warning to their brakemen when standing on the top of cars when they are approaching overhead bridges too near the cars to enable the brakemen to pass underneath in safety when standing up, is to suspend a row of leather straps called "whiplashes" or "tell-tales" across the track at such a height that they will come in contact with the face or hands of the brakeman and warn him that the train is approaching a dangerously low bridge. Experience shows that this device is not always effective, especially where the back of the brakeman is turned toward the front of the train, while he is in the act of setting or releasing a brake.²⁹ Experience shows further that this device is liable to get out of order and to remain so, through the negligence of the company charged with its reparation. But a failure to maintain such a "tell-tale" will not render the company liable for the death or injury of a brakeman who is brought in contact with the low bridge, under all circumstances and conditions; but the negligence of the company, if such it be, must have been the proximate cause of the injury. The circumstances may be such as will put the risk upon the injured brakeman, or impute contributory negligence to him.³⁰ But nevertheless, where "tell-tales" are maintained

²⁸ *Atchison &c. R. Co. v. Rowan*, 55 Kan. 270; s. c. 39 Pac. Rep. 1010; *Southern R. Co. v. Duvall*, 22 Ky. L. Rep. 56; s. c. 54 S. W. Rep. 741; 56 S. W. Rep. 988 (no off. rep.) (attention of the brakeman had not been called to the danger of standing on a car higher than the rest of the train, and he was properly on the top of the car in the discharge of his duty); *Chicago &c. R. Co. v. Matthews*, 48 Ill. App. 361 (brakeman was required to be on top of the car at the particular point, although there was a rule of the company forbidding brakemen to be on the tops of unusually high cars when approaching viaducts).

²⁹ As in *Wallace v. Central Ver-*

mont R. Co., 138 N. Y. 302; s. c. 52 N. Y. St. Rep. 351; 33 N. E. Rep. 1069 (warning-signals, erected in compliance with statute, were out of order, and brakeman had no warning of the bridge).

³⁰ It was so held where, although the company failed to maintain a "tell-tale" over one of two parallel tracks passing under a low bridge, a brakeman, while riding on the top of a freight-train, where he was learning the road, had been told to look out for low bridges, and knew of the existence of the bridge, and of its dangerous character, before the accident, but, nevertheless, climbed on the top of the car at a place which would have been be-

by a railway company to give warning of low bridges, whether in pursuance of statute, or under a duty imposed by the principles of the common law, a brakeman knowing such fact, and having no knowledge or reason to believe that they are out of order, may rightfully assume that they will be in proper order and position to give him timely warning that the train is approaching a dangerously low bridge.³¹ On the other hand, a brakeman does not, as matter of law, assume the risk of coming in contact with an overhead bridge, which is so low as not to permit the passage of a person standing upright on the top of a car, of which bridge no warning is given by "tell-tales" or other signals, where the brakeman is on his first trip;³² nor, where such a "tell-tale" has been erected, does a brakeman assume the risk of its being out of order, unknown to him.³³ Nor is a brakeman guilty of *contributory negligence* as matter of law where, when engaged in the discharge of his duty, with his face toward the rear of the train, this being the position most effectual to discharge such duty, he is struck by a low bridge, of which he has no warning, in consequence of the "tell-tales" required to be maintained by statute being out of order.³⁴ The "tell-tale" itself may be so improperly constructed, or allowed to get so out of order, as to become a source of danger instead of safety to brakeman on the top of the train,—as where the horizontal cord or wire upon which the straps or whip-lashes were suspended, hung so low that a brakeman came in contact with it while standing on a car

tween the bridge and the tell-tale if there had been one: *Allen v. Boston & C. R. Co.*, 69 N. H. 271; s. c. 39 Atl. Rep. 978. So, where a brakeman was killed in the daytime, by coming in contact with an overhead bridge, which he had passed under daily for three months, it was held that there could be no recovery, although the company had failed to erect danger signal-cords: *Hooper v. Columbia & C. R. Co.*, 21 S. C. 541; s. c. 53 Am. Rep. 691.

³¹ *Maher v. Boston & C. R. Co.*, 158 Mass. 36; s. c. 32 N. E. Rep. 950; *Beard v. Chesapeake & C. R. Co.*, 90 Va. 351; *Savannah & C. R. Co. v. Day*, 91 Ga. 676; s. c. 17 S. E. Rep. 959 (and the failure of such brakeman to heed and remember a warning given by his fellow servants and to see the bridge when within a short distance of it, with his face turned toward it and the bridge distinctly visible, does not constitute such contributory negligence as will defeat recovery). Compare *Albring*

v. New York & C. R. Co., 61 N. Y. Supp. 763; s. c. 46 App. Div. (N. Y.) 460 ("tell-tales" out of order, two straps near the center entirely gone and one tangled with the other—deceased was struck while walking leisurely forward on the train as it approached the bridge, with the "tell-tales" and bridge in plain sight,—no recovery).

³² *Fitzgerald v. New York & C. R. Co.*, 37 App. Div. (N. Y.) 127; s. c. 55 N. Y. Supp. 1124.

³³ *Hines v. New York & C. R. Co.*, 78 Hun (N. Y.) 239; s. c. 60 N. Y. St. Rep. 8; 28 N. Y. Supp. 829; s. c. aff'd, 149 N. Y. 569; 43 N. E. Rep. 987. And so, where the "tell-tales" did not hang low enough to reach a person sitting on the top of a box-car, and he was not warned of the danger of sitting on the car: *Wainright v. Lake Shore & C. R. Co.*, 11 Ohio C. D. 530.

³⁴ *Wallace v. Central Vermont R. Co.*, 138 N. Y. 302; s. c. 52 N. Y. St. Rep. 351; 33 N. E. Rep. 1069.

of more than the usual height,—in which case the company will ordinarily be liable.³⁵

§ 4755. **Risk of Lateral Objects Too Near the Track, when Assumed.**—A large number of modern decisions justify the conclusion that railway trainmen assume the risk of being injured by being brought in contact with erections or other objects of a permanent character, situated so near the track that such trainmen are liable to be brought into contact with them while upon the engine or cars in the ordinary discharge of their duties, unless special caution is taken on their part to prevent their heads, bodies or limbs from extending too far outward beyond the limits of the locomotive or car on which they are riding: always assuming, as in other cases, that they have knowledge of such obstructions, or that the character of their experience has been such that knowledge may be fairly presumed, or fairly imputed to them. As already seen,³⁶ this assumes that such objects are of a permanent nature, and are not placed or left in position by the special or *casual negligence* of the representative of the railway company charged with the duty of keeping its track in a reasonably safe condition. Under the application of this rule, risks of danger from the following objects have been put upon the killed or injured employé:—The risk, on the part of a yardmaster, of being knocked from a moving train in a railway-yard, by an *electric-light pole*, erected too near the track;³⁷ the risk, on the part of a street-railway motor-man, of being killed by colliding with a *post* located too near the track, while riding on the step of the front platform of the car, leaning outward and looking backward underneath the car, he being under no necessity or duty of being in that position;³⁸ the risk of being brought into contact with a *cattle-guard*, while stooping on the lower step of a car to throw off a defective brake, where he is aware that a large number of cattle-guards are dangerous because of their proximity to the track, and that in this regard they are all substantially alike, although he does not know that the particular cattle-guard is so near the track as to be dangerous;³⁹ the risk of coming in contact with *wing fences* at cattle-guards, while hanging low on a ladder at the side of a car, in order to find out the cause of the car scraping the road-bed, which scraping the brakeman hears;⁴⁰ the risk of injury or death

³⁵ *Darling v. New York &c. R. Co.*, 17 R. I. 708; s. c. 24 Atl. Rep. 462.

³⁶ *Ante*, § 4618.

³⁷ *Blackstone v. Central &c. R. Co.*, 112 Ga. 762; s. c. 38 S. E. Rep. 79. See also, *Anderberg v. Chicago &c. R. Co.*, 98 Ill. App. 207.

³⁸ *Sundy v. Savannah St. R. Co.*, 96 Ga. 819; s. c. 23 S. E. Rep. 841.

³⁹ *Missouri &c. R. Co. v. Somers*, 71 Tex. 700; s. c. 9 S. W. Rep. 741; s. c. on subsequent appeal, 78 Tex. 439; 14 S. W. Rep. 779.

⁴⁰ *McKee v. Chicago &c. R. Co.*, 83

caused by a collision with a *skidway* maintained by a lumber company, on a level with the floor of a passenger-car, twenty-nine inches distant from it, where a brakeman on the passenger-car, after setting his brake, leans over and looks under the car to observe the effect of setting it, but without special reason, he having notice of the presence of the skidway;⁴¹ the risk, on the part of a locomotive-engineer, of being struck by a *wooden post* four feet from the track and two feet from the tender-beam, put up as a temporary support to a bridge;⁴² the risk, on the part of a brakeman, of coming into collision with a *projecting awning* at a station, while climbing a car which had been received from another road, and which was higher than others, and had a side-ladder, but with which kind of car he was familiar;⁴³ the risk, on the part of a freight-brakeman, of coming into contact with a *post* situated near the track, he being well acquainted with its position, whether he actually knows the danger or not;⁴⁴ the risk, on the part of an experienced brakeman who knows of a bridge, and knows further that cars may have only side-ladders, of coming into contact with a *pillar* of such *bridge*, while getting down from the top of a car by means of a side-ladder;⁴⁵ the risk, on the part of a switchman, of the possibility of coming into contact with *switches* or *structures* near the track, when boarding or riding upon freight-cars;⁴⁶ the risk, on the part of a brakeman unacquainted with the yards, of being caught between a car on the side of which he is riding, in the performance of his duty as brakeman, and a *fish-chute* situated so near the track that there is not sufficient room to allow his body to pass between it and the car;⁴⁷ the risk, on the part of a brakeman on a logging-train, who has knowledge of the negligence of the company in leaving a *tree* standing too close to the track, of being killed in consequence of the logs loaded upon his cars coming into contact with the tree, where he negligently loads the logs on his train so that they will strike the

Iowa 616; s. c. 13 L. R. A. 817; 10 Rail. & Corp. L. J. 472; 48 Am. & Eng. R. Cas. 154; 50 N. W. Rep. 209 (excellent dissenting opinion by Beck, C. J., on the ground that the preservation of human life and the protection of the property of the railway company required the deceased to perform this duty, and to do it promptly).

⁴¹ Walker v. Redington Lumber Co., 86 Me. 191; s. c. 29 Atl. Rep. 979 (action by brakeman against lumber company).

⁴² Thain v. Old Colony R. Co., 161 Mass. 353; s. c. 37 N. E. Rep. 309.

⁴³ Fisk v. Fitchburg R. Co., 158

Mass. 238; s. c. 33 N. E. Rep. 510 (both at common law and under the Massachusetts Employers' Liability Act).

⁴⁴ Austin v. Boston & C. R. Co., 164 Mass. 282; s. c. 41 N. E. Rep. 288.

⁴⁵ Bell v. New York & C. R. Co., 168 Mass. 443; s. c. 47 N. E. Rep. 118.

⁴⁶ Dacey v. New York & C. R. Co., 168 Mass. 479; s. c. 47 N. E. Rep. 418.

⁴⁷ Phelps v. Chicago & C. R. Co., 122 Mich. 171; s. c. 81 N. W. Rep. 101 (the plaintiff assumed the risk of riding upon the side of the car, and the company was not liable for his injuries).

tree;⁴⁸ the risk, on the part of a brakeman on a dirt-train, of coming into contact with *trees* standing near a temporary track laid for hauling dirt through the woods, where trees are standing all along the track on both sides, and can easily be seen;⁴⁹ the risk, on the part of a brakeman, of being brought into contact with a *cattle-chute* near a siding, where the danger is obvious, and he has passed the place almost daily for nearly two months, and has frequently taken cars out upon the siding;⁵⁰ the risk incident to the existence of "*clearing-posts*" between the switch-tracks and the main tracks along the line of the road, although the employé does not know of the existence of such a post at a particular switch;⁵¹ the risk, on the part of a switchman engaged in switching cars and familiar with the surroundings, in descending from a moving car, knowing that he must strike a *post* near the track if the train does not stop, and knowing that the engine is defective in that clouds of steam escape from it, obstructing the vision so as to prevent the engineer from seeing his signal to stop,—of being struck by the post in consequence of the failure of the engineer to see his signal;⁵² the risk, on the part of a brakeman, of being injured by being struck by a *snow-bank* left along the sides of the track by a snow-plow.⁵³

§ 4756. **Risk of Lateral Objects Too Near the Track, when Not Assumed.**—On the other hand, on a principle already considered,⁵⁴ a railway employé does not assume the risk of injury from objects placed or left too near the track through the *casual*, *unforeseen*, and *unanticipated negligence* of the railway company, or of those servants of the company for whose negligence it stands responsible to other of its servants: by which is here meant such negligence as the servant, rightfully acting on the presumption that the master will do his duty, is not bound to foresee and provide against, unless he knows, or has good reason to believe, that the source of danger exists. Within this category come such objects as a *switch-stand and target* so near the track that at times it will come in contact with passing trains, especially where the rules of the company prohibit the erection of such

⁴⁸ Powers v. Thayer Lumber Co., 92 Mich. 533; s. c. 52 N. W. Rep. 937.

⁴⁹ Manning v. Chicago &c. R. Co., 105 Mich. 260; s. c. 2 Det. Leg. N. 109; 63 N. W. Rep. 321.

⁵⁰ Boyd v. Harris, 176 Pa. St. 484; s. c. 35 Atl. Rep. 222; 38 W. N. C. (Pa.) 397; 4 Am. & Eng. R. Cas. (N. S.) 472 (brakeman presumed, as matter of law, to have knowl-

edge of the danger, by reason of the known location of the source of it).

⁵¹ Scidmore v. Milwaukee &c. R. Co., 89 Wis. 188; s. c. 61 N. W. Rep. 765.

⁵² Pennington v. Detroit &c. R. Co., 90 Mich. 505; s. c. 51 N. W. Rep. 634.

⁵³ Dowell v. Burlington &c. R. Co., 62 Iowa 629.

⁵⁴ Ante, § 4618.

objects within six feet of the track;⁵⁵ a *footboard* of a *coal-chute* so near the track that a brakeman, when descending a ladder in the discharge of his duty, came in contact with it and was killed, it being impracticable for him to use the ladder on the opposite car, which he was required to do by the rules of the company, because it was at the rear end of the car;⁵⁶ a *telegraph-pole* so near the track that a brakeman was brought into contact with it while climbing the ladder on the side of a freight-car, he not being aware of its dangerous situation, and there being no other like obstructions along the road from which he might be charged with notice;⁵⁷ a *tree* negligently allowed to stand so near the track that, by its falling, it may throw an engine off the track and injure a person employed thereon;⁵⁸ a *fish-chute* situated so near the main track outside of a yard as to come in contact with the body of a brakeman upon a moving train, he not being aware of its situation, and rightfully presuming that the track was free from such dangers;⁵⁹ a *cattle-chute* similarly situated, and so near the track that the protrusion of the body of a brakeman while moving over a running freight-train may come in contact with it;⁶⁰ a *trestle* so near the track that a brakeman, while descending a moving freight-car by means of a side-ladder, was scraped off by it;⁶¹ a *water-tank* which,

⁵⁵ *Boss v. Northern &c. R. Co.*, 2 N. D. 128; s. c. 49 N. W. Rep. 655. So held where the brakeman had always worked at night, and the switch, not being used, was not provided with a light, and the injury occurred at a time when his attention was momentarily withdrawn from his own safety by reason of instructions which he was giving to a new employé: *Colf v. Chicago &c. R. Co.*, 87 Wis. 273; s. c. 58 N. W. Rep. 408.

⁵⁶ *Chicago &c. R. Co. v. Stevens*, 189 Ill. 226; s. c. 59 N. E. Rep. 577; aff'g s. c. 91 Ill. App. 171.

⁵⁷ *Potter v. Detroit &c. R. Co.*, 122 Mich. 179; s. c. 81 N. W. Rep. 80; s. c. rev'd for misconduct of counsel, 82 N. W. Rep. 245. To the same effect, see *Whipple v. New York &c. R. Co.*, 19 R. I. 587; s. c. 35 Atl. Rep. 305; 5 Am. & Eng. R. Cas. (N. S.) 517. This case holds that a brakeman does not assume the risk of injury from a *telegraph-pole* planted so near the track as not to admit of the passage of a person *climbing* a ladder on a passing freight-car, though distant enough to admit of the passage of a person standing upright on the ladder, where he does not actually know of

its dangerous proximity and has never attempted to pass the pole on the side-ladder of a car, and his only opportunity of judging of its proximity was while passing it on foot and on the top of moving cars. See also, *Crandall v. New York &c. R. Co.*, 19 R. I. 594; s. c. 5 Am. & Eng. R. Cas. (N. S.) 543; 35 Atl. Rep. 307.

⁵⁸ *Texas &c. R. Co. v. Vallie*, 60 Tex. 481.

⁵⁹ *Phelps v. Chicago &c. R. Co.*, 122 Mich. 178; s. c. 7 Det. Leg. N. 452; 84 N. W. Rep. 66; rev'g on rehearing s. c. 122 Mich. 171; 81 N. W. Rep. 101; and aff'g a judgment for plaintiff.

⁶⁰ *Wood v. Louisville &c. R. Co.*, 88 Fed. Rep. 44; s. c. 11 Am. & Eng. R. Cas. (N. S.) 525 (brakeman not required to make a nice calculation of inches to determine whether his body may pass the object in safety or not, nor required to be on the lookout, unless particularly warned of the danger; but company under the duty of seeing that *cattle-chutes* are not built so close to the track as to endanger its trainmen in the performance of their duties).

⁶¹ *Robel v. Chicago &c. R. Co.*, 35 Minn. 84 (questions of negligence

in consequence of the track having been widened, stood too near the track, so that a brakeman in the night-time, while in the car and under the orders of the conductor, having heard a noise which caused him to think that something was wrong, and having put his head out of the car-window to see what it was, was struck in the head by the tank;⁶² a *station-limit board* so near the track that a fireman is struck by it while leaning out of the gangway to inspect the condition of a hot-box under the direction of the engineer;⁶³ and also the objects noted in the margin.⁶⁴

§ 4757. Risk of Injury from Cars Negligently Left Standing on Side-Tracks.—One decision, seemingly untenable, holds that an experienced railway employé assumes the risk of being injured from coming into contact with cars of unusual width which are left standing on a side-track, while coming down the side-ladder of a freight-car in the dark, where he knows the size of the cars used by the company and the use to which they are put, and they are customarily received and stored on the side-tracks.⁶⁵ Better judicial opinion is to the effect that the railroad company will be liable to the brakeman injured by this species of negligence.⁶⁶

and contributory negligence were for the jury).

⁶² *Walsh v. Oregon R. & C. Co.*, 10 Or. 200 (question of negligence of brakeman a proper question for the jury, and nonsuit set aside).

⁶³ *Central Trust Co. v. East Tennessee & C. R. Co.*, 73 Fed. Rep. 661 (fireman not chargeable with negligence if he did not, in fact, know the location of the board).

⁶⁴ *Texas & C. R. Co. v. Kenna* (Tex. Civ. App.), 52 S. W. Rep. 555 (no off. rep.) (*buildings* in dangerous proximity to the track); *San Antonio & C. R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324; s. c. 62 S. W. 561 (*cattle-guard* so near the track as to render it "possible" for the employé to be struck thereby, provided he did not know that it was "probable" that he would be so struck); *Nance v. Newport & C. R. Co.*, 13 Ky. L. Rep. 554; s. c. 17 S. W. Rep. 570 (no off. rep.) (*beam* projecting from the side of an old warehouse ten or twelve inches over the edge of cars as they pass); *Chicago & C. R. Co. v. Cleveland*, 92 Ill. App. 308 ("*flag-shanty*" so near the track as to bring a trainman in contact with it while in the dis-

charge of his ordinary duties on the train). In all these and many like cases the trainman is entitled to presume, in the absence of knowledge to the contrary, or circumstances which ought to put him on his guard, that the railway company has done its duty and kept its track clear of such dangerous and death-dealing objects: *Phelps v. Chicago & C. R. Co.*, 122 Mich. 178; s. c. 7 Det. Leg. N. 452; 84 N. W. Rep. 66; rev'g on rehearing s. c. 122 Mich. 171; 81 N. W. Rep. 101; and aff'g a judgment for plaintiff; *Texas & C. R. Co. v. Kenna* (Tex. Civ. App.), 52 S. W. Rep. 555 (no off. rep.); *San Antonio & C. R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324; s. c. 62 S. W. Rep. 561; *Chicago & C. R. Co. v. Cleveland*, 92 Ill. App. 308; *Gulf & C. R. Co. v. Darby*, 28 Tex. Civ. App. 413; s. c. 67 S. W. Rep. 446.

⁶⁵ *Content v. New York & C. R. Co.*, 165 Mass. 267; s. c. 3 Am. & Eng. R. Cas. (N. S.) 369; 43 N. E. Rep. 94.

⁶⁶ *St. Louis & C. R. Co. v. Biggs*, 53 Ill. App. 550; *Ryan v. New York & C. R. Co.*, 88 Hun (N. Y.) 269; s. c. 68 N. Y. St. Rep. 260; 34 N. Y. Supp. 665 (brakeman injured by be-

§ 4758. **Risk of Injury from Coming into Contact with the Walls and Roofs of Tunnels.**—If a railway tunnel is of uniform height and width throughout its length, and if a trainman has knowledge of that height and width, or if circumstances exist from which knowledge will be presumed,—as where he has been in the constant habit of passing through it, back and forth,—he will, on principle, be deemed to accept the risk of injury from coming into contact with its roof or walls. If he does not know the height and width of the tunnel, but sees that the entrance to it is high enough to permit his safe passage through it while standing on the top of a train, he has a right to assume, in the absence of notice to the contrary, that it is of such height throughout.⁶⁷ The *contributory negligence* of the killed or injured employé, in riding in an improper and dangerous position, may bar his recovery,—as where he took his seat on the top of a loaded car instead of on a seat provided for him, where he might have ridden in safety.⁶⁸

ing struck by a *board* projecting from a car so standing, which had worked loose in consequence of the stake which should have held it in its proper place, being decayed, rotten and dozy); *Henry v. Wabash & C. R. Co.*, 109 Mo. 488; s. c. 19 S. W. Rep. 239 (fireman injured in consequence of his engine coming in contact with a *freight-car* left on a side-track without being properly secured, and moved by its own weight, or by the wind, upon the main track).

⁶⁷ *Hunter v. New York & C. R. Co.*, 116 N. Y. 615, 619; s. c. 23 N. E. Rep. 9; 6 L. R. A. 246; 41 Am. & Eng. R. Cas. 248; 27 N. Y. St. Rep. 729 (plaintiff testified that he was sitting down when the accident occurred, as he knew was necessary, which posture would have made his body about four feet high, and the court applied the rule that it could take judicial notice of the height of the human body in that posture, and held a verdict for the plaintiff erroneous on the plaintiff's own theory of the accident, and ordered a new trial, it appearing that the lowest arch in the tunnel cleared the top of the car by four feet seven inches). In another case the conductor of a freight-train was injured by reason of his head coming in contact with a rock in the roof of a tunnel, while riding on his train seated on the top of the side of the

cupola of the caboose, where he had taken his station in order that he might keep a lookout ahead and that the engineer might see him. His train had already passed through two or three tunnels and the one in which he was injured was at a sufficient height at the entrance to allow his safe passage in the position which he had taken; but, after proceeding in that position for about fifty feet into the tunnel, his head came in contact with the rock and he was knocked off and run over by the train. He had not been notified that the height of the tunnel was not uniform, and had no knowledge that such was the case. The evidence tended to show that, while the position of the plaintiff at the time he was struck was not improper, it was customary for the trainmen riding on the top of a train, in passing through a tunnel, to lie down, and that it was the duty of the man in charge of a train, as the plaintiff was, to acquaint himself with the condition of the road over which he ran. It was held that the question of the *contributory negligence* of the plaintiff was properly submitted to the jury: *Mexican & C. R. Co. v. Eckman*, 42 C. C. A. 344; s. c. 102 Fed. Rep. 274.

⁶⁸ *Foster v. Onderdonk*, 54 Ill. App. 254.

§ 4759. **Risk of Injury from being Brought into Contact with Mail-Cranes.**—This is a frequent source of danger, especially to passengers and bystanders, and has been considered in a former volume.⁶⁹ If a railroad company erects mail-cranes of a given pattern and at a stated and uniform distance from its cars, and its employes have acquired knowledge of the location and the distance from the cars of these objects, they may well be deemed to have assumed the risk of injury from them, and will not be able to recover damages for such an injury from the company, although other companies may have adopted mail-cranes which rise or fall automatically when not in use,—especially if it be made to appear that the pattern of crane which caused the injury was more efficient for the purposes for which such appliances are designed.⁷⁰ But where a particular mail-crane is negligently erected nearer the track than the ordinary ones,—as where it is within ten inches of the cab of the engine, while none of the others are situated nearer than seventeen inches,—a trainman does not, in the absence of knowledge of its dangerous position, assume the risk of being struck by it.⁷¹ On the other hand, a railway company is not liable for the death of a brakeman caused by being knocked from the top of a freight-car on which he was sitting, by a mail-bag suspended from a mail-crane, unless the mail-bag was hung closer to the track than was required for the mail-catcher to take it as the mail-car passed.⁷² But if he does not have knowledge of the specially dangerous position of the particular mail-crane which causes the injury, he will not be held guilty of contributory negligence, as matter of law, in failing to keep away from it, where his attention is engaged in the performance of his duty,—as where the bow of it extends to within seven inches of the side of the cab of the locomotive, and the fireman, engaged in his duties therein, comes in contact with it and is killed.⁷³

§ 4760. **Risk of Injury from Overhead Wires.**—The risk of injury from overhead wires stretched across a railway-track is not assumed by a railway trainman unless he has knowledge, or the reasonable means of knowledge, of this source of danger.⁷⁴

⁶⁹ Vol. II, § 1847.

⁷⁰ *Sisco v. Lehigh &c. R. Co.*, 145 N. Y. 296; s. c. 64 N. Y. St. Rep. 708; 39 N. E. Rep. 958.

⁷¹ *International &c. R. Co. v. Stephenson*, 22 Tex. Civ. App. 220; s. c. 54 S. W. Rep. 1086.

⁷² *Louisville &c. R. Co. v. Milliken*, 21 Ky. L. Rep. 489; s. c. 6 Am. Neg. Rep. 526; 14 Am. & Eng. R. Cas. (N. S.) 742; 51 S. W. Rep. 796 (no off. rep.).

⁷³ *Brown v. New York &c. R. Co.*, 166 N. Y. 626; aff'g s. c. 59 N. Y. Supp. 672; 42 App. Div. (N. Y.) 548; 6 Am. Neg. Rep. 614.

⁷⁴ *Erslew v. New Orleans &c. R. Co.*, 49 La. An. 86; s. c. 21 South. Rep. 153; *Stoltenberg v. Pittsburg &c. R. Co.*, 165 Pa. St. 377; s. c. 25 Pitts. L. J. (N. S.) 295; 36 W. N. C. (Pa.) 87; 30 Atl. Rep. 980 (directed to make repairs on a dangerous car standing on a side-track,

§ 4761. **Risk of Injury from Other Overhead Objects.**—Railway trainmen assume the risk of injury from other overhead objects, or do not assume such risks, under the application of principles already detailed.⁷⁵ For example, a railway brakeman who knew that the car on top of which he was riding was larger than the ordinary cars; that the projecting roof of a station-house was not very far from the cars; that there was danger from it; that the train was approaching it; and who, in his application for employment, had undertaken, as soon as possible, to make a careful examination of all things near the tracks, so that he might understand the dangers from them,—was held to have assumed the risk of being knocked off the car by his head coming in contact with the cornice of the projecting roof;⁷⁶ and the conclusion was the same where a railway employé was killed by coming in contact with an elevator-roof or awning projecting over a side-track upon which he was engaged in moving cars, of which he was well aware,—the conclusion being that, by continuing in the employment, he assumed the risk of being killed by it.⁷⁷ A worse decision is to the effect that a brakeman on a train of a construction company, who knows of the existence of a *limb of a standing tree* which projects part way over a temporary track, assumes the risk of being killed or maimed by this species of railway negligence, and waives any claim for damages against his employer by continuing in the employment without protest, complaint, or promise that such limb shall be removed.⁷⁸ But the courts

and told that it would remain there for several hours,—not guilty of contributory negligence in failing to guard against being struck by the car, in consequence of failing to guard against coming in contact with a wire stretched across the track when the car is put in motion, the view being obscured by smoke and cinders coming into his face). That it is negligence in the railroad company to allow wires or guys to be stretched across the track so low that men on the top of cars in the discharge of their duty may be brought in contact with them,—see *New York & C. R. Co. v. O'Leary*, 93 Fed. Rep. 737; s. c. 35 C. C. A. 562; 14 Am. & Eng. R. Cas. (N. S.) 718; *Stoltenberg v. Pittsburgh & C. R. Co.*, 165 Pa. St. 377; s. c. 25 Pitts. L. J. (N. S.) 295; 36 W. N. C. (Pa.) 87; 30 Atl. Rep. 980 (negligence if it can be reasonably anticipated by the company that some person will be on the top of a car to make repairs); *Burns v. Merchants' & C. Oil Co.* (Tex. Civ. App.), 63 S. W.

Rep. 1061 (negligence not to station a watchman when cable running between two buildings and over a railroad-track is lowered for repairs). Untenable decision to the effect that it is not evidence of negligence to leave a telegraph-wire extended across the track about five feet above the top of a train of freight-cars, on a street used by the company in running its trains into the wharves of several steamboat companies, whereby an employé upon the top of one of the cars in the discharge of his duty is killed: *Dalton v. Receivers*, 4 Hughes (U. S.) 180.

⁷⁵ *Ante*, §§ 4618, 4640, *et seq.*

⁷⁶ *Quinn v. New York & C. R. Co.*, 175 Mass. 150; s. c. 55 N. E. Rep. 891.

⁷⁷ *Clark v. St. Paul & C. R. Co.*, 28 Minn. 128.

⁷⁸ *Woodell v. West Virginia Imp. Co.*, 38 W. Va. 23; s. c. 17 S. E. Rep. 386. Compare *Pittsburgh & C. R. Co. v. Parish*, 28 Ind. App. 189; s. c. 62 N. E. Rep. 514 (circumstances under

have not in all cases put upon the killed or injured employé the risk of such negligence or wantonness of the employer. Circumstances have been found where, in the case of a brakeman being knocked from the top of a car, where he had gone to set the brake, by a *steam-pipe* connecting two buildings of the railway company and extending across the track, a negative finding that he was not guilty of contributory negligence was deemed to be sustained by the evidence.⁷⁹

§ 4762. **Risk of Injury from Objects Too Near Street-Railway Tracks.**—A regrettable disposition to put the negligence of the master upon the servant has resulted in the conclusion that a *conductor* of a street-car who has been for some time in the service, and who knows of the presence of a *tree* close to the track, assumes the risk of the danger of being brought in contact with it while in the discharge of his duties.⁸⁰ On the other hand, judicial severity has relaxed itself to the extent of holding that the conductor of a street-car, whose duty it is to collect fares while standing on the running footboard of an open car, does not assume the risk of being killed by a pole planted near the track to suspend an overhead wire, which is placed several inches closer to the track than the other poles, where he is ignorant of such fact, and could not by reasonable diligence have ascertained it.⁸¹

which it was held that a freight-conductor did not necessarily assume the risk of injury from a *limb of a tree* negligently allowed to project over the track, and where it was further held that whether he assumed the risk depended upon his knowledge of the obstruction at the time of the injury rather than at some prior time).

⁷⁹ *Renne v. United States Leather Co.*, 107 Wis. 305; s. c. 83 N. W. Rep. 473. In this case, an *instruction* that if the jury should find that the nearness of the pipe to the car was a danger to which the plaintiff was exposed in the performance of his duty, and was danger which was known and comprehended by him, or was so open and obvious that, considering his age, intelligence, experience, judgment and discretion, he ought, in the exercise of reasonable care, to have known it, then he assumed the risk,—was proper: *Renne v. United States Leather Co.*, *supra*. See *Van Duzen Gas & C. Engine Co. v. Schellies*, 61 Ohio St. 298. See also, *Smith v. Newark Ice & C. Co.*, 6 Ohio N. P. 528 (recovery for

an injury from a projection constructed over the doorway of a railway-building for the purpose of protecting the employés in loading and unloading a car standing upon the switch).

⁸⁰ *Hall v. Wakefield & C. R. Co.*, 178 Mass. 98; s. c. 59 N. E. Rep. 668. Another court has, with equal propriety, held that a conductor of a street-car is, as a matter of law, guilty of contributory negligence in standing upon the running-board of an open car in such a position as to be struck by a car upon the adjoining track which was 37½ inches distant from the track on which his car was standing, where he had been a conductor for nine years, although he had never before worked on an open car, and the open cars were wider than the closed ones: *Fletcher v. Philadelphia Traction Co.*, 190 Pa. St. 117; s. c. 43 W. N. C. (Pa.) 519; 5 Am. Neg. Rep. 721; 42 Atl. Rep. 527.

⁸¹ *Pikesville & C. R. Co. v. State*, 88 Md. 563; s. c. 5 Am. Neg. Rep. 358; 42 Atl. Rep. 214.

ARTICLE IV. ACCEPTING OR NOT ACCEPTING THE RISK OF OTHER INJURIES IN RAILWAY SERVICE.

SECTION

- 4765. Assumption of risk of defects in locomotive-engines.
- 4766. Other risks assumed and not assumed by locomotive-engineers.
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SECTION

- 4781. Railway track-repairers assume risk of being struck by approaching trains.
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- 4795. Risks assumed by railway and street-railway conductors.
- 4796. Various other risks assumed by railway employés.
- 4797. Still other risks assumed by railway employés.

§ 4765. Assumption of Risk of Defects in Locomotive-Engines.—Some care will be necessary in dealing with the decisions which have

been collected under this head. In the first place, it will be necessary to discriminate between the cases of the engineer, the fireman, and the "hostler." Nor can the discordant decisions be reconciled on any principle of law or sense. On the one hand, it has been held that an experienced *locomotive-engineer* has no right to presume that his engine is in good condition, in so far as there are defects which are obvious,—such as the fact that the pilot is raised seven or eight inches above the track, when it should be only four inches.¹ On the other hand, there may be defects in a locomotive-engine which are open to observation, and yet they may be of such a character that a person having the skill and experience necessary to run the engine may not be presumed to be able to understand or appreciate them, for lack of a sufficient knowledge of mechanical principles,—as where the engine is topheavy or unequally balanced, or the boiler unduly elevated above the rails.² If we turn from the case of the engineer to that of the *fireman*, who may be presumed not to have the same degree of knowledge of the engine as that possessed by the engineer, or the same amount of general mechanical skill to enable him to appreciate the dangers springing from particular defects,—we find that it has been held, in a case where a fireman was injured in consequence of a defect in a wheel of the engine, that the fact that the wheel was open to his inspection, and was so worn as to be more than ordinarily dangerous, did not defeat his recovery of damages, because it was a matter of skill and mechanical knowledge to determine how much wear the wheel would stand, and the fireman was not an expert.³ Coming back to the case of the *engineer*, we find judicial opinion to the effect that he does not assume the risk of danger arising from a defect in the engine which should have been discovered by the company in the exercise of the care which the law puts upon it, where the engineer was not aware of it, and did not have time to inspect or examine the engine before using it.⁴ On the other hand, where the engineer knew of the dangerous condition of the engine, in consequence of its having a defective boiler, but, nevertheless, remained in the employment of the railroad company for months thereafter, it was held that he assumed the risk of being injured by that source of danger in using the locomotive.⁵ Turning now to the case of a railway servant called

¹ *Fordyce v. Edwards*, 60 Ark. 438; s. c. 30 S. W. Rep. 758.

² *Galveston &c. R. Co. v. Smith* (Tex. Civ. App.), 57 S. W. Rep. 999 (no off. rep.).

³ *Bridges v. St. Louis &c. R. Co.*, 6 Mo. App. 389.

⁴ *Missouri &c. R. Co. v. Durlin*

(Tex. Civ. App.), 50 S. W. Rep. 1034 (no off. rep.).

⁵ *Bridges v. Tennessee Coal &c. R. Co.*, 109 Ala. 287; s. c. 19 South. Rep. 495. See also, *Smalls v. Southern R. Co.*, 115 Ga. 137; s. c. 41 S. E. Rep. 492 (where plaintiff's testimony shows that he was fully aware

a *hostler's helper* employed in switching engines in railroad-yards, we find that it has been held that, while he assumes the ordinary hazards incident to his employment, and is bound, in emergencies, to protect himself against obvious dangers of whatever character, yet he is not under the duty of inspecting the engines about which he works for the purpose of discovering hidden and unapprehended sources of danger.⁶ Returning to the case of an *engineer* who has been killed by a derailment of his engine, in consequence of a negligent *defect in the track*, we find that he has been exonerated from the charge of contributory negligence although he knew that the air-brake was out of order, and although, if it had been in order, the accident might have been prevented.⁷

§ 4766. **Other Risks Assumed and Not Assumed by Locomotive-Engineers.**—A locomotive-engineer assumes the risk of propelling his engine over a high trestle, the end of which is only 120 feet from a switch, as the danger is open and obvious;⁸ the risk of danger from a patent defect in his engine, which, under ordinary circumstances, he ought to have discovered before starting on the trip, although he discovered it afterwards and shortly before the accident in which he was injured;⁹ the risk attendant upon going out on the running-board of an old and hard-running engine while it is in motion—one that is

of the defective condition of a locomotive, and voluntarily assumed the risk, a judgment of nonsuit was proper).

⁶ *Atchison & C. R. Co. v. Mulligan*, 67 Fed. Rep. 569; s. c. 14 C. C. A. 547.

⁷ *Flynn v. Kansas City & C. R. Co.*, 78 Mo. 195; s. c. 47 Am. Rep. 99. On the other hand, in a jurisdiction where risks are put upon employes with severity, we find a holding to the effect that an *experienced engineer*, familiar with the rules and regulations of the company and with the signals adopted for his protection, and who knows that the air-brake under his control is ordinarily sufficient to stop the train, and that if that fails the conductor's valve is usually sufficient for the purpose, assumes the risk of an unexpected, unusual, and unexplained failure of the air-brake to work: *Whalen v. Michigan & C. R. Co.*, 114 Mich. 512; s. c. 4 Det. Leg. N. 653; 72 N. W. Rep. 323. See also, *Illinois & C. R. Co. v. Neer*, 26 Ill. App. 356. In another jurisdic-

tion, the pendulum swings backward as far in the opposite direction, the court holding that where a railway employé undertakes to run a defective engine to the machine-shop for repairs, the rule of law relating to his negligence, knowledge of the defect and acceptance of the risk of the employment, is the same rule which applies in other cases of the use of defective machinery; that it is the duty of the company to furnish safe machinery in the performance of all classes of duties which employes are called upon to perform; and that the company is under this duty with respect to the removal of a disabled engine into the shop for repairs: *Houston & C. R. Co. v. O'Hare*, 64 Tex. 600; but this is contrary to the principles already expounded: *Ante*, §§ 4616, 4617.

⁸ *Louisville & C. R. Co. v. Stutts*, 105 Ala. 368; s. c. 17 South. Rep. 29.

⁹ *Fordyce v. Edwards*, 65 Ark. 98; s. c. 11 Am. & Eng. R. Cas. (N. S.) 521; 44 S. W. Rep. 1034.

nearly worn out, and hence liable to jar and sway when in rapid motion.¹⁰ He does not assume the risk nor incur the imputation of contributory negligence, as matter of law, from the fact of not having his train under control at a point where the rules of the company require that he shall have it under control, when he repeatedly signals the brakemen to apply the brakes and they do not respond;¹¹ nor from the fact of running his train into a switch, it being an express-train not scheduled to stop at the station where the switch is, and running at the rate of forty miles an hour, where the switch is unnecessarily placed behind a water-tank, so that the red light showing the switch to be misplaced is not visible until the train is only sixty feet away, notwithstanding a rule requiring engineers to have their trains under control when approaching switches.¹²

§ 4767. **Risk of Danger from Engine or Train being Improperly Manned.**—The principles determining the question of the assumption of risk in this class of cases are not difficult of application. If a railway employé *knows* that the train is improperly manned, or if he knows of a prevailing custom to man it improperly in a given particular, and nevertheless continues in the service without complaint, he accepts the risk of injury from this source,—as where he knows of a prevailing custom of the engineers in the employ of the company to leave their firemen in charge of their engines when switching or other similar work is to be done.¹³ The same conclusion was reached where an experienced fireman was injured in a wreck alleged to have been caused by the negligence of the company in sending out the train *without a conductor*; since the plaintiff, by voluntarily going out with the train, knowing that it had no conductor, accepted the risk of injury from this source.¹⁴ Nor did the *promise of the company* to supply the fireman upon a switching-engine relieve the switchman,

¹⁰ Southern Pac. Co. v. Johnson, 69 Fed. Rep. 559; s. c. 44 U. S. App. 1; 16 C. C. A. 317. For other risks assumed by locomotive-engineers, see Train v. Old Colony R. Co., 161 Mass. 353; Texas &c. R. Co. v. Minnick, 61 Fed. Rep. 635; Manson v. Eddy, 3 Tex. Civ. App. 148; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; Knapp v. Sioux City &c. R. Co., 71 Iowa 41.

¹¹ Louisville &c. R. Co. v. Mothershed, 121 Ala. 650; s. c. 26 South. Rep. 10.

¹² Young v. Syracuse &c. R. Co., 61 N. Y. Supp. 202; s. c. 45 App. Div. (N. Y.) 296.

¹³ Louisville &c. R. Co. v. Kelly, 63 Fed. Rep. 407; s. c. 11 C. C. A. 260 (the conclusion being that the injured brakeman could recover from the company for an injury caused by the fireman left in charge of it, only when the management was below what ought to be required of a fireman, or where his unfitness was known, or should have been known, to the master mechanic or other like representative of the company).

¹⁴ Pointon v. St. Louis R. Co., 90 Ill. App. 623.

at whose request the promise had been made, from the imputation of accepting the risk of the engine being operated without a fireman, where the request was not made from a motive of safety, but for the purpose of avoiding delay in moving trains,—the view being that this was not such a promise to repair a defect or to remove a danger in the service as would prevent the continuance by the switchman in the service from operating to defeat his right to recover damages for injuries sustained in consequence of it.¹⁵ On the other hand, a railroad brakeman does not, by *failing to object* to the substitution of the fireman for the engineer upon the locomotive, in running a short distance from a place where the passenger-coach and baggage-car are left to the end of the trip, consent to such fireman's acting in that capacity, so as to assume additional hazards on account of it.¹⁶ Another court has held that knowledge on the part of a switchman that a switch-engine is operated *without a fireman*, does not of itself, as matter of law, preclude a recovery for injuries resulting from the *failure of the engineer to see signals* because his attention was diverted by the performance of a duty which ordinarily would be performed by the fireman, in the absence of evidence that the operation of the engine in the yard without a fireman was so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as a switchman.¹⁷

§ 4768. **Risk of Working with Insufficient Help.**—Recurring to what has been said upon this subject in its general aspects,¹⁸ and remembering that this is obviously a case for the application of the principle, already considered,¹⁹ that, in order to put upon the employé the assumption of the risk, it is not only necessary that he should know the defect or source of the danger, but it is also necessary that he should have knowledge or experience sufficient to enable him to appreciate the risk of injury proceeding from such source or defect,—we must conclude that the broad statement found in the decision of a Federal Court of Appeals, that the failure of an employer to furnish a sufficient number of employés to assist in certain work is a *patent defect* in the appliances for performing such work, the risk of which is assumed by an employé engaged therein,²⁰ cannot be affirmed as a general principle. For example, a common laborer might be sent

¹⁵ *International &c. R. Co. v. Turner*, 3 Tex. Civ. App. 487; s. c. 23 S. W. Rep. 146.

¹⁶ *Nicolaus v. Chicago &c. R. Co.*, 90 Iowa 85; s. c. 57 N. W. Rep. 694.

¹⁷ *Wright v. Southern &c. R. Co.*,

14 Utah 383; s. c. 46 Pac. Rep. 374; 5 Am. & Eng. R. Cas. (N. S.) 559.

¹⁸ *Ante*, §§ 3758, 3807, 4175. See also, *post*, §§ 4829, 4865, 4868.

¹⁹ *Ante*, § 4652.

²⁰ *Texas &c. R. Co. v. Rogers*, 57 Fed. Rep. 378; s. c. 6 C. C. A. 403.

with a dozen men to repair a bridge or a trestle, and he might know the exact number of men in the gang, and yet his experience might be so limited that he would be utterly unable to determine whether the number sent was sufficient to do the work in safety; whereas the master mechanic, or other vice-principal of the railroad company, would be properly chargeable with the possession of such skill and knowledge; so that, to put upon the common laborer the assumption of the risk of the work proceeding with insufficient help would be sheer injustice. But if the servant is one of a grade who may fairly be required to have knowledge of the number of men required for the safe performance of a given piece of work, then, if he proceeds to do the work with insufficient help, he may fairly be held to assume the risk incident thereto.²¹ The books exhibit a considerable tendency to put upon servants an assumption of the risk of injury from this source, as will be seen from the cases cited in the margin,²² especially in the case of experienced employes, who may be presumed to have equal knowledge with the vice-principal of the company on the subject.²³ But, under some conditions of fact, the courts have held that the risk of working with insufficient help was not assumed by the servant receiving an injury from that source,—as where the danger was not so glaring that an ordinarily prudent man would not have engaged in the work;²⁴ or where a railway train-crew was so depleted that they were on duty nineteen consecutive hours with no time allowed for meals, and the schedule under which the train was run rendered it necessary for some of them to absent themselves to get their meals;²⁵

²¹ As where a section-foreman was sent to load heavy rails on a hand-car with only one assistant, of which he had complained to the superintendent, but only to receive the reply that he could not have another man to help him, and that if he could not do the work they would get another man in his place, and was ruptured while lifting one of the rails: *Atchison &c. R. Co. v. Schroeder*, 47 Kan. 315; s. c. 27 Pac. Rep. 965; 10 Rail. & Corp. L. J. 487.

²² *Richmond &c. R. Co. v. Mitchell* 92 Ga. 77; s. c. 18 S. E. Rep. 290; *Bryan v. Southern R. Co.*, 128 N. C. 387; s. c. 38 S. E. Rep. 914 (four men attempting to load a heavy timber on a car; one of them thought they would be able to load it, but was injured—assumed the risk).

²³ *Eddy v. Rogers* (Tex. Civ.

App.), 27 S. W. Rep. 295 (no off. rep.); *Slavens v. Northern Pac. R. Co.*, 97 Fed. Rep. 255; s. c. 38 C. C. A. 151; *Long v. Coronado R. Co.*, 96 Cal. 268; s. c. 31 Pac. Rep. 170; *Membery v. Great Western R. Co.*, 14 App. Cas. 179; s. c. 58 L. J. Q. B. 563; 61 L. T. 566; 38 Week. Rep. 145; 54 J. P. 244; 7 Rail. & Corp. L. J. 53; *Way v. Chicago &c. R. Co.*, 76 Iowa 393; s. c. 41 N. W. Rep. 51 (where the employe made no complaint, when the circumstances were such that if he had complained other employes who were near by might have been called).

²⁴ *McMullen v. Missouri R. Co.*, 60 Mo. App. 231; s. c. 1 Mo. App. Rep. 230 (Missouri doctrine with respect to contributory negligence of servants).

²⁵ *Pennsylvania Co. v. McCaffery*, 139 Ind. 430; s. c. 38 N. E. Rep. 67.

or where the injured employé complained of the insufficient help, and received an express promise by the representative of his employer to "put him in a safer place in a few days";²⁶ and in the case noted in the margin.²⁷

§ 4769. **Risk of Injury from Switches being Negligently Left Open.**—This species of risk is properly ascribed to the casual negligence of the master which it is not the duty of railway employés to anticipate and foresee, in the absence of circumstances putting them specially upon inquiry; but they may rightfully assume that the company has acted carefully and done its duty in this respect, under a principle already considered,²⁸ except in those jurisdictions where this species of negligence is ascribed to *fellow servants*, the risk of whose negligence other servants assume. It is therefore deemed a special negligence of the master which trainmen are not required to anticipate and the risk of injury from which they do not assume.²⁹ It has been held that a fireman on a passenger-train does not, as matter of law, accept the risk of a switch being left open at night at a place where there is no switch-light to indicate whether the switch is open or closed.³⁰ It has been held, in a case where a brakeman was killed by reason of the train running into an open switch, that the manner of the accident was sufficient to justify a finding of negligence on the part of the company, on the principle *res ipsa loquitur*, in the absence of evidence on its part showing that it had exercised proper care to keep the switch and track at that place in a safe condition.³¹

²⁶ Illinois &c. R. Co. v. Weiland, 67 Ill. App. 332; s. c. 2 Chic. L. J. Wkly. 9; s. c. aff'd, 179 Ill. 609; 54 N. E. Rep. 300.

²⁷ Young v. Syracuse &c. R. Co., 166 N. Y. 227; s. c. 59 N. E. Rep. 828; aff'g s. c. 61 N. Y. St. Rep. 202.

²⁸ *Ante*, §§ 4618, 4654.

²⁹ International &c. R. Co. v. Johnson, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772; Seldomridge v. Chesapeake &c. R. Co., 46 W. Va. 569; Consolidated &c. Co. v. Peterson, 8 Kan. App. 316; Allen v. Boston &c. R. Co., 69 N. H. 271; Young v. Boston &c. R. Co., 69 N. H. 356.

³⁰ Chicago &c. R. Co. v. House, 172 Ill. 601; s. c. 50 N. E. Rep. 151; aff'g s. c. 71 Ill. App. 147. Compare Illinois Cent. R. Co. v. Swisher, 61 Ill. App. 611.

³¹ International &c. R. Co. v. Johnson, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772 [citing McCray v. Galveston &c. R. Co., 39 Tex. 168;

s. c. 34 S. W. Rep. 95; Washington v. Missouri &c. R. Co., 90 Tex. 314; s. c. 38 S. W. Rep. 764; Gulf &c. R. Co. v. Wells, 81 Tex. 685; s. c. 17 S. W. Rep. 511]. Circumstances and location of switch under which a finding by the jury, in substance, that the company owed the brakeman who was killed the duty of inspecting the switch, at least once every six years, and that it was guilty of negligence in failing to do so, would not be set aside on appeal: International &c. R. Co. v. Johnson, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772. Evidence having been introduced that the track at that point was in a defective condition, the burden was on the company to show that the defects had no effect in overturning the car: International &c. R. Co. v. Johnson, *supra*. For a case where a locomotive-fireman was held not to have assumed the risk of running into

§ 4770. Risk of Danger from Absent or Defective Hand-Holds upon Cars.—Whether a railway trainman, whose duty requires him to ascend or descend the cars on the outside of them, assumes the risk of injury from the absence or deficiency of what are usually called hand-holds, though sometimes called hand-rails, turns chiefly on the inquiry whether he knew, or had had ample opportunity to know, of the deficiency or danger of the car in this respect. Where this question is answered in the affirmative, he is deemed to assume the risk of injury from this source, unless he has notified his employer of it, and has received his promise to repair, on the faith of which he has remained in the service; and he is also deemed to assume the risk if he has received injury because he has so remained an unreasonable time after such promise has been given, under a principle already considered;³² or where he acquires knowledge of the source of danger, but nevertheless continues to use the car without objection, although the company has been negligent in failing to repair it.³³

§ 4771. Risk of Injury while Riding on Hand-Cars: Defective Hand-Cars.—Railway servants who ride up and down the track upon hand-cars, assume the risk of coming into collision with trains which they know may come along at that time;³⁴ or with fast trains which they know to be due;³⁵ or with "wild trains" which they know are liable to appear, when it is their duty to look out for them and to protect themselves from them;³⁶ or with freight-trains left standing on the track, where the injured employé wrongfully, and for his

an open switch at a station, where the evidence was conflicting as to whether the train was under control, and he had nothing to do with the speed of the train,—see *Missouri & c. R. Co. v. Follin*, 29 Tex. Civ. App. 512; s. c. 68 S. W. Rep. 810.

³² *Chicago & c. R. Co. v. Travis*, 44 Ill. App. 466; *Wabash & c. R. Co. v. Kastner*, 80 Ill. App. 572.

³³ *Shackelton v. Manistee & c. R. Co.*, 107 Mich. 16; s. c. 2 Det. Leg. N. 557; 64 N. W. Rep. 728; *Carey v. Boston & c. R. Co.*, 158 Mass. 228; s. c. 33 N. E. Rep. 512 (circumstances under which a railway employé assumed the danger of his clothing being caught upon a threaded screw projecting from the handle of a car beyond the end of the nut); *Davis v. Baltimore & c. R. Co.*, 152 Pa. St. 314; s. c. 31 W. N. C. (Pa.) 300; 23 Pitts. L. J. (N.

S.) 339; 53 Am. & Eng. R. Cas. 372; 25 Atl. Rep. 498 (brakeman, by continuing in service upon a freight-train, takes the risk of the want of a platform or guard-railing at the end of a box-car such as is in common use on railroads, but which is used as a caboose); *Crawford v. New York & c. R. Co.*, 23 Ohio C. C. 207 (conductor assumed risk of injury from a caboose, remodelled from a freight-car, which had no platforms, hand-holds, or other safeguards at the ends, where he had used it for more than a year without complaint).

³⁴ *McGrath v. New York & c. R. Co.*, 14 R. I. 357.

³⁵ *Wright v. Southern R. Co.*, 80 Fed. Rep. 260.

³⁶ *Sullivan v. Fitchburg R. Co.*, 161 Mass. 125; s. c. 36 N. E. Rep. 751.

own pleasure, delays returning with the hand-car until it is too dark to see such standing cars;³⁷ or the risk of injury from the hand-car jumping the track, caused by the fact of its being too light, of which fact the injured employé knew, or ought to have known in the exercise of ordinary care and judgment.³⁸

§ 4772. **Risk of Injury from Defects in the Construction and Operation of Elevated Railways.**—Employés of companies operating elevated railroads have been held to assume the risk of dangers of the service under the following circumstances:—Where a plank broke, injuring an employé while engaged in replacing a derailed car, who had worked about the premises for five years and was perfectly familiar with them;³⁹ and where an employé of an elevated-railway company, who had been employed for more than three weeks in a yard which was elevated some distance above the street grade, and who had actual knowledge that it was not in a completed state, but that carpenters were constantly working about it covering it with planking, was injured by falling through one of the uncovered spaces between the tracks;⁴⁰ where an employé fell from a narrow, unguarded walk alongside the track, who had been in the employ of the company for ten years, during which time he had been lampman, brakeman and con-

³⁷ *Slaney v. Duluth & C. R. Co.*, 46 Minn. 384; s. c. 49 N. W. Rep. 187.

³⁸ *Gulf & C. R. Co. v. Williams*, 72 Tex. 159; s. c. 12 S. W. Rep. 172. Or, knowing that the handle of the lever of a hand-car is worm-eaten and defective, assumes the risk of using it while going to a distant place after the close of his day's work: *McGhee v. Bell*, 19 Ky. L. Rep. 267; s. c. 39 S. W. Rep. 823 (no off. rep.); *rev'g* on rehearing s. c. 38 S. W. Rep. 702. Or the danger of coming into collision with a switching-engine, in a switch-yard filled with smoke from adjacent coke-ovens, when he did not stop before entering the smoke and send the flagman forward to reconnoitre: *Woodward Iron Co. v. Herndon*, 130 Ala. 364; s. c. 30 South. Rep. 370. Evidence in the same case not sufficient to warrant the giving of a peremptory instruction for the defendant: *Woodward Iron Co. v. Herndon*, *supra*. That the *fright* with which a fellow servant was seized, while attempting to lift a hand-car from a track in order to avoid a fast train which had sud-

denly appeared around the curve, was not a risk assumed by an employé injured in the operation, since he could not have anticipated that his co-employé would become so frightened that he would let go his hold of the car,—see *International & C. R. Co. v. Newburn*, 94 Tex. 310; s. c. 60 S. W. Rep. 429; *aff'g* s. c. (Tex. Civ. App.), 58 S. W. Rep. 542. The brake of a hand-car was defective, and a section-hand learning of the fact had himself changed to another car. While operating the other car, he was run into by the car having a defective brake while it was being operated by other employés of the company. It was held that the former employé did not assume the risk of being injured by the car having the defective brake: *International & C. R. Co. v. Williams* (Tex. Civ. App.), 34 S. W. Rep. 161 (no off. rep.).

³⁹ *Davey v. Hall & C. Co.*, 122 Mich. 206; s. c. 80 N. W. Rep. 1082.

⁴⁰ *Kennedy v. Manhattan R. Co.*, 145 N. Y. 288; s. c. 64 N. Y. St. Rep. 705; 39 N. E. Rep. 956.

ductor, and the evidence showed that he was familiar with the construction of the walks and had walked along unguarded ones before, including the one from which he fell.⁴¹

§ 4773. **Risks Assumed in Street-Railway Operation.**^a—A conductor on an open street-car assumes, as part of the risk of the employment, an enhancement of the danger from the presence of a passenger on the running-board along the side of the car; and it makes no difference that the passenger is a superintendent of the railroad company, superintending at the time, to the extent of having an eye on the way the car is managed, and that there are seats in the car, so that it is not necessary for him to be on the running-board.⁴²

§ 4774. **Risks of Injury from Absent or Defective Air-Brakes.**—Brakemen assume the risk of injuries in consequence of being obliged to move back and forth upon the tops of cars, in order to perform their duties by means of hand-brakes, in consequence of the cars not being equipped with air-brakes.⁴³ Where the engineer detailed for a trip was assigned to an engine which on examination seemed to be equipped with an efficient air-brake, but which, after starting on the trip, proved to be worthless, which, however, could not be repaired until the engine could be brought back to the starting-point,—the engineer did not, by continuing at his post in order to make the return trip, assume the risk of an accident due to the defectiveness of the air-brake.⁴⁴ So, knowledge on the part of a fireman that the air-brake is defective, is not, as a matter of law, conclusive evidence of negligence on his part in continuing at his post, although the air-brake afterwards proves so defective that the train cannot be stopped within the distance at which a signal can be seen, where the fireman does not know the extent of the defect, and especially where an assurance has been made to him by a representative of the company that the defect will be repaired.⁴⁵

⁴¹ *Nugent v. Brooklyn Union El. R. Co.*, 64 App. Div. (N. Y.) 351; s. c. 72 N. Y. Supp. 67.

^a See *ante*, § 4762; *post*, §§ 4777, 4795.

⁴² *Hall v. Wakefield & Co. St. R. Co.*, 178 Mass. 98; s. c. 59 N. E. Rep. 668.

⁴³ *Rogers v. Louisville & Co. R. Co.*, 88 Fed. Rep. 462.

⁴⁴ *Flynn v. Kansas City & Co. R. Co.*, 78 Mo. 195; s. c. 10 West. Rep. 418. Somewhat to the same effect, see *Pierson v. New York & Co. R. Co.*, 53

App. Div. (N. Y.) 363; s. c. 65 N. Y. Supp. 1039 (holding that under such circumstances the question whether the engineer was negligent in continuing at his post was for the jury).

⁴⁵ *New Jersey & Co. R. Co. v. Young*, 1 U. S. App. 96; s. c. 49 Fed. Rep. 723. That a servant assumed the risk of running an engine backward in the night, without any light or lookout on the forward end of the tender, was held to constitute *no defense to an action* against the

§ 4775. **Other Dangerous Defects on Locomotives or Cars.**—The following have been held to be risks of injuries assumed by railway trainmen:—The risk of being injured in making up trains where the cars are not uniform in size;⁴⁶ the risk of being injured by the projection of a bolt from the end of a car by reason of the fact that the nut which held the opposite end had worked off or been knocked off;⁴⁷ the risk of being caught by a hook on the rear of a locomotive-tender, used for supporting the hose of the air-brake when not coupled, where the object was apparent and its danger was known, and where it had been replaced every time the injured brakeman knocked it off, where he continues to climb over the end of the tender;⁴⁸ the risk of injury from being struck by a bolster on a passing car, which was designed to allow timbers longer than the cars to have room to play while rounding curves, which appliance was properly devised and inspected, but which suddenly worked out and struck the caboose in which the brakeman was.⁴⁹ On the other hand, the following risks were deemed not to have been assumed by the employé under the circumstances stated:—The risk of injury from a defective footboard furnished on a switch-engine for the use of switchmen, the danger not being so apparent that an ordinarily prudent man under the same circumstances would not have used it;⁵⁰ the risk ordinarily attendant on using a bolt with but a single nut to secure a *stirrup* used in getting on and off a car, where the employé did not know that the usual and customary precautions had not been taken to prevent the nut coming off;⁵¹ the risk of being injured in consequence of a defect in a ladder on a freight-car used by brakemen at night, although the defect was so obvious that it would have been discovered by a mechanical inspector if the proper inspection had been made;⁵² the risk of being injured while using a *side-ladder* on a freight-car, where a statute prohibited companies from using such ladders on their own cars and made them liable in damages to employés injured through the use of

master for negligence in failing to supply the engine with *brakes*, where the servant did not know and could not reasonably have known of the absence of brakes: Choctaw & R. Co. v. Holloway, 114 Fed. Rep. 458; s. c. 52 C. C. A. 260.

⁴⁶ Rodgers v. Louisville & C. R. Co., 88 Fed. Rep. 462.

⁴⁷ Mensch v. Pennsylvania R. Co., 150 Pa. St. 598; s. c. 17 L. R. A. 450; 30 W. N. C. (Pa.) 548; 25 Atl. Rep. 31; 53 Am. & Eng. R. Cas. 198.

⁴⁸ Crawford v. Detroit & C. R. Co.,

127 Mich. 312; s. c. 8 Det. Leg. N. 363; 86 N. W. Rep. 817.

⁴⁹ Knox v. New York & C. R. Co., 69 Hun (N. Y.) 93; s. c. 52 N. Y. St. Rep. 730; 23 N. Y. Supp. 198.

⁵⁰ O'Mellia v. Kansas City & C. R. Co., 115 Mo. 205; s. c. 21 S. W. Rep. 503.

⁵¹ Missouri & C. R. Co. v. Bailey, 28 Tex. Civ. App. 609; s. c. 68 S. W. Rep. 803.

⁵² Missouri & C. R. Co. v. Chambers, 17 Tex. Civ. App. 487; s. c. 3 Chic. L. J. Wkly. 99; 43 S. W. Rep. 1090.

such ladders;⁵³ the risk of being injured by a defect in a brake, of which the employé had no notice;⁵⁴ the risk of being injured in consequence of ice and snow around and covering the end-gate of a coal-car, raising the gate at an angle of twenty or thirty degrees, instead of allowing it either to lie flat on the floor of the car or to be perpendicular, the brakeman not knowing of the source of danger until he approached it at the time of the accident.⁵⁵

§ 4776. **Risk of Injury from Collision with Teams where Highways and Railways Cross Each Other.**—It has been held that a railway employé, who knows from daily observation for several years the risk of collision with teams at a grade crossing on account of obstructions to the view in approaching the track, and who makes no request that a switchman be stationed there, or that any other means be taken to diminish the risk, assumes the risk of injuries by such a collision.⁵⁶ So, it has been held that a brakeman cannot recover for personal injuries received while riding on a switching-engine in his ordinary work, caused by collision with a cart at a crossing without gate or flagman, at which freight-cars stood on the side-track in such a position as to hide the engine from the view of persons approaching the crossing, where he had continued in the service for three years, with knowledge of the situation and use of the side-track, and of the obstruction to the view and lack of a gate and flagman.⁵⁷

§ 4777. **Risks Assumed in Electrical-Railway Operation.**^a—It has been held that a person entering the employ of an electric-railway company, knowing that the cars have no fenders or guards, assumes the risks of injury from the want of them.⁵⁸ On the other hand, a brakeman on an electric car does not, as a matter of law, assume the risk of running it down a steep and slippery grade without having a sandman on the car, unless he knows that the brakes and the power to reverse the motion are insufficient to prevent the car from running away, and that a sandman is required.⁵⁹

⁵³ *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288; s. c. 52 Atl. Rep. 531. (Pa.) 20; 23 Am. & Eng. R. Cas. 376; 25 Atl. Rep. 37.

⁵⁴ *Hollingsworth v. Long Island R. Co.*, 91 Hun (N. Y.) 641; s. c. 36 N. Y. Supp. 1126; 70 N. Y. St. Rep. 409.

⁵⁵ See *ante*, §§ 4762, 4773; *post*, 4795.

⁵⁶ *Chandler v. Atlantic & C. R. Co.*, 61 N. J. L. 380; s. c. 4 Am. Neg. Rep. 189; 39 Atl. Rep. 674.

⁵⁷ *Windover v. Troy City R. Co.*, 4 App. Div. (N. Y.) 202; s. c. 38 N. Y. Supp. 591.

⁵⁸ *Rumsey v. Delaware & C. R. Co.*, 151 Pa. St. 74; s. c. 31 W. N. C.

§ 4778. **Risk of Collision with Other Engines, Cars, or Trains.**—Railway employes have been held to have assumed the risk of injuries through railway collisions under the following circumstances:—Where an engineer, required to approach stations with great care, and not being entitled to notice that a train preceding him was late, came into collision with such a train;⁶⁰ where an engineer in charge of a locomotive on the main track was familiar with the manner of using the track, and knew that it was customary to leave cars standing on the side-tracks without the brakes being applied to them, and a car, so left, ran down upon the main track and collided with his engine;⁶¹ where a stock-train, not run upon schedule time, ran into a hand-car, the section-hands upon which were not apprised of the coming of the stock-train, owing to the existence of a fog and to the noise created by the running of the hand-car, where the section-hands knew that such wild trains were to be expected at any time, and that no notice would be given to them;⁶² where an experienced motorman took a car from the barn, by the direction of the dispatcher, *eastward on the west-bound track*, he knowing the rule of all railroads that cars should proceed on the right-hand track, and knowing that it was possible that he might meet a car on that track returning for repairs;⁶³ where a fireman on a passenger-train knew that it was the custom to run the water-train without a conductor, and was injured in a collision between the two trains;⁶⁴ and under the circumstances of the cases cited in the marginal note.⁶⁵ Where the “fellow-servant doctrine” does not

⁶⁰ Illinois Cent. R. Co. v. Neer, 26 Ill. App. 356.

⁶¹ Hewitt v. Flint & C. R. Co., 67 Mich. 61; s. c. 11 West. Rep. 148; 34 N. W. Rep. 659.

⁶² Hinz v. Chicago & C. R. Co., 93 Wis. 16; s. c. 66 N. W. Rep. 718; 3 Am. & Eng. R. Cas. (N. S.) 611. That a railway company is not liable for an injury resulting to an employe from a collision between its trains during a fog, although a better system for giving signals during fogs than the one employed by the company is in existence, where the one employed by it is reasonably safe,—see Kemmerer v. Manhattan R. Co., 81 Hun (N. Y.) 444; s. c. 31 N. Y. Supp. 82; 63 N. Y. St. Rep. 323.

⁶³ Savage v. Nassau Elec. R. Co., 59 N. Y. Supp. 225; s. c. 42 App. Div. (N. Y.) 241; 6 Am. Neg. Rep. 619.

⁶⁴ Gulf & C. R. Co. v. Harriett, 80 Tex. 73; s. c. 15 S. W. Rep. 556.

So, where a collision was brought about through the mistake of a brakeman in giving a signal, this being the negligence of a fellow servant, the risk of which was assumed: Cole v. Rome & C. R. Co., 72 Hun (N. Y.) 467; s. c. 55 N. Y. St. Rep. 245; 25 N. Y. Supp. 276. On the other hand, a motorman does not assume the risk of injury from a collision with the car of a contractor employed in ballasting an electric railway, due to the negligence of the contractor in operating the signals, the railway company retaining the right to *direct the management* of the contractor's cars and signals, and the additional use of the track presenting no obvious danger: Ortlip v. Philadelphia & C. Traction Co., 198 Pa. St. 586; s. c. 48 Atl. Rep. 497.

⁶⁵ Pierson v. New York & C. R. Co., 65 N. Y. Supp. 1039; s. c. 53 App. Div. (N. Y.) 363 (collision with a relief-engine which had been tele-

prevail with respect to railway service, it has been held that a brakeman on a railroad-train does not necessarily assume the risk of dangers incident to the speed at which a train may run; the only dangers assumed by him being such as are incident to the operation of the road in a reasonably prudent and careful manner.⁶⁶

§ 4779. Risks Assumed by Engine and Car Inspectors, Repairers, and Cleaners.—It has been held that inspectors, repairers and cleaners of locomotive-engines and cars assume the risk of injuries in their employment, or are guilty of contributory negligence, under the following circumstances:—Where a car-inspector went, after dark, under cars which were standing upon a side-track in a yard, for the purpose of inspecting them, without giving notice of his intention so to do, and without placing any signal indicating that he was there, in which position a car was pushed against the farther car of the group which he was inspecting, injuring him,—and this, although the railway company may have been guilty of negligence in not stationing a lookout upon the cars which were being run in upon the side-track;⁶⁷ where a car-inspector went between cars to uncouple them, and not to inspect them, and was killed by other cars being pushed against them, such work being outside of his regular employment;⁶⁸ where a car-repairer, under the direction of the foreman, took his position upon a side-track for the purpose of repairing a car, and was injured in consequence of the car being put in motion by the moving of other cars by an engine which entered upon the side-track at the end where no signals had been posted,—the car-repairer being an experienced railroad-hand who had worked in his present position for several weeks, and who knew that the end of the side-track had not been guarded, and knew that engines were likely to enter upon it from that end;⁶⁹ where the helper of a railroad “hostler” went under an engine to clean the ash-pan and was injured in consequence of the insufficient depth of the ash-pit,—its depth, nature, size and condition being known to him from observation and experience;⁷⁰ where a car-repairer

graphed for in consequence of the air-brakes upon an engine refusing to work). But see *Southern R. Co. v. Barr*, 21 Ky. L. Rep. 1615; s. c. 55 S. W. Rep. 900 (no off. rep.) (brakeman riding on tender of backing engine, under orders of engineer, in the night-time, injured by backing of the engine at great speed to pick up lost cars,—*did not accept risk*).

⁶⁶ *Connors v. Burlington & C. R. Co.*, 74 Iowa 383; s. c. 37 N. W. Rep.

966. Similarly, see *Lawhorn v. Millen & C. R. Co.*, 97 Ga. 742; s. c. 25 S. E. Rep. 492.

⁶⁷ *Alabama & C. R. Co. v. Roach*, 116 Ala. 360; s. c. 11 Am. & Eng. R. Cas. (N. S.) 869; 23 South. Rep. 52.

⁶⁸ *Devoe v. New York & C. R. Co.*, 70 App. Div. (N. Y.) 495; s. c. 75 N. Y. Supp. 136.

⁶⁹ *Chicago & C. R. Co. v. McGraw*, 22 Colo. 363; s. c. 45 Pac. Rep. 383.

⁷⁰ *Clay v. Chicago & C. R. Co.*, 56 Ill. App. 235.

went under a car for the purpose of obtaining an appliance to use upon another car, under the direction of his foreman, who had no authority to change the rules as to the places in which work should be done, the repairer knowing that the track was used only for *storing* crippled cars upon which repairs were to be made, and that the work of repairing them was done on other tracks, and knowing that cars were handled upon that track without warning, and while so under the car, was injured by the shunting of another car upon the track without any warning-signal;⁷¹ where a railway employé went under a car remote from the engine, without giving notice to the engineer, for the purpose of fastening a brake-rod in position, knowing the danger attending the act and knowing that no one was charged with the duty of warning him, and was there injured by the starting of the train;⁷² where an employé went under an engine to clean out the ash-pan, knowing that a train standing upon another track would soon enter upon the track upon which such engine was standing, for the purpose of removing therefrom cars which were standing about 120 feet from such engine upon an up-grade, precluding a recovery for his death caused by the cars being put in motion by the train in an attempt to couple them, and by their running down against the engine under which he was;⁷³ and where an engine-wiper, while wiping the engine in broad daylight, was injured in consequence of rubbing his bare hand over small steel splinters on a sliver which projected half an inch beyond the tire of a wheel of the engine, and which extended for six inches around its circumference.⁷⁴

§ 4780. **Risks Not Assumed by Engine and Car Inspectors, Repairers, and Cleaners.**—On the other hand, it has been held that the risk of injury was not assumed by this class of railway employés under the following circumstances:—Where an employé was justified in believing that a train would remain stationary, but it was nevertheless started suddenly and without warning, just as he was in the act of stepping upon one of the cars to wash it;⁷⁵ where a car is raised up for the purpose of being repaired, and a car-repairer goes under it to repair it, but, in consequence of latent defects in the car, which the inspector has negligently failed to discover and mark, it falls and crushes him;⁷⁶ where

⁷¹ *Keenan v. New York &c. R. Co.*, 49 N. Y. St. Rep. 513; s. c. 21 N. Y. Supp. 445; 2 Misc. (N. Y.) 34; s. c. aff'd, 145 N. Y. 190.

⁷² *Norfolk &c. R. Co. v. Graham*, 96 Va. 430; s. c. 31 S. E. Rep. 604.

⁷³ *Seldomridge v. Chesapeake &c. R. Co.*, 46 W. Va. 569; s. c. 14 Am.

& Eng. R. Cas. (N. S.) 639; 33 S. E. Rep. 293.

⁷⁴ *McCain v. Chicago &c. R. Co.*, 76 Fed. Rep. 125; s. c. 40 U. S. App. 181; 22 C. C. A. 99.

⁷⁵ *Chicago &c. R. Co. v. Bingenheimer*, 116 Ill. 226.

⁷⁶ *G. H. Hammond Co. v. Mason*,

the railroad company's foreman, with knowledge that the side-bearings designed to keep the car from tilting were missing, ordered an employé, ignorant of the fact, to go on top of the car, without warning him of the danger, and the car tilted and injured him;⁷⁷ where a railroad company used an engine which, in consequence of being out of repair, was accustomed to move automatically and without warning, and an engine-cleaner, not knowing of the defect, was ordered to go into the pit to clean the engine, and while there it started up, and cut off his fingers;⁷⁸ where a car-repairer, after having planted his signal-flag, went between two cars, standing on a branch track, to repair the bumper of one of them, which was about six inches from the bumper of the other, and, while in the act of turning a nut upon a bolt between the bumpers, took hold of a bumper with one hand over the end in order to support himself, in which position he was injured in consequence of an unattended freight-car being shunted upon the branch track against the car in front of the one which he was repairing, and driving it against the one in the rear, causing the bumpers to come together and crush his hand;⁷⁹ where an employé in a car-shop remained under a car repairing it when he knew that the foreman, who had promised to protect him, had gone to another portion of the shop, but did not know that the foreman was not keeping watch, or that the foreman had not taken steps to protect him from danger as effectually as his own personal watchfulness would have done,—and was injured by another car being driven against the car under which he was working;⁸⁰ where a car-repairer, in the employ of a company engaged in the business of repairing cars, was repairing certain cars, and his employer's foreman notified the switchman of a railroad company to remove certain other cars on the same track, but failed to notify such switchman that there were car-repairers at work on other cars on the same track.⁸¹ In several of the foregoing cases, the question is reasoned on the theory of *contributory negligence*. Another case, so reasoning it, holds that where the place where a car-repairer was ordered to work was not necessarily or inherently dangerous, he

12 Ind. App. 469; s. c. 40 N. E. Rep. 642.

⁷⁷ *Southern R. Co. v. Hart*, 23 Ky. L. Rep. 1054; s. c. 64 S. W. Rep. 650 (no off. rep.); distinguishing *Chesapeake &c. R. Co. v. Hennessey*, 96 Fed. Rep. 713; s. c. 38 C. C. A. 307.

⁷⁸ *Atchison &c. R. Co. v. Holt*, 29 Kan. 149.

⁷⁹ *Murphy v. New York &c. R. Co.*, 118 N. Y. 527; s. c. 23 N. E. Rep. 812; 29 N. Y. St. Rep. 941; aff'g s. c.

51 Hun (N. Y.) 242 (he had a right to suppose that the other servants of the company would do their duty and would not disregard his signal-flag—was not guilty of negligence as matter of law).

⁸⁰ *Missouri &c. R. Co. v. Williams*, 75 Tex. 4; s. c. 12 S. W. Rep. 835.

⁸¹ *Street's Western Stable Car Line v. Bonander*, 97 Ill. App. 601; s. c. aff'd, 196 Ill. 15; 63 N. E. Rep. 688.

had a *right to presume* that he would not be exposed to unnecessary danger, and that the master had used proper care to render the place where he was to work reasonably safe; and the fact that he, in obedience to the order of the foreman in charge of the repairers, went to work under the car beneath which he was fatally injured, does not establish contributory negligence.⁸² Other decisions are found which hold the railway company liable for *failing to adopt rules* for the protection of car-repairers while at work on cars standing on a side-track,—as, in one case, for failing to adopt any other rule than that “blue” is the signal to be used by car-inspectors;⁸³ or failing to establish a proper regulation fixing the distance from the main track at which cars may safely be placed on a repair-track connecting with the main track;⁸⁴ or, what is a wrong of the same nature, in failing to acquaint their servants with the rules which they have devised to this end.⁸⁵

§ 4781. **Railway Track-Repairers Assume Risk of being Struck by Approaching Trains.**—Although the rule may be a hard one which puts upon railway track-repairers the duty of prosecuting their work, and, at the same time, of keeping watch for approaching trains, yet the weight of authority seems to be that such is the law,—that they are required to look at their work and to look up and down the track at the same time to see whether trains are not approaching, and that if, while so engaged, they are run over by an approaching train, they merely suffer an injury the risk of which they have assumed, or, what is nearly the same thing, are guilty of contributory negligence in not, at one and the same time, looking at their work and looking up and down the railway-track in both directions.⁸⁶ This conclusion

⁸² *Pool v. Southern Pac. R. Co.*, 20 Utah 210; s. c. 58 Pac. Rep. 326.

⁸³ *Chicago & C. R. Co. v. McGraw*, 22 Colo. 363; s. c. 45 Pac. Rep. 383.

⁸⁴ *Texas & C. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493; s. c. 40 S. W. Rep. 546 (holding company liable for the death of a car-repairer in consequence of cars being placed on the repair-track so close that they are struck by an engine on the main track).

⁸⁵ *Gulf & C. R. Co. v. Kizziah*, 4 Tex. Civ. App. 356; s. c. 22 S. W. Rep. 110 (inexperienced car-repairer made repeated requests to be furnished with a copy of such rules, of which he was ignorant). See also, *Cumpston v. Texas & C. R. Co.* (Tex. Civ. App.), 33 S. W. Rep. 737 (no

off. rep.) (failing to designate, by clearing-post or otherwise, the distance which cars on the repair-track should be placed from the main track—car-repairer injured by reason of a passing engine on the main track striking a car on the repair-track—defendant's negligence a question for the jury).

⁸⁶ *Coyne v. Union & C. R. Co.*, 133 U. S. 370; s. c. 33 L. ed. 651; 7 Rail. & Corp. L. J. 434; 10 Sup. Ct. Rep. 382; *Schofield v. Chicago & C. R. Co.*, 114 U. S. 615; s. c. 29 L. ed. 224; *Aerkfet v. Humphreys*, 145 U. S. 418; s. c. 36 L. ed. 758; *Keefe v. Chicago & C. R. Co.*, 92 Iowa 182; *Lynch v. Boston & C. R. Co.*, 159 Mass. 536; s. c. 34 N. E. Rep. 1072 (servant cleaning under a switch-

may fairly be upheld where the railway company has a rule, made known to such employes, requiring them to place a flag at a reasonable distance from the point of their work to warn the engineer and fireman of approaching trains so that they may reduce speed, and, if necessary, come to a full stop until a signal is made by the workmen for them to proceed.⁸⁷ An ingenuity of reasoning for the purpose of excusing railway negligence, and especially that murderous form of negligence which consists of shunting cars with no one upon them to give danger-signals, has led to the conclusion that a railroad employe engaged in cleaning under a switch-bar in a yard is not entitled to expect with certainty a warning from every car that may be shunted or kicked upon the track where he is working, or if so, can expect only a shout as the car draws near, and is not entitled to rely upon his ears alone without using his eyes, nor to rely upon the car being stopped in time after it is discovered that he is not going to get out of the way.⁸⁸ A railway track-repairer has been held to assume the danger arising from a pile of logs beside the track cutting off the opportunity

bar in a *railroad-yard*, where cars were being shunted, struck by a shunted car); *Carlson v. Cincinnati &c. R. Co.*, 121 Mich. 48; s. c. 6 Det. Leg. N. 214; 14 Am. & Eng. R. Cas. (N. S.) 803; 79 N. W. Rep. 688; *Larson v. St. Paul &c. R. Co.*, 43 Minn. 423; s. c. 45 N. W. Rep. 722 (experienced section-man chargeable with notice of the practice of running irregular trains, and assumes the risk of injury from that cause); *Chicago &c. R. Co. v. Yost*, 56 Neb. 439; s. c. 76 N. W. Rep. 901 (knew that a gravel-train was frequently followed by a switch-engine, but stepped back upon the track after the gravel-train had passed, without looking, and was struck by the switch-engine—contributory negligence); *Palko v. Central R. Co.*, 9 Kulp (Pa.) 550 (track-repairer employed on the main line assumed risk of injury from getting under car on a side line in order to allow a train on the main line to pass); *Kennedy v. Pennsylvania R. Co.* (Pa.), 24 W. N. C. (Pa.) 371; s. c. 17 Atl. Rep. 7 (no off. rep.); *Brady v. New York &c. R. Co.*, 20 R. I. 338; s. c. 39 Atl. Rep. 186 (cautioned to look out for himself, no right to rely upon any other person warning him of danger); *International &c. R. Co. v. Arias*, 10 Tex. Civ. App. 190; s. c. 30 S. W. Rep. 446. Compare *Woodley v. Met-*

ropolitan &c. R. Co., 2 Exch. Div. 384; s. c. 46 L. J. 521 (workman in dark and narrow tunnel, knowing that precaution of lookout had been discontinued and that engines gave no warning by whistle, was struck by train as he stooped to pick up a tool from the track—no recovery).

⁸⁷ In such a case, it was held that the injured track-repairer assumed the risk, although the train by which he was struck was approaching slowly at the time: *Bruen v. Uhlmann*, 30 App. Div. (N. Y.) 453; s. c. 51 N. Y. Supp. 958. There is more difficulty in agreeing with a decision which holds that a railroad company is not liable for an injury to the foreman of a track-gang due to the failure of the men in charge of the approaching train to give signals upon approaching highway-crossings, where the failure to give such signals is habitual to such an extent that the company is chargeable with notice of it, provided the injured servant himself knows that the omission is habitual, but nevertheless continues in the service; since, by doing so, he assumes the risk of injury from this source: *McPeck v. Central Vt. R. Co.*, 79 Fed. Rep. 590; s. c. 50 U. S. App. 27; disapproving *Smith v. Baker*, [1891] A. C. 325.

⁸⁸ *Lynch v. Boston &c. R. Co.*, 159 Mass. 536; s. c. 34 N. E. Rep. 1072.

of ready escape from the track, and also the danger arising from the known custom of running trains, in a yard of the company, at a speed greater than that allowed by a city ordinance.⁸⁹

§ 4782. **Risks of Injuries from Moving Trains which are Not Assumed by Track-Repairers.**—On the other hand, it has been held that employes of a railroad company engaged in the grading of a new track alongside the main track, in such close proximity as to be liable to be struck by passing trains, are not bound to keep a constant lookout for approaching trains, where it is the uniform practice of those operating the trains to give warning of their approach.⁹⁰ Nor does a track-repairer assume the risk of a switch-train being driven so forcibly against a dead car as to cause it to start suddenly forward, at a time when the track-repairer has left the main track to permit a train to pass, and has taken refuge upon the track where the dead car is located; nor is he, as matter of law, imputable with contributory negligence, although the bell of the switch-engine was ringing, when there was no one on the front end of the train which backed into the dead or detached car.⁹¹

§ 4783. **Further Risks Assumed by Railway Track-Repairers, Section-Men, etc.**—Other decisions ascribe an assumption of the risk or impute contributory negligence to this class of railway employes under the following circumstances:—Where a foreman of track-repairers stepped upon a track in a freight-yard for the purpose of crossing it, without looking to see whether an engine was upon it, and was struck by a returning engine which had just passed in the opposite direction;⁹² where a section-hand, engaged in ballasting the track, was injured by the fact of a stone, probably thrown up by himself, flying out at right angles with the track upon the passage of a train,—his injury being due either to his own negligence in not removing the stone, or to an unaccountable accident or occult risk attending his employment, which he had assumed;⁹³ where an experienced railway

⁸⁹ Bengston v. Chicago & C. R. Co., 47 Minn. 486; s. c. 50 N. W. Rep. 531.

⁹⁰ Erickson v. St. Paul & C. R. Co., 41 Minn. 500; s. c. 43 N. W. Rep. 332; 5 L. R. A. 786.

⁹¹ Chicago & C. R. Co. v. Shannon, 43 Ill. App. 540. Railway company liable for death of a section-foreman, free from contributory negligence, caused by his being run over while riding on a hand-car by a

train driven at an excessive speed around a curve at an obscure place, without sounding the whistle as required by a rule of the company: Southern & C. Co. v. Ryan (Tex. Civ. App.), 29 S. W. Rep. 527 (no off. rep.).

⁹² Grand Trunk R. Co. v. Baird, 94 Fed. Rep. 946; s. c. 36 C. C. A. 574.

⁹³ Steffen v. Chicago & C. R. Co., 46 Wis. 259; s. c. 50 N. W. Rep. 348.

employé was injured in the night-time while engaged in relaying a track to prevent it from being washed away by a flood, in consequence of the light which was furnished for him to work by being insufficient, as this was an obvious risk;⁹⁴ where a member of a section-gang, engaged in unloading cross-ties from a flat-car from which the standards had been removed for convenience in unloading, was injured in consequence of the car being suddenly stopped by him, at a point where unloading was needed, by thrusting a piece of scantling in front of the wheels according to custom, the jolt causing the ties to fall on him;⁹⁵ and in the cases cited in the marginal note.⁹⁶

⁹⁴ *Gulf &c. R. Co. v. Jackson*, 65 Fed. Rep. 48; s. c. 12 C. C. A. 507. And also the risk incident to the ground being broken and obstructed by *debris*, which caused the stumbling of one of his fellow servants, who was engaged with him in carrying a rail, inflicting injury upon him: *Gulf &c. R. Co. v. Jackson*, *supra*.

⁹⁵ *Houston &c. R. Co. v. Martin*, 21 Tex. Civ. App. 207; s. c. 51 S. W. Rep. 641.

⁹⁶ *Louisville &c. R. Co. v. Walker*, 19 Ky. L. Rep. 369; s. c. 40 S. W. Rep. 461 (no off. rep.) (railroad company not liable for an injury to an employé by coal falling down a chute while he was sitting under it, with knowledge of the danger, before the arrival of the time to commence his work of repairing the track, unless employer guilty of "gross negligence"); *Texas &c. R. Co. v. Lyons* (Tex. Civ. App.), 3 Am. & Eng. R. Cas. (N. S.) 316; s. c. 34 S. W. Rep. 362 (no off. rep.) (injured from the falling or slipping of railroad-ties while superintending the loading of a flat-car). It has been held that a railroad company is not liable to a section-hand injured by a passing engine while he was cleaning the tracks at a crossing, on the ground of failing to observe a rule requiring a lookout on the footboard of an engine backed across a *public highway*, as the rule is for the protection of the public, and not employes: *Carlson v. Cincinnati &c. R. Co.*, 120 Mich. 481; s. c. 6 Det. Leg. N. 214; 14 Am. & Eng. R. Cas. (N. S.) 803; 79 N. W. Rep. 688. Circumstances under which a section-hand, nineteen years of age, was held to have assumed the risk of

an injury from the slipping of his clawbar, while nipping ties on a bridge, causing him to fall to the bed of the stream, when the work would have been less dangerous if two men had been employed, which fact, however, the plaintiff did not know, though he was familiar with the work and though the clawbar was worn, etc.: *Houston &c. R. Co. v. Scott* (Tex. Civ. App.), 62 S. W. Rep. 1077 (no off. rep.). In another case a box was placed on rollers on a push-car for the purpose of hauling and dumping dirt on a railroad-track, and the plaintiff was injured by reason of the car tilting and throwing him off. The car in question and a similar car had been used for some time before the accident, and the car causing the injury was used for a long time after without change, and never tilted before or after the accident. The plaintiff had assisted in constructing the apparatus, was experienced in such work, and the contrivance was in perfect order at the time he was injured. It was held that he had assumed the risk as matter of law: *Corletti v. Southern Pac. Co.*, 136 Cal. 642; s. c. 69 Pac. Rep. 422. Where the plaintiff, who was one of a crew of four men engaged in removing old ties from a bridge for the purpose of putting in new ones, placed his hand over the end of a tie in guiding it, so that his hand struck a girder, causing him to faint and fall into the river below, —the fact that the foreman, whose duties called him to another part of the bridge, did not call some one to take his place for the purpose of giving the word when to heave or launch the ties, did not render the master liable, where one of the

§ 4784. **Risks Not Assumed by Railway Track-Repairers.**—On the other hand, railway track-repairers have been held not to have assumed the risks, nor to have incurred the imputation of contributory negligence, under the following circumstances:—Where an employé of a railroad company, engaged in constructing a ditch along the track and ten feet therefrom, was struck by a piece of coal which fell from an overloaded tender of a passing train;⁹⁷ where an employé on a railway repair-train was injured in consequence of a derailment which took place by the falling of a cross-tie from the tender under the wheels, which falling was due to the rocking of the cars from the speed at which they were run over an uneven and defective roadbed and track;⁹⁸ where a section-man was injured while attempting, by order of the assistant roadmaster, to load rails upon a moving train, which was an unusual way of doing the work, when he was ignorant of the danger and was not warned or instructed with respect to it;⁹⁹ where an employé of a manufacturing corporation was killed by the falling of a post standing upright on a plate or beam at the level of the third story of a building in process of construction, while he was engaged in grading a railroad belonging to the corporation;¹⁰⁰ where a track-repairer was run over by a switch-engine which had a square tank, which was more dangerous than a sloping tank, the evidence failing to show that he knew that it was more dangerous or that he understood the danger from the use of a square tank;¹⁰¹ where a common laborer working with pick and spade in a gravel-cut of a railroad, was injured by an unexploded blast left in the ground, of which he had no knowledge or information;¹⁰² and so in the cases noted in the margin.¹⁰³

crew gave the word, as had been the custom in the foreman's absence, and the plaintiff, with knowledge of that method of working, had made no complaint, as he thereby assumed the risk: *Daniels v. Covington &c. El. R. &c. Co.*, 23 Ky. L. Rep. 1800; s. c. 66 S. W. Rep. 187 (no off. rep.).

⁹⁷ *Croll v. Atchison &c. R. Co.*, 57 Kan. 548; s. c. 46 Pac. Rep. 972.

⁹⁸ *Wilson v. Louisiana &c. R. Co.*, 51 La. An. (pt. 2) 1133; s. c. 25 South. Rep. 961; 14 Am. & Eng. R. Cas. (N. S.) 648.

⁹⁹ *Palmer v. Michigan &c. R. Co.*, 87 Mich. 281; s. c. 49 N. W. Rep. 613.

¹⁰⁰ *Mickee v. Walter A. Wood Mowing &c. Mach. Co.*, 70 Hun (N. Y.) 456; s. c. 53 N. Y. St. Rep. 689; 24 N. Y. Supp. 501.

¹⁰¹ *Missouri &c. R. Co. v. Lehmberg*, 75 Tex. 61; s. c. 12 S. W. Rep. 838.

¹⁰² *Burke v. Anderson*, 69 Fed. Rep. 814; s. c. 34 U. S. App. 132; 16 C. C. A. 442.

¹⁰³ *Gulf &c. R. Co. v. Wood* (Tex. Civ. App.), 63 S. W. Rep. 164 (no off. rep.) (section-hand struck by a piece of coal falling from a passing train—risk not assumed). A shoveller engaged by a railway company to assist in removing dirt and other obstructions from its track, upon which they have been washed by an unusual storm or freshet, does not assume the risk of the company's failure, before the storm, to keep in proper repair a bridge over which the train on which he is carried is required to pass, or to send out a track-walker

§ 4785. **Risk of Injury from Suffocation in Passing through a Tunnel.**—Where a railway employé has full knowledge of the condition of a tunnel and of the danger of passing through it, and is required to pass through it daily, if he is killed by being suffocated in it, his personal representative cannot recover damages from the company, because he is deemed to have accepted the risk of being so killed.¹⁰⁴

§ 4786. **Risk Assumed by Reason of Failing to Take the Safer Way.**—This subject is generally dealt with under the head of “contributory negligence,” as we have already seen;¹⁰⁵ but where the injury is to the servant acting in the course of his employment, it is sometimes dealt with on the question of his accepting the risk. So dealing with it, it has been held that a railroad employé who is sent from the engine to the tender on a dark night to fill the tender with coal, without any light other than a torch, assumes the risk of attempting to get back to the engine, after his torch goes out, by walking on the tank, to attempt which he knows is dangerous, on account of a toolbox at the end, when a safer way is, to his knowledge, available to him;¹⁰⁶ that a yardmaster assumes the risk of using a piece of timber, found by him in the vicinity, as a “push-stick,” where there is no “push-stick” on the engine, but there is *no emergency* calling for the use of such a substitute.¹⁰⁷

§ 4787. **Risks Assumed or Not Assumed by Locomotive-Firemen.**—In dealing with this subject, it should be kept in mind that a mere fireman, stoker, or coal-heaver, is not to be presumed to

in advance of the train to ascertain the condition of the track or bridge after the storm, or to take such other due and precautionary measures to prevent accidents as may be required by the exigency of the situation: *Conlon v. Oregon &c. R. Co.*, 23 Or. 499; s. c. 53 Am. & Eng. R. Cas. 356; 32 Pac. Rep. 397. It has been held that a section-hand may rely on the superior knowledge and judgment of his section-boss; so that where a section-hand obeyed the order of the section-boss to ride on a hand-car to his place of work when he knew that a fast train was overdue, he did not assume the risk of a collision, even though the place where the men boarded the car was not a telegraph-station, and the boss knew no more about the

whereabouts of such train than the servant did; unless the danger was so obvious that an ordinarily prudent servant, situated as he was, would not have obeyed, which was a question for a jury: *Long v. Illinois Cent. R. Co.*, — Ky. —; s. c. 24 Ky. L. Rep. 567; 68 S. W. Rep. 1095; 58 L. R. A. 237.

¹⁰⁴ *Baltimore &c. R. Co. v. State*, 75 Md. 152; s. c. 23 Atl. Rep. 310.

¹⁰⁵ Vol. I, § 1019, *et seq.*; *ante*, §§ 4628, 4629.

¹⁰⁶ *Chicago &c. R. Co. v. Cowles*, 54 Neb. 269; s. c. 11 Am. & Eng. R. Cas. (N. S.) 33; 74 N. W. Rep. 579 (could have walked back over the coal).

¹⁰⁷ *Garrison v. McCullough*, 28 App. Div. (N. Y.) 467; s. c. 51 N. Y. Supp. 128.

have the knowledge of the condition and capacity of the locomotive which the engineer has. The risks, the assumption of which the law puts upon him, lie, therefore, in a narrower compass than in case of the engineer. He assumes, however, the risk of an injury arising from the fact of the train not being equipped with *air-brakes*, where none of the trains of the particular company are so equipped, although air-brakes are used to some extent on other railways.¹⁰⁸ He assumes the risk of being overcome by heat while in the position over the boiler which he is obliged to assume, when oiling the machinery, because of the defective condition of the automatic lubricator,—that condition, however, not causing the injury.¹⁰⁹ But he *does not assume* the risk consequent upon continuing in the service upon the engine after its boiler has become defective, where such defects are on the inside and not visible to him;¹¹⁰ nor the risk of injury in consequence of the defective condition of the machinery and apparatus of a water-tank, and of the spout connected therewith, maintained for furnishing water to locomotives, where the defects are not patent and such as could be discovered by ordinary observation, or by their use by such an employé;¹¹¹ nor the risk of an injury from a defect in the flange of a wheel of the locomotive, where it was not apparent; nor did the same employé, from the fact that he had mere knowledge of a defect in the brake, assume the risk of injury from it, where such defect was not discovered until after the trip had commenced, and he did not know and had not been warned of the danger of its use;¹¹² nor the risk of injury from the use of an engine having a leaky faucet, making the floor slippery, which condition had existed for a month or more, but of which the fireman was ignorant until the time of the accident;¹¹³ nor the risk of injury from a defect in a grate and shaker-bar, allowing the bar to go over so far as to render it difficult for him to retain his hold, of which defect he is ignorant;¹¹⁴ nor the risk of an injury from continuing to ride on a defective engine, after

¹⁰⁸ *France v. Rome & C. R. Co.*, 88 Hun (N. Y.) 318; s. c. 34 N. Y. Supp. 408; 25 App. Div. (N. Y.) 315.

¹⁰⁹ *Stockwell v. Chicago & C. R. Co.*, 106 Iowa 63; s. c. 4 Am. Neg. Rep. 380; 12 Am. & Eng. R. Cas. (N. S.) 576; 75 N. W. Rep. 665; *Drake v. Union & C. R. Co.*, 2 Idaho 454; s. c. 21 Pac. Rep. 560 (case contains a good statement of the general doctrine of accepting risk).

¹¹⁰ *Tyler & C. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185; s. c. 3 Am.

& Eng. R. Cas. (N. S.) 376; 34 S. W. Rep. 794.

¹¹¹ *Missouri & C. R. Co. v. Gordon*, 11 Tex. Civ. App. 672; s. c. 33 S. W. Rep. 684.

¹¹² *St. Louis & C. R. Co. v. McLain*, 80 Tex. 85; s. c. 15 S. W. Rep. 789.

¹¹³ *Fancher v. New York & C. R. Co.*, 75 Hun (N. Y.) 350; s. c. 56 N. Y. St. Rep. 745; 27 N. Y. Supp. 62.

¹¹⁴ *Fancher v. New York & C. R. Co.*, 75 Hun (N. Y.) 350; s. c. 56 N. Y. St. Rep. 745; 27 N. Y. Supp. 62.

it has acted strangely, where the fireman calls the attention of the engineer to the fact, and asks if he shall not stop, and the engineer pays no attention to the inquiry.¹¹⁵

§ 4788. **Risks Assumed with Respect to "Foreign Cars."**—It does not constitute negligence as matter of law for a railroad company, in the ordinary course of its business, to use the cars of another company, having open, obvious, or discoverable defects therein,—such as differences in coupling-apparatus, or in height, size, and construction, between such foreign cars and the cars of the company in whose service the injured employé is; but they are deemed the ordinary risks of the service which he assumes,¹¹⁶—although such "foreign cars" may not be constructed with the most approved appliances in use in railway transportation.¹¹⁷ And this is so, although, as between itself and the company whose cars they are, it is not bound to repair defects which it discovers in them; since the duty of inspecting them is a duty which it owes to its own employés.¹¹⁸ It seems also that if the railway company adopts a limited or *defective system* of inspection of "foreign cars," and this system is *known to its own employés*, they take the risk of the increased dangers due to the limited or defective character of such system, which is illustrated by a case cited in the margin.¹¹⁹

¹¹⁵ *Brownfield v. Chicago &c. R. Co.*, 107 Iowa 254; s. c. 5 Am. Neg. Rep. 331; 77 N. W. Rep. 1038. Nor the risk of an injury from the breaking of a cord spliced to a rope provided to operate the valve to a water-tank, which appeared sound, though in fact it was rotten, and which broke when the fireman took hold of it, he not having knowledge of its unsafe condition,—but the question of his contributory negligence in taking hold of the rope was for the jury: *International &c. R. Co. v. Elkins* (Tex. Civ. App.), 54 S. W. Rep. 931 (no off. rep.).

¹¹⁶ *St. Louis &c. R. Co. v. Higgins*, 44 Ark. 293; *Toledo &c. R. Co. v. Black*, 88 Ill. 112; *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687; *Baldwin v. Chicago &c. R. Co.*, 50 Iowa 680; *Ellsbury v. New York &c. R. Co.*, 172 Mass. 130; s. c. 51 N. E. Rep. 415 (drawbars of different height, defect obvious, and assumed by servant); *Michigan &c. R. Co. v. Smithson*, 45 Mich. 212; *Norfolk &c. R. Co. v. Brown*, 91 Va. 668;

Kohn v. McNulta, 147 U. S. 238; s. c. 37 L. ed. 15.

¹¹⁷ *Baldwin v. Chicago &c. R. Co.*, 50 Iowa 680.

¹¹⁸ *Atchison &c. R. Co. v. Penfold*, 57 Kan. 148; s. c. 45 Pac. Rep. 574.

¹¹⁹ The plaintiff, an experienced brakeman in defendant railroad company's employ, was injured while standing on the platform of a foreign coal-car, by reason of a defective brake-rod. Plaintiff knew that defendant's inspector never examined the brakes on *foreign cars*, except to see that the chains were attached to the rods. It was held that as such plaintiff was familiar with defendant's *system* of inspection, and the danger from defective brake-rods on such cars was apparent to a man of ordinary prudence, plaintiff, by voluntarily remaining in defendant's employment with knowledge of such danger, assumed the risk incident thereto: *Leazott v. Boston &c. R. Co.*, 70 N. H. 5; s. c. 45 Atl. Rep. 1084.

§ 4789. **Risk of Injury in Handling Defective or "Crippled" Cars.**—The rule that the master must furnish the servant with safe machinery has no application to a case where a railway servant is injured while handling defective or "crippled" cars, knowing that they have been laid aside for repairs, but he takes the extra risk incident to the nature of the service.¹²⁰ But it is to be kept in mind that this rule does not apply to the case of cars which have not been laid aside as defective, or placed upon the "repair-track" for repairs, but which are in use notwithstanding defects in them which the railroad company ought to discover, but of which the injured servant does not know.¹²¹

§ 4790. **Risk of Injuries from the Operation of Snow-Plows, "Bucking Snow," etc.**—The employes of railroad companies assume the risks ordinarily incident to the use of snow-plows operated in front of engines to clear the track from snow.¹²² They assume such risks as are usually and customarily incident to the falling of snow and forming of ice on and removal of the same from the tracks and places where employes are required to work, where such removal is made in a proper and reasonable manner, in the exercise of due and ordinary care for the safety of employes.¹²³ The risk of injury from the well-known and general practice of coupling several engines together for the purpose of "bucking snow" from the track is one of the risks assumed by a locomotive-engineer as an ordinary risk of his employment.¹²⁴ The conductor of a train ordered to run as an extra to

¹²⁰ Chicago &c. R. Co. v. Ward, 61 Ill. 130; Fraker v. St. Paul &c. R. Co., 32 Minn. 54; Chesapeake &c. R. Co. v. Hennessey, 96 Fed. Rep. 713; s. c. 38 C. C. A. 307.

¹²¹ Jones v. New York &c. R. Co., 28 Hun (N. Y.) 364; s. c. aff'd, 92 N. Y. 628 (defective rung used for climbing a freight-car).

¹²² Brown v. Chicago &c. R. Co., 69 Iowa 161 (nor can employe contend that signals should be placed at snow-banks, or notice given by bell or whistle of the approach of a train to a snow-bank); Bryant v. Burlington &c. R. Co., 66 Iowa 305; s. c. 55 Am. Rep. 275; Derr v. Lehigh Valley R. Co., 158 Pa. St. 365; s. c. 33 W. N. C. (Pa.) 295; 27 Atl. Rep. 1002 (engineer who sets out to clear snow from the tracks, assumes the risk incident to the employment, although he does not know the exact location and size of every drift which must be removed).

¹²³ Lawson v. Truesdale, 60 Minn. 410; s. c. 62 N. W. Rep. 546.

¹²⁴ Morse v. Minneapolis &c. R. Co., 30 Minn. 465. The vice-principal of a railroad company has the right to assume that one of a gang of men employed to release a snowbound train on one track will not place himself in danger of being struck by a train on another track seven feet from the former: Nye v. Pennsylvania R. Co., 178 Pa. St. 134; s. c. 39 W. N. C. (Pa.) 209; 35 Atl. Rep. 627. Circumstances under which the division superintendent of a railway company does not owe to one gang of men employed to remove a train blocked in the snow, the duty of giving notice of such fact to the engineer of a train going over the same road, but on another track than that which the blocked train is on: Nye v. Pennsylvania R. Co., *supra*.

carry snow-shovellers to a certain station beyond which the road is blockaded, does not assume the risk of a *snow-slide* between the stations on the trip he is ordered to run.¹²⁵

§ 4791. Risk of Injury from Cattle Getting upon the Track.—On this subject we find some irreconcilable decisions. On the one hand, if the cattle get upon the track through a failure on the part of the railway company to keep its fences in repair, and if the non-repair of its fences is a permanent condition, and not the result of transient, unforeseen, and consequently unanticipated negligence of the company,—then the employé is deemed to assume the risk of injury from that source of danger.¹²⁶ And this is so, although the failure to fence the track is a violation of the statute law.¹²⁷ Directly opposed to this, we learn from another court that a railroad company is liable to a brakeman for its failure to maintain fences as required by statute, in consequence of which an animal gets upon the track, causing a derailment of the train and injury to the brakeman.¹²⁸ On clear grounds, where a railway trainman is killed or injured from defects in the track or in the roadbed existing through the negligence of the company, it will be liable, although the primary cause of the derailment is the running into an animal on the track.¹²⁹

§ 4792. Risk of Injury through Defects in Railroad-Tracks outside of Yard and Switch Limits.—We are now dealing with the question

¹²⁵ Fisher v. Oregon &c. R. Co., 22 Or. 533; s. c. 16 L. R. A. 519; 30 Pac. Rep. 425; 12 Rail. & Corp. L. J. 139.

¹²⁶ Houston &c. R. Co. v. Quill (Tex. Civ. App.), 55 S. W. Rep. 1126; s. c. aff'd, *sub nom.* Quill v. Houston &c. R. Co., 93 Tex. 616; s. c. 57 S. W. Rep. 948; Fleming v. St. Paul &c. R. Co., 27 Minn. 111; Sweeney v. Central Pac. R. Co., 57 Cal. 15; Dickson v. Omaha &c. R. Co., 124 Mo. 140; s. c. 25 L. R. A. 320, and note.

¹²⁷ Fleming v. St. Paul &c. R. Co., 27 Minn. 111; Sweeney v. Central Pac. R. Co., 57 Cal. 15; Newsom v. Norfolk &c. R. Co., 81 Fed. Rep. 133; s. c. 35 L. R. A. 135; 42 U. S. App. 282; 2 Va. L. Reg. 882; 23 C. C. A. 669 (statute not intended for protection of railroad employés). That a railway-engineer assumes the risk of a derailment of his engine by a cow which becomes fastened in a railroad-bridge with-

out any fault on the part of the company, where its tracks and bridges are examined at reasonably frequent intervals,—was held in Manson v. Eddy, 3 Tex. Civ. App. 148; s. c. 22 S. W. Rep. 66.

¹²⁸ Atchison &c. R. Co. v. Reesman, 60 Fed. Rep. 370; s. c. 23 L. R. A. 768. That a railway engineer *does not* assume the risk of the derailling of his engine by a collision with a cow which gets upon the track at a place where there is no fence, where he does not know that the track is not fenced,—was held in Terre Haute &c. R. Co. v. Williams, 172 Ill. 379; s. c. 50 N. E. Rep. 116; aff'g s. c. 69 Ill. App. 392.

¹²⁹ Texas &c. R. Co. v. McClane, 24 Tex. Civ. App. 321; s. c. 62 S. W. Rep. 565; New York &c. R. Co. v. Green, 90 Tex. 257; s. c. 38 S. W. Rep. 31; aff'g on this point s. c. 36 S. W. Rep. 812. Compare Vol. I, §§ 48, *et seq.*, 68.

indicated in the caption, in its application to trainmen who are employed in conducting trains along the main line and outside of the yard and switch limits. The first obvious suggestion of the doctrines already considered is that such trainmen are not chargeable with notice of defects or dangers in the railway-track, or of dangers proceeding from objects adjacent thereto, where such defects or dangers are not obvious to passing trainmen,¹³⁰ but are discoverable only by such an inspection and examination as the superintendents and track-repairers of the company are employed to make and are presumed to make.¹³¹ They do, indeed, assume the risks of defects in the road-bed of which they have actual knowledge, or of which they might acquire knowledge by the exercise of such reasonable care for their own safety as their situation and the nature of their service admit of.¹³² In the case of a finished track open for public travel, they are obviously not required to go over the track—let us say, upon a hand-car—and make a minute inspection of it in order to ascertain whether it will be safe for them to proceed over it upon a train; but they are entitled to assume, in the absence of notice or knowledge to the contrary,¹³³ that the railway company has made the track reasonably safe; and if they are injured in consequence of its not having been made reasonably safe, without special fault on their own part, they may recover damages from the company.¹³⁴ This does not mean that they are entitled to neglect the admonitions of their senses, their knowledge, or their experience; but it justifies the conclusion that, in order to put upon them the assumption of such a risk, the defect or danger must have been so obvious and threatening to a servant engaged

¹³⁰ *Davidson v. Southern Pac. R. Co.*, 44 Fed. Rep. 476.

¹³¹ *Gulf & C. R. Co. v. Hohl* (Tex. Civ. App.), 29 S. W. Rep. 1131 (no off. rep.).

¹³² *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531; s. c. 1 Repr. (Ind.) 1009; 14 Am. & Eng. R. Cas. (N. S.) 701; 53 N. E. Rep. 763.

¹³³ *Clapp v. Minneapolis & C. R. Co.*, 36 Minn. 6; s. c. 32 N. W. Rep. 18.

¹³⁴ *Gulf & C. R. Co. v. Warner*, 22 Tex. Civ. App. 167; s. c. 54 S. W. Rep. 1064; *Peirce v. Delaney*, 87 Fed. Rep. 133; s. c. 59 U. S. App. 283 (inexperienced and uninformed brakeman upon a freight-train, handling the output of a coal mine, does not assume the risk of the lack of the necessary appliances to prevent the escape of heavily-loaded coal-cars from a coal-track, having a steep grade, upon the main

track); *Clune v. Ristine*, 94 Fed. Rep. 745; s. c. 6 Am. Neg. Rep. 416; 36 C. C. A. 450; 2 Denv. Leg. Adv. 593; 15 Am. & Eng. R. Cas. (N. S.) 761 (duty of company to protect the track from the falling of loose overhanging rocks imbedded in the slopes of cuts); *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451; s. c. 40 L. ed. 766; 16 Sup. Ct. Rep. 618 (not bound to know the danger lurking in a narrow seam in a mountainside, rendering a fall of rocks upon the track probable); *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477; s. c. 56 N. E. Rep. 796 (street-railway conductor not held, as matter of law, to have assumed the risk arising from the presence of a pile of stones, he not knowing of their existence until he fell over them while attempting to board a car).

in the operation of trains upon a track, that a reasonably prudent man, in his situation, would have refused to proceed, or would in some manner, such as the circumstances afforded, have avoided it.¹³⁵ Many decisions roundly support the doctrine that trainmen do not assume the risk of being injured through the negligence of the company in failing to keep its track in a reasonable condition of repair.¹³⁶

§ 4793. **Circumstances under which Such Risks are Assumed.**—If a railroad employé knows that the general condition of the track is defective in certain particulars, but nevertheless continues in the employment, he assumes the risk of injury from all defects of that nature, whether specially known to him or not.¹³⁷ This is especially

¹³⁵ *Chicago &c. R. Co. v. Price*, 97 Fed. Rep. 423; s. c. 38 C. C. A. 239; *Graham v. Chapman*, 58 Hun (N. Y.) 602; s. c. 33 N. Y. St. Rep. 349; 11 N. Y. Supp. 318 (general knowledge that the track is in bad condition will not put upon a trainman an acceptance of the risk of a derailment); *Pidgeon v. Long Island R. Co.*, 87 Hun (N. Y.) 43; s. c. 67 N. Y. St. Rep. 486; 33 N. Y. Supp. 870.

¹³⁶ *Knapp v. Sioux City &c. R. Co.*, 71 Iowa 41; s. c. 32 N. W. Rep. 18; *Evansville &c. R. Co. v. Maddux*, 134 Ind. 571; s. c. 33 N. E. Rep. 345; 34 N. E. Rep. 511; *Little Rock &c. R. Co. v. Voss* (Ark.), 18 S. W. Rep. 172 (no off. rep.); *Union Pac. R. Co. v. O'Brien*, 4 U. S. App. 221; s. c. 49 Fed. Rep. 538; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451; s. c. 40 L. ed. 766; 16 Sup. Ct. Rep. 618 (engineer does not assume the risk of danger from the failure of the railroad company to construct and maintain its tracks in a proper condition at the foot of a mountain). A locomotive-fireman did not assume the risk of defects in the railroad-track over which he was running his train in the course of his employment, merely because he knew that a company other than his employers owned the track, and owed the duty of keeping it in repair: *Story v. Concord &c. Co.*, 70 N. H. 364; s. c. 48 Atl. Rep. 288. It has been held that a person by accepting service under a railroad corporation whose road is in bad condition, does not accept, as matter of law, the *double risk* of injury from insufficient and

bad tracks, and from the careless and negligent handling of cars over dangerous places: *Wilson v. Louisiana &c. R. Co.*, 51 La. An. (pt. 2) 1133; s. c. 25 South. Rep. 961; 14 Am. & Eng. R. Cas. (N. S.) 648. Assuming that the "fellow-servant doctrine" is not applicable to the case above cited, the conclusion of the court is plain, since the careless and negligent handling of cars over dangerous places would refer itself to the special negligence of the master or to some one for whose conduct the master is accountable, in which case, as already seen (*ante*, § 4618), the risk is not assumed.

¹³⁷ *Green v. Cross*, 79 Tex. 130; s. c. 15 S. W. Rep. 220. See also, *Texas &c. R. Co. v. Taylor* (Tex. Civ. App.), 44 S. W. Rep. 892 (no off. rep.); *Chicago &c. R. Co. v. Massig*, 50 Ill. App. 666 (helper of a locomotive "hostler" knew of the bad condition of the planking upon the track near the round-house for two years before the accident); *Clark v. Missouri &c. R. Co.*, 48 Kan. 654; s. c. 29 Pac. Rep. 1138 (railroad employé, familiar with the construction of the roadbed and track, assumes all the risks arising from the fact that the ballast slopes from the middle of the tracks so that no filling is left under the ends of the ties); *Atchison &c. R. Co. v. Croll*, 3 Kan. App. 242; s. c. 45 Pac. Rep. 112 (injury from coal being jostled off a passing tender, due to low joints in a good rock-ballasted track, the conclusion being that the company was not negligent). See also, *Texas &c. R.*

true with respect to an employé who is charged with the duty of looking after the reparation of the roadbed, and who knows of its defective condition.¹³⁸ Outside of this, the employés below named have been held to assume the risk of injury from the danger stated in each case:—A railway-switchman, the risk of injury from worn rails used in side-tracks, of which he has knowledge;¹³⁹ an engineer and conductor of a construction-train, who knows the manner in which a trestle is constructed and that there is an unprecedented flood, but who nevertheless attempts, without compulsion or necessity, to drive his train across the bridge;¹⁴⁰ a railway-engineer who knows and understands the liability of the engines used by the company to scatter fire, and who is acquainted with the character and extent of a watch kept upon a wooden bridge forming a part of the roadway, the risk of injuries due to the burning of the bridge by sparks escaping from a locomotive;¹⁴¹ a locomotive-engineer who knows that there are no track-walkers or night-watchmen on a bridge over which he is obliged to drive his train, the risk of a disaster in consequence of their absence.¹⁴²

§ 4794. Risks Assumed in Using Uncompleted Tracks, Tracks Undergoing Repairs, etc.—There is an obvious distinction between the extent of the assumption of the risk by the railway servant in the case of a track which has been completed and is open for public service (in which case he may rightfully assume that the company has done its duty in making it reasonably safe), and in the case of a track undergoing construction or reparation. In the latter case, the employé is entitled to expect no more than a degree of care and skill equal to that ordinarily employed in railway construction, and he consequently assumes the risk of injury due to the fact of the track being unfinished, where this degree of care and skill has been used.¹⁴³

Co. v. Dillard, 70 Tex. 62; s. c. 8 S. W. Rep. 113 (unless it is made to appear that the company has been guilty of negligence such as would increase the danger which the employé assumes); **Batterson v. Chicago &c. R. Co.**, 53 Mich. 125 (railroad company not liable for an injury sustained by a brakeman from a side-track being so poorly ballasted as to afford an insecure footing).

¹³⁸ **St. Louis &c. R. Co. v. Denny**, 5 Tex. Civ. App. 359; s. c. 24 S. W. Rep. 317.

¹³⁹ **Michigan &c. R. Co. v. Austin**, 40 Mich. 247.

¹⁴⁰ **Columbus &c. R. Co. v. Bridges**, 86 Ala. 448; s. c. 5 South. Rep. 864.

¹⁴¹ **Texas &c. R. Co. v. Minnick**, 61 Fed. Rep. 635; s. c. 23 U. S. App. 310.

¹⁴² **Texas &c. R. Co. v. Minnick**, 57 Fed. Rep. 362; s. c. 6 C. C. A. 387.

¹⁴³ **Colorado &c. R. Co. v. Naylor**, 17 Colo. 501; s. c. 30 Pac. Rep. 249; **Colorado &c. R. Co. v. O'Brien**, 16 Colo. 219; s. c. 10 Rail. & Corp. L. J. 351; 27 Pac. Rep. 701; 48 Am. & Eng. Corp. Cas. 235 (assumes the risk of injury while being carried to and from his work over a newly-constructed road, reasonably safe for such use but not finished for public travel).

But he is entitled to expect the exercise of that degree of care; and consequently he assumes only the risks ordinarily incident to travel over the new track; and, although he may himself be a civil engineer and have been engaged in laying it, he does not, for example, assume the risk of injury from the negligence of the company in driving a train over the track at an undue rate of speed, or in failing to repair defects made in the track by storms, where the track has been completed for several weeks and is under the charge of the roadmaster.¹⁴⁴ It has been held that a brakeman on a construction-train running over a road not yet open for traffic, assumes the risk of an accident from the general unfinished and incomplete condition of the road, where such matters come directly within his observation, or the danger is equally open to the observation of the master and the brakeman.¹⁴⁵ If it is the duty of the injured employé to keep the road in proper repair, or to assist in doing so, this fact charges him with notice of its condition and puts upon him an assumption of the risk of injury in consequence of his riding to and fro over it.¹⁴⁶

§ 4795. Risks Assumed by Railway and Street-Railway Conductors.—Conductors of railway-trains and of street-railway cars have been held to assume the risk of being injured under the following circumstances:—Where, under the rule of a railway company, no duty was imposed upon the conductor to examine or to repair any appliances connected with the operation of the train, but the conductor nevertheless, without notifying the engineer, went between the engine and the cars to examine the air-brake, there being no pressing emergency requiring him to do so, and thereby sustained injuries in consequence of the moving of the train;¹⁴⁷ where the conductor of an electric car stood upon the bumper of a moving car in attempting to

¹⁴⁴ *Meloy v. Chicago &c. R. Co.*, 77 Iowa 743; s. c. 4 L. R. A. 287; 42 N. W. Rep. 563.

¹⁴⁵ *Baltimore &c. R. Co. v. Welsh*, 17 Ind. App. 505; s. c. 47 N. E. Rep. 182.

¹⁴⁶ *White v. Kennon*, 83 Ga. 343; s. c. 9 S. E. Rep. 1082; 39 Am. & Eng. R. Cas. 330; *Evansville &c. R. Co. v. Henderson*, 134 Ind. 636; s. c. 33 N. E. Rep. 1021; *Evansville &c. R. Co. v. Henderson*, 142 Ind. 596; s. c. 42 N. E. Rep. 216; *Brick v. Rochester &c. R. Co.*, 98 N. Y. 211; *Carlson v. Oregon &c. R. Co.*, 21 Or. 450; s. c. 28 Pac. Rep. 497 (except as against neglect of the railroad company to take that due care to ascertain its condition and

prevent accidents which the exigencies of the case would suggest to prudent and cautious men experienced in such work, although a particular bridge which causes injury to him is not known to be out of repair and he is not employed to assist in repairing it); *Illinois &c. R. Co. v. Quirk*, 51 Ill. App. 607 (death of engineer due to recent ballasting, which was necessary to make a first-class road, the engineer being aware of the extra danger, and where company was not guilty of negligence in performing the work).

¹⁴⁷ *Central &c. R. Co. v. McWhorter*, 115 Ga. 476; s. c. 42 S. E. Rep. 82.

disconnect the trolley from the wire while passing under a low bridge and to connect it again after its passage under the bridge, knowing that the track at that point was uneven, and was thrown from his perch by a severe jolt of the car;¹⁴⁸ where the conductor of a freight-train, in violation of a rule of the company, voluntarily left the caboose while the train was in motion, and stepped outside upon the platform of another car to observe the station-lights, which he might have seen from the caboose, and in consequence of so doing got killed;¹⁴⁹ where a street-railway conductor, whose duty it was to assist the motorman in turning the car on a turntable at the end of the line, overstrained himself in attempting to do so, in consequence of the turntable getting out of repair so that the rails scraped against the side of the pit, impeding its motion, of which fact the conductor had knowledge;¹⁵⁰ and in another case specially noted in the margin.¹⁵¹ On the other hand, and somewhat at variance with the case just referred to in the foot-note, it has been held that a conductor on a trolley-car does not assume the risk of being struck by a passing car, while properly standing on the running-board of his car, collecting fares, where the tracks are unnecessarily constructed too near together, for a short distance, he not knowing of the danger and it not being obvious to him.¹⁵²

¹⁴⁸ *McCauley v. Springfield St. R. Co.*, 169 Mass. 301; s. c. 47 N. E. Rep. 1006.

¹⁴⁹ *Crawford v. New York & C. R. Co.*, 23 Ohio C. C. 207.

¹⁵⁰ *Roberts v. Indianapolis St. R. Co.*, 158 Ind. 634; s. c. 64 N. E. Rep. 217. See *post*, § 4834.

¹⁵¹ The plaintiff, who had been engaged on other roads as a conductor, and who, at the time of the accident, was engaged in learning the duties of conductor on the defendant's street-car, while standing on the running-board of a car moving along the track on the side of a road, was struck by a trolley-post and injured. He was an experienced man, and familiar with the duties of a conductor. He knew it was common to have the tracks on one side of the street, and knew that in such cases there would be trolley-posts. He was sent out on this part of the road to learn the conditions of its operation, and had made two trips before the accident. He failed to observe whether the car was in the center or on the side of the road, and paid no attention

to trolley-posts, and when stepping down on the running-board to perform certain duties as a conductor, he did not look to see if there were obstructions. The running-board on the opposite side of the car could have been used with safety. The defendant's tracks had been in the same position for several years, and the condition of the track and trolley-posts was not unusual. It was held that plaintiff assumed the risk, the danger being obvious: *Ladd v. Brockton St. R. Co.*, 180 Mass. 454; s. c. 62 N. E. Rep. 730.

¹⁵² *True v. Niagara Gorge R. Co.*, 70 App. Div. (N. Y.) 333; s. c. 75 N. Y. Supp. 216. State of evidence where a freight-car was backed down a grade at night and was derailed and the conductor killed in consequence of the excessive speed,—where the conclusion of the court was that the evidence did not show, as matter of law, that the conductor assumed the risk of injury from the excessive speed: *International & C. R. Co. v. Vinson*, 28 Tex. Civ. App. 247; s. c. 66 S. W. Rep. 800.

§ 4796. Various Other Risks Assumed by Railway Employés.—

Referring to various other decisions, we find that it has been held that a section-hand familiar with the fact that trains are run at a high rate of speed at a certain place, assumes the risk incident to the high rate of speed, but not the risk of the failure of the engineer to give him a signal which peculiar circumstances may require;¹⁵³ that a railway employé assumes the risks incident to travel over the road while it is in a reasonably safe condition, but does not assume risks which grow out of any ordinary defect in the road which renders it more hazardous than is reasonable, unless he has knowledge of such defect;¹⁵⁴ that a brakeman who had worked on the train on which the accident occurred for six months, during which time the mode of carrying broad-gauge cars, complained of as unsafe, had been followed, and cars similar to the one on which the accident occurred had been frequently carried, the same car itself having been once carried but a short time before,—assumed the risk of injury from that mode of carrying broad-gauge cars;¹⁵⁵ that a brakeman on a freight-train drawn by two engines takes the risk of the increased strain put upon the couplings;¹⁵⁶ that a head brakeman, a part of whose duty it is to fill the water-tank of the locomotive through the manhole, and who has filled it several times during the trip, assumes the risk of injury from stepping on the manhole-cover, which he knows is out of repair;¹⁵⁷ that a brakeman on a freight-train who knows that trains are run at a speed in excess of that provided by a city ordinance, and who nevertheless remains in the service without protesting,—assumes the risk;¹⁵⁸ that a brakeman on a freight-train assumes the risk of *inclement weather conditions*, and that a railroad company may run its trains at any *speed* it sees fit, irrespective of such conditions; so that where a brakeman is thrown from the top of a car on a cold, frosty morning, when objects are covered with ice, and while the train is moving at a high speed, he cannot recover;¹⁵⁹ that a switchman on top

¹⁵³ *Schulz v. Chicago &c. R. Co.*, 57 Minn. 271; s. c. 59 N. W. Rep. 192.

¹⁵⁴ *Taylor &c. R. Co. v. Taylor*, 79 Tex. 104; s. c. 14 S. W. Rep. 918.

¹⁵⁵ *Titus v. Bradford &c. R. Co.*, 136 Pa. St. 618; s. c. 26 W. N. C. (Pa.) 472; 21 Pitts. L. J. (N. S.) 165; 47 Phila. Leg. Int. 496; 8 Lanc. L. Rev. 93; 20 Atl. Rep. 517.

¹⁵⁶ *Hawk v. Pennsylvania R. Co.* (Pa.), 11 Atl. Rep. 459 (no off. rep.). See also, *Chicago &c. R. Co. v. Maloney*, 77 Ill. App. 191; s. c. 3 Chic. L. J. Wkly. 298 (what risks

are assumed by a railway-yardman employed to clean snow and ice from the switches, where engines and cars are running over the tracks to the switches where he is working).

¹⁵⁷ *McQuiggan v. Delaware &c. R. Co.*, 122 N. Y. 618; s. c. 34 N. Y. St. Rep. 618; 26 N. E. Rep. 13.

¹⁵⁸ *Martin v. Chicago &c. R. Co.* (Iowa), 87 N. W. Rep. 654 (no off. rep.); s. c. on appeal from judgment directed for defendant, 118 Iowa 148; 91 N. W. Rep. 1034.

¹⁵⁹ *Martin v. Chicago &c. R. Co.*,

of the cars assumes the risk of the neglect of a fellow switchman, who has tried unsuccessfully to uncouple some cars, to give him a cautionary signal before signalling the engineer to stop, where it is not shown that the defendant company is under any duty to give such cautionary signal before giving the stop signal; for in such case the jerk occasioned by stopping is a risk assumed by him as a switchman, unless it is an unusual and extraordinary one attributable to some defect in the engine, machinery, cars or appliances, or to the unskillful handling of the engine.¹⁶⁰

§ 4797. **Still Other Risks Assumed by Railway Employés.**—A railway employé who is required to pass over a railway-bridge to get to his work from his boarding-house, assumes the risk of injury from the fact of the bridge being used by a derrick-car, which was in use at the time of the commencement of his employment.¹⁶¹ A railway employé engaged in loading coal into cars upon a coal-dock, in the night-time, who knows that empty cars propelled by gravity to the place of loading are to be expected at any time, assumes the risk of being run over by such a car, when the sight of its approach is obscured by steam escaping from a locomotive.¹⁶² A railway employé who, in the exercise of reasonable care for his own safety, under principles already stated,¹⁶³ ought to know that there is no "switch-marker" at a particular junction, voluntarily assumes the risks of its absence by continuing in the employment, so as to prevent a recovery for his death, in case it proceeds from such a source.¹⁶⁴ It is a just conclusion that the liability of injury from the fact of a piece of ore turning under the foot of a railway employé, while passing in the course of his duty from a car loaded with ore, is one of the ordinary risks of his employment which he assumes, in the absence of evidence that the car was not properly loaded.¹⁶⁵ A railway employé assumes the risk incident to the mode of operating a turntable, where the source of danger is open and visible.¹⁶⁶ A railway employé who avails

supra. See generally, as to assumption of risk of *weather conditions*, *Central R. & C. Co. v. Smith*, 82 Ga. 236; s. c. 8 S. E. Rep. 311; *O'Bannon v. Louisville & C. R. Co.*, 9 Ky. L. Rep. 706; s. c. 6 S. W. Rep. 434 (no off. rep.); *Piquegno v. Chicago & C. R. Co.*, 52 Mich. 40; s. c. 17 N. W. Rep. 232; *Harding v. Railway Transfer Co.*, 80 Minn. 504; s. c. 83 N. W. Rep. 395; *International & C. R. Co. v. Hester*, 64 Tex. 401.

¹⁶⁰ *Shields v. Kansas City & C. R. Co.*, 87 Mo. App. 637.

¹⁶¹ *Olsen v. Andrews*, 168 Mass. 261; s. c. 47 N. E. Rep. 90.

¹⁶² *Osborne v. Lehigh Valley Coal Co.*, 97 Wis. 27; s. c. 71 N. W. Rep. 814.

¹⁶³ *Ante*, § 4647.

¹⁶⁴ *Union & C. R. Co. v. Monden*, 50 Kan. 539; s. c. 53 Am. & Eng. R. Cas. 363; 31 Pac. Rep. 1002.

¹⁶⁵ *East Tennessee & C. R. Co. v. Suddeth*, 86 Ga. 388; s. c. 12 S. E. Rep. 682.

¹⁶⁶ *Mellott v. Louisville & C. R. Co.*, 101 Ky. 212; s. c. 19 Ky. L. Rep. 379; 40 S. W. Rep. 696.

himself of permission to sleep in a caboose while it is standing at night on a side-track, knowing that the track is used for switching other cars, assumes the risk of injury from a collision between the caboose and other cars so being switched, and cannot recover from the company for such an injury.¹⁶⁷ An experienced freight-handler assumes the risk of a defective hook used in fastening a grain-door upon a freight-car, causing the door to fall when the car vibrates in the course of loading it, where the defect is obvious, and before commencing work he looks to see whether it is all right.¹⁶⁸ That a stick which an employé uses as a lever is insufficient in size to withstand the force applied to it, is a matter open and obvious to the person using it, and the fact that it may break is an incident of the business in which he is engaged and one which he assumes.¹⁶⁹ An experienced railway employé who is thoroughly familiar with the yard in which he works, and knows that such yard is usually overcrowded with cars, and that such condition is permanent, by continuing in the service assumes the risk of dangers incident to the crowded condition of the yard.¹⁷⁰

¹⁶⁷ *Jacobs v. Lake Shore &c. R. Co.*, 84 Mich. 299; s. c. 47 N. W. Rep. 669.

¹⁶⁸ *Cassaday v. Boston &c. R. Co.*, 164 Mass. 168; s. c. 41 N. E. Rep. 129.

¹⁶⁹ *Bohn v. Chicago &c. R. Co.*, 106 Mo. 429.

¹⁷⁰ *Bence v. New York &c. R. Co.*, 181 Mass. 221; s. c. 63 N. E. Rep. 417. But a railway employé, who with three others, is directed to remove iron guard-rails weighing 300 or 400 pounds on a bridge nine feet

wide, by stooping from time to time, *does not assume the risk of being injured by any of the others making a misstep, where he is not aware of the danger, is not in his regular line of work, and does not have time to find out that he is doing his work in a dangerous manner*: *Bonnet v. Galveston &c. R. Co.*, 89 Tex. 72; s. c. 33 S. W. Rep. 334; rev'g s. c. (Tex. Civ. App.), 31 S. W. Rep. 525 (a vice-principal was present and directed the work).

CHAPTER CXX.

ACCEPTING RISK OF INJURY FROM ELEVATORS IN BUILDINGS.

SECTION

4802. Risk of injuries from elevators in buildings, when assumed.

4803. Accepting risk of falling into elevator-shafts.

SECTION

4804. Risk of injuries from elevators in buildings, when not assumed.

4805. Assumption of risk of injury from elevators in buildings in process of construction by independent contractors.

§ 4802. **Risk of Injuries from Elevators in Buildings, When Assumed.**—When it is remembered that these dangerous machines are generally operated by *boys*, it may be easily understood that a principle already considered¹ obtains in some jurisdictions, under the operation of which a person is not conclusively deemed to have assumed the risk unless he not only knows, or has the means of knowing, of the source of danger, but also has such knowledge or means of knowledge, or is so situated, as to be able to *appreciate* the danger arising therefrom; and it may well be concluded that the “elevator-boy,” or even the “elevator-man,” who sustains injuries from the fall of the elevator, is not, as matter of law, precluded from recovery therefor, although he may have had the same means of knowing of the existence of the defects in the machinery which caused the accident as his employer had, and although he may have continued thereafter to use it without objection, provided the circumstances were such that, although he may have imputably had knowledge of the defect, yet he was not conclusively imputable with a knowledge or realization of the danger which it threatened.² Subject to this qualification (which does not seem to be admitted in all jurisdictions), an employé assumes the risk of accident from the *evident* absence of safety-appliances upon a freight-elevator, on which he rides by invitation, where the exercise of ordinary care would reveal their absence.³ Considering this source of

¹ *Ante*, § 4652.² *Union Show Case Co. v. Blindaur*, 75 Ill. App. 358; s. c. aff'd, 175 Ill. 325; 51 N. E. Rep. 709.³ *Sievers v. Peters Box &c. Co.*, 151 Ind. 642; s. c. 8 Am. & Eng.Corp. Cas. (N. S.) 629; 50 N. E. Rep. 877; 52 N. E. Rep. 399; 1 Repr. (Ind.) 420. See also, *Hall v. Murdock*, 114 Mich. 233; s. c. 72 N. W. Rep. 150; *Shields v. Robins*, 3 App. Div. (N. Y.) 582.

danger with respect to volunteers,⁴ it has been held that an employé who, under a mere implied license so to do, rides upon an elevator known to him to be intended only for carrying *goods*, does so at his own risk.⁵ An employé of the proprietor, lessee, or tenant of a building has been held to assume the risk of injury from elevators employed therein under the following circumstances:—Where he works around and upon the elevator-shaft, knowing that it is open;⁶ where a boy, seventeen years old, who had previously operated a freight-elevator in connection with the inspector, but who had never been warned or instructed concerning it, undertook, of his own volition, to operate it alone in bringing up some glassware from the basement, the inspector having been, while the loading was in operation, temporarily called away, and in so doing, the boy was killed;⁷ where an employé, who had been engaged for eight or nine weeks in pushing a coal-car into an elevator-car to which there were no automatic gates, running the elevator to the roof and pushing the coal-car out to a chute and dumping it, and then returning it, was injured by reason of the elevator descending, without the fault of the employer, and the employé pushed the coal-car into the vacant elevator-well and fell with it;⁸ where an employé entrusted with the duty of constructing a *freight-elevator* invited a co-employé to ride therein, instead of going up the stairway provided for the use of employés,—with the conclusion that the co-employé accepted the invitation at his own risk;⁹ where an employé twenty-three years old, who had run the elevator many times a day for sixty days prior to the accident, knew that the jerking and the shifting of the elevator would cause loose boxes placed by him on the floor in piles six feet or more high to be so moved and shaken in the ascent of the elevator as to be caught under a projecting beam, the position of which he also knew;¹⁰ where the porter in a store, being familiar with the custom, in operating the elevator, to warn any person using it by shaking the chain before moving it, and that the person so warned should answer, was injured by a premature movement of the elevator while he was using it, after the chain was

⁴ *Ante*, § 4677, *et seq.*

⁵ *Wise v. Ackerman*, 76 Md. 375; s. c. 25 Atl. Rep. 424.

⁶ *Whatley v. Block*, 95 Ga. 15; s. c. 21 S. E. Rep. 985.

⁷ *Kinnare v. Klein*, 88 Ill. App. 304.

⁸ *Keenan v. Edison Electric Illum. Co.*, 159 Mass. 379; s. c. 34 N. E. Rep. 366.

⁹ *Sievers v. Peters Box &c. Co.*, 151 Ind. 642; s. c. 50 N. E. Rep. 877; 8 Am. & Eng. Corp. Cas. (N.

S.) 629; 52 N. E. Rep. 399; 1 Repr. (Ind.) 420. See also, *Hoehmann v. Moss Engraving Co.*, 4 Misc. (N. Y.) 166; *Morris v. Brown*, 111 N. Y. 326.

¹⁰ *Barry v. New York Biscuit Co.*, 177 Mass. 449; s. c. 59 N. E. Rep. 75 (the conclusion being that he was either negligent in not appreciating the danger and using adequate means to prevent an accident from it, or else that he did appreciate it and assumed the risk and took the chances).

shaken and before his answer;¹¹ where an employé accepts service in a building knowing an elevator is not provided with *automatic doors* as required by statute,—the conclusion being that he waives the benefit of the statute and assumes the extra risk,—a view which repeals the statute;¹² where the elevator, in running which the operator was injured, was not out of repair, and was of a kind in ordinary use,—the master not being liable, though the operator had told the master's superintendent that there should be guards at the sides of the elevator, and the superintendent had promised to provide them;¹³ where an employé, a part of whose duties had long been to sweep and clean out the bottom of the elevator-shaft several times a week, was injured while performing such duty by the descent of the car upon him, the danger being obvious, and no change having been made in the mode of operating the elevator during the time of his employment;¹⁴ and in the other cases cited in the marginal note.¹⁵

¹¹ *Beyer v. Victor*, 51 N. Y. St. Rep. 83; s. c. 22 N. Y. Supp. 392.

¹² *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun (N. Y.) 530; s. c. 53 N. Y. St. Rep. 786; 24 N. Y. Supp. 403. See also, *Burns v. Nichols Chemical Co.*, 65 App. Div. (N. Y.) 424; s. c. 72 N. Y. Supp. 919 (failure to have *guard-rails* around elevator-opening as required by a city ordinance—held to be an obvious risk, assumed by a workman who had remained in the service for three months).

¹³ *Leonard v. Herrmann*, 195 Pa. St. 222; s. c. 45 Atl. Rep. 723.

¹⁴ *Volk v. B. F. Sturtevant Co.*, 43 C. C. A. 527; s. c. 104 Fed. Rep. 276.

¹⁵ *Elliott v. Carter White-Lead Co.*, 53 Neb. 458; s. c. 73 N. W. Rep. 948 (employé required to place pigs of lead upon an inclined wooden elevator, up which they were drawn by an endless chain with an apron attachment, injured by one of the bars falling upon him); *Hart v. Naumburg*, 123 N. Y. 641; s. c. 25 N. E. Rep. 385 (servant was warned that the elevator was dangerous and was told by the engineer not to use it, but the master himself afterwards granted permission to do so). Where the plaintiff was an elevator constructor and repairer, and had an operator in an elevator, and made some examination of it, and was able to tell the cause of the accident which thereafter happened, he assumed the risk incident

to its use: *Watson v. Duncan*, 61 N. Y. Supp. 667; s. c. 46 App. Div. (N. Y.) 298; rehearing denied, 62 N. Y. Supp. 257; s. c. 47 App. Div. (N. Y.) 640. Where the elevator in defendant's building was not provided with an operator, and the general manager, without being required to do so, reached over the automatic safety-gate from the outside and attempted to operate the elevator by the cable-rope, as was the custom, when the elevator suddenly shot upward and the gate caught him and then dropped him into the shaft, killing him,—he was held to have assumed the risk of injury from the gate: *Stagg v. Edward Westen Tea & Co.*, 169 Mo. 489; s. c. 69 S. W. Rep. 391. Where an adult employé was injured while operating a hoisting-apparatus, consisting in part of a wheel turned by an endless rope, which was kept in place on the wheel by V-shaped pieces of wood, some of which had split off, and the injury was occasioned by the rope running off in consequence of such guide-pieces being split off,—it was held that the danger of the rope running off if not kept in line with the wheel, and the defect in the wheel, were so apparent that the employé would be deemed to have assumed the risk: *Bays v. Warren Featherbone Co.*, 131 Mich. 205; s. c. 9 Det. Leg. N. 256; 91 N. W. Rep. 164.

§ 4803. **Accepting Risk of Falling into Elevator-Shafts.**—As a general rule, the servant assumes the risk of falling down an elevator-shaft where he has been apprised of its location, or has acquired such knowledge by experience in his employment.¹⁶ One employed as a *watchman* in an unfinished building, who knows that an elevator-shaft is being constructed by independent contractors, and is in an unfinished condition, assumes the risk of falling down the shaft, and if he does not keep away from it but falls down it, he cannot recover damages for the hurt.¹⁷ Where the employés in a warehouse are in the habit of removing the car of an elevator at will, although at the time another employé may be engaged in loading goods thereon, an employé who, after the car has been thus removed, backs into the shaft with his load and is killed, does not thereby create grounds for an action for damages against the warehouse company, because he is deemed to have assumed the risk or to have been guilty of contributory negligence.¹⁸

§ 4804. **Risk of Injuries from Elevators in Buildings, When Not Assumed.**—The master being, as already seen,¹⁹ under the duty of exercising ordinary or reasonable care to the end of providing a safe place for his servant to work, and safe tools, machinery and appliances with or about which he is to work,—it follows that the servant may, within reasonable limits, rely upon the performance of this duty by the master, without personally inspecting the elevator, and may recover damages from the master for an injury received by him which is due to its imperfect construction, where a reasonable inspection and a proper measure of diligence would have detected the defect and led to its reparation;²⁰ in other words, an employé does not assume the risk of the employer's negligence in failing to provide him with safe machinery wherewith to work and with a safe place wherein to work, unless the danger is so open and obvious that by entering upon the employment or by continuing therein, he impliedly accepts it.²¹ Another principle is that already adverted to,²² that, although the

¹⁶ *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226; 60 N. E. Rep. 815 (servant walked into the elevator-shaft and was killed, although he knew that the elevator was used by other workmen and was liable not to be standing at the door of the shaft).

¹⁷ *Conway v. Furst*, 57 N. J. L. 645; s. c. 32 Atl. Rep. 380.

¹⁸ *Perras v. Booth*, 82 Minn. 191; s. c. 84 N. W. Rep. 739. To the same effect, see *Danuser v. Seller*, 24 Wash. 565; s. c. 64 Pac. Rep. 783.

¹⁹ *Ante*, §§ 3758, 3759.

²⁰ *Eastman v. Curtis*, 67 Vt. 432; s. c. 32 Atl. Rep. 232; *Olson v. Hanford Produce Co.*, 111 Iowa 347; s. c. 82 N. W. Rep. 903 (employé did not assume the risk of injuries received in operating a platform elevator by reason of coming in contact with an iron girder extending into the elevator-shaft); *ante*, § 3894, *et seq.*

²¹ *Frolich v. Cranker*, 21 Ohio C. C. 615; s. c. 11 Ohio C. D. 592.

²² *Ante*, §§ 4652, 4654.

servant may be aware of the defective condition of an elevator, yet he is not thereby necessarily chargeable with a knowledge or appreciation of the danger that may attend its use, but has the right to assume, in the absence of notice or circumstances putting him upon inquiry, that it is reasonably safe for him to operate it in the manner directed by the master.²³ Moreover, a servant whose duty is not to run the elevator, but who, let us say, is employed to wash bottles in the basement of the building, does not assume the risk incident to the running of it at the command of his foreman, although he may understand how to use it and may have run it on a number of occasions, unless the danger is such that an ordinarily prudent man would not encounter it.²⁴ Here, as elsewhere, the principle which puts upon the servant an assumption of the risk depends upon his years, his maturity, and his capacity to understand the danger. Upon this principle it has been held that a boy employed to run an elevator does not assume the risk of danger arising from the proximity of the drum and cable to the check-line, which is but six inches away, where he is not of sufficient age and experience to comprehend the danger of accidentally taking hold of the cable instead of the check-line, and where there is a statute requiring all elevators and drums so situated as to be dangerous to employés to be securely guarded or fenced; and if the master has neglected this statutory duty, he may be held liable for an injury resulting therefrom to the elevator-boy.²⁵ As already seen, one who is not employed to do a dangerous work, but who *voluntarily* enters upon it, takes the risk thereby incurred and cannot put the consequences of his own voluntary and unnecessary act upon his master;²⁶ but this principle was held not to apply so as to make a chambermaid in a hotel, who, with the consent, approval, or direction of the housekeeper or manager, who had power to employ and discharge chambermaids, used the elevator in passing from one story to another in the performance of her duties, a mere *volunteer* who assumed the risk of that method of transit, unless she knew or had reason to believe that the housekeeper or manager had no right to allow her to use the elevator.²⁷ Nor was the operator of a freight-elevator outside the scope of his employment in removing a slight obstruction which had stopped his progress, its removal not being such as to involve any hazard under ordinary conditions, though his instructions were to

²³ Union Show-Case Co. v. Blindaur, 175 Ill. 325; s. c. 51 N. E. Rep. 709; aff'g s. c. 75 Ill. App. 358.

²⁴ Dallemand v. Saalfeldt, 175 Ill. 310; s. c. 17 Nat. Corp. Rep. 439; 51 N. E. Rep. 645; aff'g s. c. 73 Ill. App. 151; 15 Nat. Corp. Rep. 698.

²⁵ Thompson v. Johnston Bros. Co., 86 Wis. 576; s. c. 57 N. W. Rep. 298.

²⁶ *Ante*, § 4066.

²⁷ The Oriental v. Barclay, 16 Tex. Civ. App. 193; s. c. 41 S. W. Rep. 117.

report to the mechanic in charge when his elevator would not run or needed fixing; nor was he outside the scope of his employment in going up to the fifth floor of the building to see what had stopped his elevator; and he could not, on such grounds, be precluded from recovering for injuries resulting from the fall of the elevator, which was due to the cable having, unknown to him, become uncoiled, where he had never been warned of the danger, and it was not obvious.²⁸ It is not necessary to repeat that when the employé has no knowledge of the defect, and where his situation and experience have not been such as to make his ignorance negligent, under principles already discussed,²⁹ he does not assume the risk of an injury from the defect;³⁰ and, although he may have known of it and may have complained of it, and may have received from the representative of the master the assurance that it would be repaired, circumstances may thereafter exist which will give him the right to indulge in the reasonable assumption that it has been repaired, although such may not be the fact.³¹

²⁸ *Stone v. Boscawen Mills*, 71 N. H. 288; s. c. 52 Atl. Rep. 119.

²⁹ *Ante*, § 4647.

³⁰ *Simmons v. Peters*, 85 Hun (N. Y.) 93; s. c. 32 N. Y. Supp. 680; 66 N. Y. St. Rep. 64; *McGregor v. Reid & Co.*, 178 Ill. 464; s. c. 6 Am. Neg. Rep. 28; 53 N. E. Rep. 323; rev'g s. c. 76 Ill. App. 610 (employé not in charge of a freight-elevator and not knowing of its defective condition, injured by its fall).

³¹ *Ante*, § 4669; *Larkin v. Washington Mills Co.*, 61 N. Y. Supp. 93; s. c. 45 App. Div. (N. Y.) 6 (a considerable lapse of time after the complaint and assurance that the reparation would be made; a cessation for some weeks by the plaintiff of the use of the elevator; lumber seen by him on the premises and he having been told that carpenters were at work). It is quite unnecessary to say—except to show the propositions which ingenuity can conjure up and submit to judges—that one employed to run an elevator and who consequently is required, in the discharge of his duty to his master, to be upon it, is not affected by a notice stating that there is danger, and that riding on the elevator without permission is strictly forbidden: *Boess v. Clausen & Co. Brew. Co.*, 12 App. Div. (N. Y.) 366; s. c. 42 N.

Y. Supp. 848. Nor is it necessary to say that a man employed to run an elevator does not assume the risk of its *defective construction* because, after he has been hired, he has been told that the employer will not be responsible, and replies that he has run elevators, and that there need be no fear of him: *Fairbank Canning Co. v. Innes*, 24 Ill. App. 33; s. c. aff'd, 125 Ill. 410; 15 West. Rep. 176; 17 N. E. Rep. 720. Circumstances under which an employé, directed by the foreman to go into the bottom of an elevator-shaft and pick up articles therein, did not assume the risk of the elevator descending upon him: *Kirk v. Senzig*, 79 Ill. App. 251. Circumstances under which an employé, who was ordered by the foreman to unload a freight-car on to an elevator, was killed, where, during the progress of the work, the foreman permitted another employé to remove the elevator without warning the deceased, whereby, in walking backwards with the truck down the incline to the elevator, according to the custom, he fell into the elevator-shaft,—the conclusion being that, as the evidence did not show a custom to remove an elevator without warning when it was in use, the evidence that the risk was assumed was not conclusive, and the question should have

§ 4805. **Assumption of Risk of Injury from Elevators in Buildings in Process of Construction by Independent Contractors.**—In general, the employes of the owner of a building in process of erection assume risks of this kind; and if there is negligence, it is that of the independent contractor who is erecting the building, for which, on principles already considered,³² the owner of the building is not liable.³³ It has been held that where the foreman of a contractor engaged in constructing a brick building, knowing that it was against the rules, rode up to the third story on an ordinary builder's elevator, intended solely for lifting brick and mortar, and not for carrying passengers, he assumed the risk of injury therefrom.³⁴

gone to the jury: *Perras v. Booth*, 82 Minn. 191; s. c. 84 N. W. Rep. 739.

³² Vol. I, § 621.

³³ *Conway v. Furst*, 57 N. J. L. 645; s. c. 32 Atl. Rep. 380. See also, *Jehle v. Ellicott Square Co.*, 31 App.

Div. (N. Y.) 336; s. c. 52 N. Y. Supp. 366 (where the employe of a *third person* was injured by an *independent contractor*).

³⁴ *Ingram v. Fosburgh*, 73 App. Div. (N. Y.) 129; s. c. 76 N. Y. Supp. 344.

CHAPTER CXXI.

RISKS ASSUMED AND NOT ASSUMED BY MINERS AND OTHER PERSONS
WORKING IN MINES.

SECTION

4807. Miners and mine-workers assume what risks.

4808. Miners and mine-workers do not assume what risks.

SECTION

4809. Duty of miner to make inspections and his right to assume that the employer has done so.

4810. Complaint of dangerous defect and promise to repair.

§ 4807. **Miners and Mine-Workers Assume what Risks.**—Applying (or misapplying) the general principles already considered,¹ it has been held that miners and mine-workers assume the risk of an explosion of *gas* which accumulates, in sufficient quantities to explode, within fifteen minutes after an inspection;² that a mine-worker engaged in timbering an “entry” assumes the danger of the *fall of a mass of mud* and other material which the foreman and other workmen have been unable to dislodge with picks, but which has become loosened by the jarring produced by the drilling carried on by the injured employé;³ that a miner assumes the risk of death or injury from *smoke* accumulating in the mine, which risk could have been avoided if the fan had been kept in operation, where he voluntarily remains in the mine after having been warned of the fire that has broken out therein and cautioned to leave, he knowing that those in charge of the fan may not know the location of the fire, and, in the use of the fan, may proceed erroneously;⁴ that a mine-worker employed in cleaning out the shaft of an old mine, which is reached from another shaft by a connecting tunnel, where the method adopted is to remove the material from the bottom, thus allowing the *superimposed material* to sink down, by the fall of which the mine-worker is killed, assumes the risk of danger from that source, it being obvious;⁵ that an experi-

¹ *Ante*, § 4608, *et seq.*² *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 337.³ *Finalyson v. Utica Min. & Co.*, 67 Fed. Rep. 507; s. c. 14 C. C. A. 492.⁴ *Hughes v. Oregon Imp. Co.*, 20 Wash. 294; s. c. 55 Pac. Rep. 119.⁵ *Robinson v. Dininny*, 96 Va. 41; s. c. 30 S. E. Rep. 442.

enced miner, who knows the danger of working in a room which is *insufficiently propped*, but who nevertheless continues to work in it without complaint after acquiring knowledge of the incompetency of a person required to prop it, assumes the risk of its being insufficiently propped;⁶ that a mine-worker engaged in shifting a platform in a shaft of a salt mine during the process of its construction, who knows that the work is incomplete and that there are holes in the platform, assumes the risk of using it in that condition, and cannot recover damages for an injury received by *falling through a hole* in it;⁷ that a miner, working by contract in one room of a mine, who knows that, according to the custom of the mine, the work therein will be carried on without cessation, although there is "*standing gas*" in some of the rooms, where such rooms are marked with a danger signal, assumes the risk of injury from that source;⁸ that an experienced miner who, for extra compensation, undertakes to draw the pillars and stubs at a cross-entry in a mine, having at least as much knowledge as his employer as to the danger of the *fall of rocks* from the roof *when blasting*, assumes the risk of danger from that source, where a large stone shows indications of danger, and he continues to work without complaint and without propping it up;⁹ that a miner assumes the risk of danger from the *falling of rocks* from the roof of a mine consequent upon the discharge of a blast in the vicinity, where he goes to the place for the purpose of determining whether all the blasts have been fired;¹⁰ that a miner who has had sufficient experience to know that *overhanging walls* in a mine are liable to crack if left for any time without protection, and who also knows that the wall, in a place where he is required to work, has been left since the previous day without sufficient protection, assumes the risk of injury from that source where he continues to work in the place without complaint, and without promise, on the part of the owner of the mine, to put it in safe condition;¹¹ that an experienced miner, knowing the premises and conditions, who, just before quitting time, started down the entry-way, where he was met by a train of "*empties*" hauled by a mule "*side-hitched*" to the center of the train, while, at the same time, some loaded cars which

⁶ Consolidated Coal &c. Co. v. Clay, 51 Ohio St. 542; s. c. 32 Ohio L. J. 355; 2 Ohio Leg. N. 75; 38 N. E. Rep. 610; 25 L. R. A. 848.

⁷ Sharpsteen v. Livonia Salt &c. Co., 3 App. Div. (N. Y.) 144; s. c. 38 N. Y. Supp. 49.

⁸ Cerrillos Coal Co. v. Deserant, 9 N. M. 49; s. c. 49 Pac. Rep. 807.

⁹ Watson v. Kansas &c. Coal Co., 52 Mo. App. 366.

¹⁰ Boemer v. Central Lead Co., 69 Mo. App. 601.

¹¹ Andrews v. Tamarack Min. Co., 114 Mich. 375, 382; s. c. 4 Det. Leg. N. 630; 72 N. W. Rep. 242 (but judgment for plaintiff reversed, and a new trial ordered, because, among other errors, the trial judge did not submit the question of the miner's knowledge to the jury).

were descending by force of gravity to the shaft overtook him, and he, to escape the "empties," attempted to climb upon a loaded car and was injured,—assumed the risk;¹² that an employé engaged in running cars in and out of the cage at the bottom of a shaft, who was injured by the *falling of a lump of coal* in consequence of the cage being left uncovered in violation of a statute, assumed the risk notwithstanding the statute, the danger being obvious;¹³ that a mine-worker, having a few moments' leisure, who employed it in going into another room in the mine to see some fellow workman, and was there killed by the *falling of the roof*, assumed the risk of being so killed, because he was not, at the time, engaged in the line of his duty, but stood in the attitude of a volunteer, which gave him only the rights of a visitor or bare licensee;¹⁴ that an experienced miner, who voluntarily prosecutes the work of sinking a shaft in the mine, assumes the risk of a "*cave in*" while timbering the shaft, where he knows more of the shaft and of the nature of the ground than his employer knows, and believes that it can be timbered before it will cave in;¹⁵ that an experienced miner assumes the risk of using a piece of *iron gas-pipe* with the end plugged with wood or clay, for the purpose of tamping a charge of dynamite into a hole drilled for blasting, where, by the concussion thereby produced, the charge is prematurely exploded;¹⁶ that a miner who is himself engaged in *making safe a place* which has become dangerous during the progress of the work, or from the manner in which the work has been done, assumes the risk incident to the dangerous condition of the place, as one of the hazards of the employment, if he knows of it, or should know of it in the exercise of ordinary care and observation,—and this whether the place originally became dangerous through the negligence of the master or not;¹⁷ and the

¹² *Forbes v. Boone Val. Coal & Co.*, 113 Iowa 94; s. c. 84 N. W. Rep. 970.

¹³ *Bodell v. Brazil & Co. Coal Co.*, 25 Ind. App. 654; s. c. 58 N. E. Rep. 856. As to the assumption of risks by the servant where *statutory precautions* are disregarded by the master, see *ante*, § 4620, *et seq.*

¹⁴ *Wright v. Rawson*, 52 Iowa 329. That bare licensees take the premises as they find them, and assume the risk of the dangers,—see Vol. I, § 946.

¹⁵ *Stiles v. Richie*, 8 Colo. App. 393; s. c. 46 Pac. Rep. 694.

¹⁶ *King v. Morgan*, 109 Fed. Rep. 446; s. c. 48 C. C. A. 507.

¹⁷ *Moon-Anchor Consol. Gold Mines v. Hopkins*, 111 Fed. Rep. 298; s. c. 49 C. C. A. 347. But it was held that

a miner making excavations preparatory to the placing of supporting timbers by other workmen, was not engaged in making a dangerous place safe, and did not assume the risk: *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; s. c. 66 Pac. Rep. 799. So, where a foreman in a mine knew that the roof of an entry was cracked, but negligently failed to support it by temporary props, and ordered a miner, who was ignorant of the condition of the roof, to pick a hole in the wall, into which a supporting cross-timber was to be inserted, and the roof fell and injured the miner, it was held that he had not assumed the risk: *Wahlquist v. Maple Grove Coal & Co.*, 116 Iowa 720; s. c. 89 N. W. Rep. 98.

mine-worker assumed the risk in the other cases noted in the margin.¹⁸

§ 4808. **Miners and Mine-Workers do Not Assume what Risks.**—On this subject it has been held that where there is a statute requiring owners or operators of coal mines to provide for the proper ventilation of their mines, a miner employed in a mine may rightfully assume that the *statute will be complied with*, and does not assume the risk of the negligence of a person put in charge of the work of keeping the mine suitably ventilated;¹⁹ that a mine-worker did not assume the risk of injury from the *accidental explosion of dynamite*, in consequence of its being struck by another workman, which had been lying on a rock within a few feet of the entrance of the mine for nearly two months, on the theory of his being chargeable with a knowledge of the dangerous character of dynamite;²⁰ that a mine-worker, who had not helped in the work of excavation, did not assume the risk of the *falling of a mixture of talc and granite* allowed to remain on the side of a shaft after it had been excavated, the shaft being barely lighted and the place of danger not being readily seen in ascending and descending the shaft;²¹ that a mine-worker engaged in drilling and *blasting a tunnel* does not assume the risk of injury from the negligence of his employer in failing to keep that part of the tunnel already run in a reasonably safe condition;²² that a worker in an iron mine does not assume the risk of injury consequent upon the *individual methods used* by his employer, but has the right to assume that the practice or custom resorted to in similar mines to render the place where miners have to work reasonably safe, will be followed by his employer;²³ that a mine-worker does not, as matter of law, assume the risk of injury in consequence of walking on an incline on which a *car-track* is laid, at a particular point where there is no opportunity for stepping off the track, although he has previously passed along the track;²⁴ that a

¹⁸ Muddy Valley Min. &c. Co. v. Parrish, 74 Ill. App. 559 (shot-worker employed in a coal mine to pull down loose coal after a blast); Coal Valley Min. Co. v. Nelson, 87 Ill. App. 180 ("bottom digger" directed by a track-layer in the mine to take down a rock in the roof in a different place from that in which he was employed, and in so doing was injured).

¹⁹ Sommer v. Carbon Hill Coal Co., 89 Fed. Rep. 54; s. c. 59 U. S. App. 519.

²⁰ Myrberg v. Baltimore &c. Mining &c. Co., 25 Wash. 364; s. c. 65 Pac.

Rep. 539 (there was evidence that dynamite becomes more dangerous after it has been exposed to the weather).

²¹ Severance v. New England Talc Co., 72 Vt. 181; s. c. 47 Atl. Rep. 833 (question of assumption of risk not decided as a question of law).

²² Kelley v. Fourth of July Min. Co., 16 Mont. 484; s. c. 41 Pac. Rep. 273.

²³ Bergquist v. Chandler Iron Co., 49 Minn. 511; s. c. 52 N. W. Rep. 186.

²⁴ Benham v. Taylor, 66 Mo. App. 308.

mine-worker does not assume the risk of injury from defects in the *hoisting-apparatus* used for lowering him to the place where he works, this not being machinery about which he is employed;²⁵ that a person employed at a mine as a blacksmith to sharpen tools and to perform other work of a similar character, does not assume the risk of injury consequent upon leaving the *mouth of the shaft unprotected* in violation of a statute;²⁶ that one who is set to work by the side of a *pile of ore*, which is insufficiently lighted, does not, by consenting to work there and by continuing at the work, assume the risk of injury from the pile falling on him in consequence of its unsafe condition;²⁷ that a mine-worker does not voluntarily assume the risk from *unprotected belts, pulleys and rollers* upon an insufficiently lighted platform upon which he is set at work, where he has never been upon the platform before, and has no knowledge of the location of the machinery, belts or pulleys, and his general duties are not such as to require him to have such knowledge;²⁸ nor was the risk assumed in the other cases noted in the margin.²⁹

§ 4809. Duty of Miner to Make Inspections, and his Right to Assume that the Employer has Done So.—Proceeding now to the inquiry whether it is the duty of the miner or of the mine-worker to inspect those portions of the mine and the entrance thereto, and the tunnels connecting the different rooms thereof, in which he is required to work, or whether he may rely for his safety upon the discharge of this duty by his employer,—we find that it has been held that a “*machine-runner*” operating a machine to undermine coal cannot, as a matter of law, be held to have had his attention drawn to the fact that the duty

²⁵ *Moran v. Harris*, 63 Iowa 390.

²⁶ *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; s. c. 27 N. E. Rep. 741.

²⁷ *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; s. c. 44 N. E. Rep. 876.

²⁸ *Gisson v. Schwabacher*, 99 Cal. 419; s. c. 34 Pac. Rep. 104.

²⁹ *Kelley v. Wilson*, 21 Ill. App. 141 (injured from the falling of a rock from the roof—injured coal-miner knew the general nature of the roof and that there were no timbers in the entry); *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304 (risk of injury from the falling of a roof of a mine, owing to its not being propped, not one of the ordinary hazards of the service performed by a driver therein, etc.); *Chicago &c. Coal Co. v. Peterson*, 39

Ill. App. 114 (although miner knew of the danger of the roof falling and asked for more props). Dealing with the subject rather on the theory of contributory negligence than upon that of assumption of the risk, and pursuing a doctrine formulated in Missouri in earlier cases, it has been held in that State that mere knowledge by an employé in a mine that the entry is defective, and that some risk is incurred in its use, is not, as matter of law, sufficient to defeat a recovery for his death caused by the falling of rock from the entry, if the danger is not such as to threaten immediate injury, or if it is reasonable to expect that the entry might be safely used by the exercise of care: *Smith v. Little Pittsburg Coal Co.*, 75 Mo. App. 177; s. c. 1 Mo. App. Repr. 324.

of inspecting the roof of the mine, which the mine-manager agreed to assume, was being neglected, because he had been in the room about two hours and there had been no inspection, although frequent inspections were required, where he seemed to have been giving the machine his constant attention in an attempt to "break the record" for runs;³⁰ that the *driver of a coal-car* in a mine is not under the same duty to take precautions against injury from defects in the roof which the law puts upon one making an excavation in loose earth, sand, or gravel;³¹ and that a mine-worker who is *ordered by the "mine boss"* to go into a particular room in the mine is not required to test the safety of the roof of such room, although he knows that rock and slate have fallen from the roof before he enters the room, but may rely upon the obligation of his master to provide a safe place in which he is to work.³² In these and many other like cases, the injured miner or mine-worker is entitled to assume that the mine owner or operator has done his duty to the end of rendering the place safe; especially where that duty is enjoined by the statute law, in which case he is not bound to anticipate a willful violation of the statute.³³ He may, when directed to work in an entry, rightfully assume that his employer has performed his duty of inspecting the same, and may proceed with his work relying upon this presumption, unless the circumstances are such that a reasonably prudent and intelligent man would be able to discern the risks which obvious defects in the mine disclose.³⁴

§ 4810. Complaint of Dangerous Defect and Promise to Repair.—

Here, as elsewhere,³⁵ a complaint by a miner or mine-worker of a source of danger, made to the vice-principal of the mine owner or operator, who directs the miner to continue to work and promises to

³⁰ *Westville Coal Co. v. Schwartz*, 177 Ill. 272; s. c. 52 N. E. Rep. 276; aff'g s. c. 75 Ill. App. 468.

³¹ *Hancock v. Keene*, 5 Ind. App. 408; s. c. 32 N. E. Rep. 329; *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; s. c. 88 N. W. Rep. 817 (driver injured by rock falling from unpropped roof of entry in which he had been but a few times before, where, though it was not customary to prop the entire roof of an entry, and it was his duty to report defects known to him, it was no part of his duty to inspect walls or do work on them—finding warranted that he did not assume risk).

³² *Island Coal Co. v. Risher*, 13 Ind. App. 98; s. c. 40 N. E. Rep. 158.

³³ *Pawnee Coal Co. v. Royce*, 184 Ill. 402; s. c. 56 N. E. Rep. 621; rev'g s. c. 79 Ill. App. 469; *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1; s. c. 61 N. E. Rep. 236 (does not assume risk of wall becoming so thin as to be blown out by a blast, where the mining-boss has failed to make the inspection required by statute, and the miner is ignorant of the condition of the wall).

³⁴ *Ashland Coal &c. R. Co. v. Wallace*, 101 Ky. 626; s. c. 42 S. W. Rep. 744; 43 S. W. Rep. 207; 19 Ky. L. Rep. 849, 857.

³⁵ *Ante*, § 4667.

remedy the defect, in consequence of which a miner or mine-worker continues at his work and is injured through the source of danger complained of,—will ordinarily make the question of his assumption of the risk or contributory negligence in remaining in the service one for the decision of a jury.³⁶ If the injured employé is directed to remedy the defect but fails to do it, he cannot recover for an injury which he receives in consequence of it.³⁷

³⁶ *Taylor v. Star Coal Co.*, 110 Iowa 40; s. c. 81 N. W. Rep. 249. Compare *Morbach v. Home Mining Co.*, 53 Kan. 731; s. c. 37 Pac. Rep. 122 (where it is held that it is the duty of the employé to leave the dangerous employment when he finds that his employer does not remedy the defect). In an action brought in New York for injuries sustained in Pennsylvania, where it appeared that a miner complained to his mining-foreman of a dangerous crossing in the mine, but continued to work therein with knowledge that the defect had not been remedied, it was held that he could not recover for injuries subsequently

sustained at such crossing; since by the law of Pennsylvania and the decisions of its courts the foreman was his fellow servant, notice to whom was not notice to the master; and for the further reason that by continuing in the service with knowledge that the defect had not been remedied he assumed the risk: *Szotak v. Berwind-White Coal Min. Co.*, 36 Misc. (N. Y.) 98; s. c. 72 N. Y. Supp. 647.

³⁷ *Russell Creek Coal Co. v. Wells*, 96 Va. 416; s. c. 4 Va. Law Reg. 597; 31 S. E. Rep. 614 (loose slate in a roof which fell after the explosion of a blast); *ante*, § 4616.

CHAPTER CXXII.

VARIOUS OTHER RISKS ASSUMED OR NOT ASSUMED.

SECTION	SECTION
4812. Risk of injuries from vicious animals, tame or wild.	4826. Risks assumed by stevedores, steamboat and dock laborers, etc.
4813. When such risks not assumed.	4827. Risks assumed by quarrymen.
4814. Risk of injury from unsafe or defective harness, etc.	4828. Risks assumed in blasting.
4815. Risks assumed by electrical linemen.	4829. Risk of working with insufficient help.
4816. Risks not assumed by electrical linemen.	4830. Risk of injury from the falling of a pile of lumber.
4817. Risk of injury from defects in scaffoldings and stagings.	4831. Risks assumed by carpenters and joiners.
4818. Contributory negligence of employes injured in consequence of defects in scaffoldings.	4832. Risks assumed by servants in charge of steam-boilers.
4819. Risk of injury from defects in ladders.	4833. Risks assumed by employes working in ice-houses.
4820. Risk of injury from defects in derricks.	4834. Risk of injury from straining in lifting and from over-work.
4821. Fall of a cornice put up without anchors.	4835. Risk of injury incurred in protecting the master's property from fire.
4822. Risks assumed in excavating, risks of caving in, rocks falling, etc.	4836. Risk of injury from poisons, microbes, etc.
4823. Risks not assumed by employes in excavating.	4837. A catalogue of risks which the servant assumes.
4824. Particular circumstances under which the risk of caving in of excavation was not assumed.	4838. Further risks which the servant assumes.
4825. Risks assumed by sailors.	4839. Various other risks assumed.
	4840. Still other risks assumed.
	4841. Various other risks not assumed.

§ 4812. **Risk of Injuries from Vicious Animals, Tame or Wild.**—The risk of injury from the vicious propensities of animals with or about which the servant is required to work, is ordinarily assumed by

him, whether such animal be wild¹ or tame,² under substantially the same conditions under which the law puts upon the servant the assumption of the risks of his employment in other cases. If the animal is known to the master to be dangerously vicious, and its vice is not known to the servant, it is the obvious duty of the master to give the servant *warning* of that fact; and in the case of a horse which has the habit of vicious lunging and balking, he does not give that warning by the mere act of his foreman in telling the servant that the horse is "high-lived."³ In the absence of such knowledge or of such a warning, the servant may *rightfully assume* that the horse furnished him by his employer is reasonably safe for the purpose for which it is to be used.⁴ Circumstances may, of course, exist from which the law will, or a jury may, infer that the injured servant had knowledge of the vicious character of the horse; but it has been held that this inference does not arise, in the case of a night-watchman in a brewery, from the mere circumstance that he has seen the horse in the barn and hitched to a wagon, where he is charged with no other duty with respect to it than to put down a little hay in the morning.⁵

§ 4813. When such Risks Not Assumed.—On clear grounds, where the employer of a driver promises to furnish him with nothing but gentle teams, and assures him that a team with which he furnishes him is gentle, when in fact it is in the habit of running away, he is liable to the driver for injuries sustained without his fault, in consequence of the team becoming suddenly frightened and running away.⁶ It has been held that a miner is not prevented from recovering damages for personal injuries received in consequence of the falling of props supporting the roof of the mine, caused by the fact of

¹ An employé assumes the risk of injury by animals *ferae naturae*, such as elks and deer, when he voluntarily engages to work inside of the enclosure in which they are kept: *Bormann v. Milwaukee*, 93 Wis. 522; s. c. 33 L. R. A. 652; 67 N. W. Rep. 924.

² *Denver Tramway Co. v. O'Brien*, 8 Colo. App. 74; s. c. 44 Pac. Rep. 766 (horse frightened by automatic escape of steam from a boiler and kicked its driver); *Consolidated St. R. Co. v. Maier*, 9 Ohio C. C. 268 (circumstances under which a street-car company not liable for injuries to a boy in its employ engaged in driving horses attached to a car, owing to the horses becoming frightened on meeting another team.

and owing to the negligence of the motorman in handling the car, where the boy was not required or expected to ride upon the car, and the lines were not defective for driving on the ground, and the company had no notice or knowledge that the horses were liable to become excited).

³ *Wilson v. Sioux Consol. Min. Co.*, 16 Utah 392; s. c. 52 Pac. Rep. 626.

⁴ *Wilson v. Sioux Consol. Min. Co.*, 16 Utah 392; s. c. 52 Pac. Rep. 626.

⁵ *Jos. Schlitz Brew. Co. v. Blacklay*, 18 Ohio C. C. 359; s. c. 10 Ohio C. D. 17.

⁶ *Wrought-Iron Range Co. v. Martin*, 4 Tex. Civ. App. 185; s. c. 28 S. W. Rep. 557.

an unruly and vicious mule coming in contact with them, by reason of having continued to work in the place with knowledge of the character of the mule and without objection or complaint, where he did not have charge of the mule.⁷

§ 4814. Risk of Injury from Unsafe or Defective Harness, etc.—

The official syllabus of a decision of the Supreme Court of Georgia affirms a proposition thus clearly stated: "When a servant is employed in a business requiring the use of an animal, and the master furnishes an animal which is vicious and dangerous, and this fact is well known both to the master and the servant, it is the duty of the master to furnish such harness and appliances as will render reasonably safe the use of such an animal in the business to be carried on; and if, on account of the failure to furnish equipment of this character, the servant is injured by the animal, without fault on his part, the master is liable to the servant for whatever damages he sustains by reason of such injury, if it further appears that the harness and appliances furnished were known, or could, by the exercise of ordinary diligence, have been by the master known, to be unsafe and unsuitable, and the servant was ignorant of this fact, and could not have discovered it by the exercise of like diligence."⁸

§ 4815. Risks Assumed by Electrical Linemen.—According to various holdings, the risks of injury were assumed by electrical linemen under the following circumstances:—By a telephone lineman, the risk of injury through the fact that the insulation of a wire belonging to another company was worn off through contact with a tree, which had been burned, the risk being regarded as characteristic of the employment;⁹ by an employé of a thrashing-machine company, who,

⁷ *Western Coal &c. Co. v. Ingraham*, 70 Fed. Rep. 219; s. c. 36 U. S. App. 1; 2 Am. & Eng. Corp. Cas. (N. S.) 689; 17 C. C. A. 71 (roof fell, owing to the *negligent setting* of the props, which could have been discovered by a proper inspection. The mule would not have knocked the props down had they been properly set).

⁸ *Cooper v. Robert Portner Brewing Co.*, 112 Ga. 894; s. c. 38 S. E. Rep. 91. That dropping the reins and gently lifting a sapling that has been bent across the road, after first applying the brakes to his wagon, by one employed as a driver and peddler, who has been informed and believes that he is driving a

gentle team, but known by his employer to be vicious, is not such negligence, as matter of law, as will prevent recovery against the employer for injuries inflicted by their running away,—see *Martin v. Wrought-Iron Range Co.*, 4 Tex. Civ. App. 185; s. c. 23 S. W. Rep. 387. Circumstances under which street-railway company liable for injuries to its driver from the breaking of a hame-strap of poor quality, etc.,—see *Toledo Consol. St. R. Co. v. Yunker*, 9 Ohio C. C. 262.

⁹ *Chisholm v. New England Telephone &c. Co.*, 176 Mass. 125; s. c. 57 N. E. Rep. 383. Especially does the lineman assume the risk of injury from a defect in the insulation

directed by his employer to string an electric wire, for the purposes of a call-bell, over a wet and slippery roof, and knowing that two other wires which were "alive" were extended over the roof, and knowing the danger of coming in contact with live wires, held the wire which he was stretching in one hand, and caught one of the other wires in the other hand in consequence of slipping, thus completing an electric circuit and killing himself;¹⁰ by an experienced telegraph lineman injured by a discharge of electricity in the construction of a telegraph-line, he having equal knowledge of the danger with the foreman under whom he was working;¹¹ by an experienced electric-light lineman, killed by handling uninsulated wires charged with electricity without using the *rubber gloves* provided for him;¹² by a telegraph lineman ordered to ascend a telephone-pole belonging to another company, over which his own employer had no control, for the purpose of removing wires which hindered the erection of a telegraph-pole which he and others were engaged in putting up, and injured by reason of one of the spikes driven into the pole giving way,—the conclusion being that his own employer was under no duty of inspecting it, but that the employé assumed the risk;¹³ by an electrical lineman, the risk of coming in contact with primary electric-light wires while passing a rope under a wire, he being aware of their presence and of the danger of touching them, notwithstanding the fact that the work which he was directed to do brought him into close proximity with them;¹⁴ by an employé of a telephone company who had undertaken to assist other employés in removing old and decayed telephone-poles, the risk of injury, while on the top of one of such poles detaching a wire, because of the pole falling;¹⁵ by a lamp-

of a wire where it is *his duty to repair* such defects: *Smart v. Louisiana Electric-Light Co.*, 47 La. An. 869; s. c. 17 South. Rep. 346. See also, *Broderick v. St. Paul City R. Co.*, 74 Minn. 163; s. c. 77 N. W. Rep. 28. Compare *Kelly v. Erie Tel. & Co.*, 34 Minn. 321.

¹⁰ *Davis v. Port Huron Engine & Co.*, 126 Mich. 429; s. c. 85 N. W. Rep. 1125.

¹¹ *Epperson v. Postal Tel. Cable Co.*, 155 Mo. 346; s. c. 50 S. W. Rep. 795. The plaintiff had detected a current in the wire, and complained that it was too strong to handle the wire satisfactorily. The foreman felt the wire and assured him it was safe. The plaintiff was not permitted to say that he relied on the assurance of the foreman.

¹² *Junior v. Missouri Electric-*

Light & Co., 127 Mo. 79; s. c. 29 S. W. Rep. 988; *Wagner v. Portland*, 40 Or. 389; s. c. 60 Pac. Rep. 985; 67 Pac. Rep. 300 (worked without *rubber gloves* and without *boards to stand on*).

¹³ *Dixon v. Western U. Tel. Co.*, 68 Fed. Rep. 630. In this case it was held that the employé had no right to rely on the judgment or inspection of his foreman, when he knew that the foreman had no better knowledge of the condition of the pole than he himself had.

¹⁴ *Newnom v. Southwestern Tel. & Co. (Tex. Civ. App.)*, 47 S. W. Rep. 669; s. c. 1 J. A. 243 (no off. rep.).

¹⁵ *Saxton v. Northwestern Tel. & Co.*, 81 Minn. 314; s. c. 84 N. W. Rep. 109.

trimmer of an electric-light company, experienced and fully instructed, the risk of injury in consequence of a lamp becoming "alive" by reason of the wire coming in contact with those of another company, he knowing the danger of injury from the *crossing of wires*;¹⁶ by a lineman of an electric-light company, the risk of an injury from the breaking and falling of a pole on which he is at work, by reason of its being badly decayed a few inches below the surface of the ground,—this being regarded as an incident of his employment;¹⁷ by a lineman whose duty requires him to climb telegraph-poles, the risk of injury caused by his *spur slipping* from a tin sign nailed to such a pole;¹⁸ by a telephone lineman, the risk of injury caused by the *breaking of a limb* of a tree on which he is voluntarily standing for the purpose of removing an obstruction to the stringing of a wire between the poles erected for that purpose;¹⁹ by an experienced lineman, engaged in changing the wires from old telegraph-poles to new ones, who knew the wires were being changed because the poles were decayed, the risk of *cutting a guy-wire* attached to the pole he was on, to free some wires which had become lodged thereon, though done upon the advice of the foreman, by reason of which the pole fell and injured him;²⁰ by a man of mature years, not laboring under any mental disability, engaged in taking down fire-alarm wires, the risk of being killed while working in *proximity to an electric company's wires*, where he had been warned of the danger by a fellow servant, had heard two fellow servants say that they had received shocks, and had witnessed the effect of electricity on a horse;²¹ by an experienced telephone-lineman, charged by his employment with the duty of inspecting and repairing his employer's line, the risk of a *cross-bar breaking* and injuring him while he is repairing it, where he has full notice that numbers of cross-bars are defective, but makes no test of the one which breaks.²²

¹⁶ Carr v. Manchester Electric Co., 70 N. H. 308; s. c. 48 Atl. Rep. 286.

¹⁷ McIsaac v. Northampton Electric Lighting Co., 172 Mass. 89; s. c. 51 N. E. Rep. 524 (grossly untenable decision).

¹⁸ Peoria General Electric Co. v. Gallagher, 68 Ill. App. 248.

¹⁹ Yearsley v. Sunset Teleph. & Co., 110 Cal. 236; s. c. 42 Pac. Rep. 638.

²⁰ Tanner v. New York & C. R. Co., 180 Mass. 572; s. c. 62 N. E. Rep. 993 (neither lineman nor foreman had examined the pole, but lineman knew danger as well as foreman did, whose direction to cut the wire was not an assurance of safety).

²¹ Wagner v. Portland, 40 Or. 389;

s. c. 60 Pac. Rep. 985; 67 Pac. Rep. 300.

²² Roberts v. Missouri & C. Teleph. Co., 166 Mo. 370; s. c. 66 S. W. Rep. 155. It has been held that an experienced lineman, a part of whose duty was to climb poles, and who knew that some poles decayed in a short time, and that the point of danger in a decayed pole was only a few inches beneath the surface of the earth, and that the condition could only be ascertained by an examination of this point, assumed the risk in climbing a pole without such examination, though ordered to climb it by the company, which had, unknown to plaintiff, designated the pole as one to be replaced, and as

§ 4816. **Risks Not Assumed by Electrical Linemen.**—According to other holdings, electrical linemen do not assume the risk of injury from a dangerous current of electricity, communicated by contact with a crane operated by an electric motor, the insulation of which was known by his master to be defective, though the current used did not render it dangerous, but other wires carrying *dangerous* currents came into contact with the wire supplying current to the motor, outside of the master's premises;²³ the risk of an injury from a current of electricity released in consequence of the negligence of the foreman of the defendant, an electrical lighting company, the previous incompetency of such foreman having on previous occasions been brought to the attention of such company;²⁴ by a "trimmer" employed by an electrical company, who is without experience in climbing poles, the danger of injury from defects in spurs furnished him for that purpose, consisting in the fact of the spurs being set at an improper angle to the shank, and being made of soft material, the defect not being regarded as necessarily obvious even to an experienced person;²⁵ by a lineman of an electric street railway, the risk of injury from an uninsulated "span" wire so located as to render it liable to come in contact with the trolley-wire and become charged with electricity.²⁶

unfit to remain *beyond* that season, but not as unfit to use *through* the season, nor as unsafe to climb at the time plaintiff mounted it to strip it. The company's standard of condemnation was with reference to a variety of considerations which might require the condemnation of poles entirely safe for climbing; wherefore its failure to inform plaintiff that the pole had been condemned was not negligence: *Sias v. Consolidated Lighting Co.*, 73 Vt. 35; s. c. 50 Atl. Rep. 554.

²³ *Moran v. Corliss Steam-Engine Co.*, 21 R. I. 386; s. c. 43 Atl. Rep. 874; 45 L. R. A. 267.

²⁴ *Malay v. Mt. Morris Electric Light Co.*, 58 N. Y. Supp. 659; s. c. 41 App. Div. (N. Y.) 574; 6 Am. Neg. Rep. 325.

²⁵ *Indiana &c. Gas Co. v. Marshall*, 22 Ind. App. 121; s. c. 1 Repr. (Ind.) 427; 52 N. E. Rep. 232.

²⁶ *McAdam v. Central R. &c. Co.*, 67 Conn. 445; s. c. 35 Atl. Rep. 341; 5 Am. & Eng. R. Cas. (N. S.) 7 (company guilty of gross negligence). See also, *Grennis v. Louisville Electric-Light Co.*, 20 Ky. L. Rep. 1293; s. c. 49 S. W. Rep. 184 (no off. rep.) (employé of electric

light company killed on the roof of a house by contact with live wires, held to be in discharge of his duty); *Tague v. Westinghouse &c. Co.* (Pa.), 30 Pitts. L. J. (N. S.) 67 (electric company not negligent in employing a boy eighteen years old, at his own request, to wind and test armatures); *Thompson v. New Orleans &c. R. Co.*, 108 La. 52; s. c. 32 South. Rep. 177 (a workman engaged in carrying rails for the reconstruction of overhead electric lines did not assume the risk of injury from an imperfectly insulated wire). It has been held that where a telegraph-pole on which an employé was engaged fell from a cause which could not reasonably have been anticipated or discovered by him, and it did not appear that the poles were being moved because they were decayed, it could not be said that, because the pole was decayed, the employé was engaged in a known dangerous work, and therefore assumed the risk: *Riker v. New York &c. R. Co.*, 64 App. Div. (N. Y.) 357; s. c. 72 N. Y. Supp. 168 (pole had not been originally imbedded deep enough in the earth, or else the earth had been

§ 4817. Risk of Injury from Defects in Scaffoldings and Stagings.

—An employé of a company engaged in constructing an elevator in a building, who knows that the main part of the building in which the company is putting in the elevator is being constructed by other persons, takes the risk of using a scaffolding built by such other persons for their own use.²⁷ An employé who knows of the defect in a scaffolding, but nevertheless voluntarily resumes work thereon, assumes the risk of injury from it.²⁸ An employé engaged in the construction of a scaffolding between piers built for the erection of a bridge, does not, as matter of law, assume the risk of a collapse of the scaffolding due to the improper driving of the piles and bracing of the structure, he being a common laborer and not familiar with the principles and methods of such construction.²⁹ Common laborers upon such structures do not assume the risk of injury from their falling, where the defect is of such a nature that mechanical skill and knowledge would be required to discover and appreciate it.³⁰ As elsewhere seen,³¹ if the master provides a quantity of materials to be used in the erection of a scaffolding, and enough of such materials is well suited to the purpose, and he commits the plan and construction of the scaffolding to the discretion of his workmen, one of the workmen cannot recover from the master damages visited upon him by the defects in it.³² This is especially true where the servant injured or killed himself assisted in the erection of the scaffolding and in the erection of that part of it which fell, and was fully acquainted with its construction.³³

§ 4818. Contributory Negligence of Employés Injured in Consequence of Defects in Scaffoldings.—Remaining in the service with knowledge of a defect which may or may not carry with it danger to the employé is sometimes, by a misuse of terms, called “contributory

gradually worn away from its base).

²⁷ Whallon v. Sprague Electric Elevator Co., 1 App. Div. (N. Y.) 264; s. c. 37 N. Y. Supp. 174; 72 N. Y. St. Rep. 519.

²⁸ Nuss v. Rafsnyder, 178 Pa. St. 397; s. c. 39 W. N. C. (Pa.) 296; 35 Atl. Rep. 958.

²⁹ Pursley v. Edgemoor Bridge Works, 168 N. Y. 589; s. c. 60 N. E. Rep. 1119; aff'g s. c. 56 App. Div. (N. Y.) 71; 67 N. Y. St. Rep. 719.

³⁰ Hatton v. Hilton Bridge Const. Co., 167 N. Y. 590; s. c. 60 N. E. Rep. 1112; aff'g s. c. 59 N. Y. St. Rep. 272; 42 App. Div. (N. Y.) 398 (error not to submit to the jury the question of defendant's negligence and plaintiff's freedom from contribu-

tory negligence); Healy v. Burke, 71 N. Y. St. Rep. 1027; s. c. 35 Misc. (N. Y.) 384 (laborer removing bricks in a wheelbarrow on a scaffolding made of planks, with planks overlapping the joints, failed to observe the absence of one of the overlapping planks, which had been removed by order of the foreman, in consequence of which he was thrown from the scaffolding—entitled to recover).

³¹ Ante, § 3760; post, § 4852.

³² Blackman v. Thomson-Houston Electric Co., 102 Ga. 64; s. c. 29 S. E. Rep. 120; Hartman v. Kloeppinger, 9 Ohio C. C. 433; s. c. 3 Ohio Dec. 19.

³³ Stewart v. Ferguson, 60 N. Y. Supp. 429; s. c. 44 App. Div. (N. Y.) 58; ante, § 4616.

negligence" instead of "*accepting the risk*."³⁴ This species of negligence is not imputable to the employé where the scaffolding is suspended in a way which the servant deems unsafe, and where he objects to the manner in which it is fastened, but where scaffoldings are sometimes fastened that way, and the judgment of the injured employé is overborne by that of the foreman of the common master, unless the danger is so imminent that an ordinarily prudent man would not incur it;³⁵ but the fact that the injured servant had *some* opportunity of inspecting the scaffolding before going upon it does not impute contributory negligence to him, as matter of law, where he is injured by its collapse, but the question of his negligence is for the jury.³⁶ As to the right of the servant to assume that master has made the structure safe, on a principle already considered,³⁷ and within limits already considered, the servant may rightfully assume that the master has applied sufficient tests to the structure to indicate that it is safe, and may act upon that assumption without incurring the disadvantage of accepting the risk of injury from it, or of being guilty of contributory negligence—in using it without subjecting it to a special inspection, or putting his own judgment above that of his master.³⁸ But if the defect is such that the danger of using it is obvious and glaring,—so much so that no person in the exercise of ordinary care would use it,—the servant cannot put the risk of using it upon the master.³⁹ No recovery can be had by an employé for an injury from the fall of a staging in consequence of a visible flaw in a hook which supported it, and which he could not fail to see by reason of his frequent handling of the hook;⁴⁰ nor can an employé recover for an injury caused by the fall of an insufficient staging which was

³⁴ *Ante*, § 4611.

³⁵ *Offutt v. World's Columbian Exposition*, 175 Ill. 472; s. c. 51 N. E. Rep. 561; rev'g s. c. 73 Ill. App. 231. And so where the injury results from the breaking of a wire rope supporting the scaffolding on which the servant is working, where he does not know that the interior strands of the rope have become rusted, but suspects its safety and questions his employer about it, who assures him that it is all right, in reliance upon which assurance he uses it: *Purcell Mill & Co. v. Kirkland*, 2 Ind. Ter. 169; s. c. 47 S. W. Rep. 311.

³⁶ *McLaughlin v. Eidlitz*, 64 N. Y. Supp. 193; s. c. 50 App. Div. (N. Y.) 518. Somewhat to the same ef-

fect, see *Strabler v. Toledo Bridge Co.*, 11 Ohio C. D. 87.

³⁷ *Ante*, §§ 4618, 4654.

³⁸ *McBeath v. Rawle*, 192 Ill. 626; aff'g s. c. 93 Ill. App. 212; *Cole v. Warren Man. Co.*, 63 N. J. L. 626; s. c. 44 Atl. Rep. 647; *Strabler v. Toledo Bridge Co.*, 11 Ohio C. D. 87 (if the servant knew that the removal of certain boards from a scaffold was likely to render the scaffold insecure, he was entitled to assume that the master had performed his duty in again securing it).

³⁹ *Armour v. Brazeau*, 191 Ill. 117; s. c. 60 N. E. Rep. 904; rev'g s. c. 93 Ill. App. 235 (obvious defect in plank furnished for scaffold).

⁴⁰ *Goltz v. Milwaukee & C. R. Co.*, 76 Wis. 136; s. c. 44 N. W. Rep. 752; 41 Am. & Eng. R. Cas. 282.

constructed in a proper manner, where the danger was obvious, and where there was no emergency requiring him to expose himself to it;⁴¹ nor for an injury caused by falling from a staging by reason of its being defectively attached to a building, when the injured employé himself had built and attached the staging, and had not asked nor received any instructions from the master with reference thereto.⁴²

§ 4819. **Risk of Injury from Defects in Ladders.**—Contributory negligence or an acceptance of the risk has been imputed to an experienced mechanic who mounted a ladder standing on the floor of a factory, and who was thrown from it to his injury, by reason of its slipping from beneath him in consequence of the absence of spikes to hold it in its place, since the defect was open and obvious;⁴³ but where the injury proceeded from the breaking of the ladder at a place where it had been spliced, and the evidence was conflicting as to whether a splice in a ladder weakened it or left it as strong as it was before,—it was held that it could not be said, as matter of law, that the danger of using the ladder was so obvious that the servant must be held to have assumed the risk of using it, but that the question was one for the jury.⁴⁴

§ 4820. **Risk of Injury from Defects in Derricks.**—Injuries from derricks have generally proceeded from the breaking of the supporting ropes or wires; and where the servant receiving the injury knows of the defect, or of circumstances which would probably produce a defect in such a rope,—such as the fact that it is small and has been in a cellar where there was an accumulation of acid,—and fails to call the attention of the master to such defect, but continues to work after knowledge of it, he assumes the risk of injury from it.⁴⁵ Where

⁴¹ *Daniel v. Forsyth*, 106 Ga. 568; s. c. 32 S. E. Rep. 621 (fell on account of amount of material piled on it).

⁴² *Arnold v. Eastman & Co.*, 176 Mass. 135; s. c. 57 N. E. Rep. 209 [citing *Adasken v. Gilbert*, 165 Mass. 443; s. c. 43 N. E. Rep. 199; *McKay v. Hand*, 168 Mass. 270; s. c. 47 N. E. Rep. 104; *Brady v. Norcross*, 172 Mass. 331; s. c. 51 N. E. Rep. 528]. Employé of subcontractor injured by fall of staging erected for him, at request of his employer, by employé of general contractor, has no right of action against subcontractor: *Channon v. Sanford Co.*, 70 Conn. 573; s. c. 41 L. R. A. 200; 40 Atl. Rep. 462.

⁴³ *Borden v. Daisy Roller-Mill Co.*, 98 Wis. 407; s. c. 74 N. W. Rep. 91.

⁴⁴ *Jones v. Pacific Mills*, 176 Mass. 354; s. c. 57 N. E. Rep. 663.

⁴⁵ *Gunn v. Willingham*, 111 Ga. 427; s. c. 36 S. E. Rep. 804. State of evidence in a case where a servant was injured in consequence of the breaking of a wire rope supporting a derrick, which had been eaten into with rust, and some of the strands of which had broken, in which it was held that he did not accept the risk as matter of law, but that there might be a recovery upon a proper submission of the case to the jury: *Yaw v. Whitmore*, 61 N. Y. Supp. 731; s. c. 46 App. Div. (N. Y.) 422.

employés injured by the falling of a derrick had nothing to do with its erection or operation, and were required to work so near it that they might be injured by its fall, it could not be said, as a matter of law, that they were negligent in working there, or that they assumed the risk of such injury.⁴⁶

§ 4821. **Fall of a Cornice Put Up without Anchors.**—Where the plans and specifications of a building provided for the use of anchors in constructing the cornices, and an employé undertook, knowing the danger, to put up a cornice without the use of anchors, in consequence of which it fell, killing him, his death could not be made the foundation of an action against his employer,—the reason being that he voluntarily assumed the risk of the method which he employed.⁴⁷

§ 4822. **Risks Assumed in Excavating, Risks of Caving In, Rocks Falling, etc.**—There is, perhaps, no situation in which the oscillations of the judicial pendulum are more plainly perceived than in the inquiry upon which we are now about to enter. A master is bound to furnish his servant with a reasonably safe place in which to work, and if the employment consists in making an excavation, he is therefore bound to shore it up and to make it reasonably safe. This statement implies that the master is liable to the servant if the servant is injured through the negligent failure of the master to perform this duty. The servant, on the other hand, is bound to take notice of ordinary physical laws; and assumes the risk of exposing himself to the operation of such laws;⁴⁸ where he is employed in making an excavation, he has, under many if not most conditions, as good an opportunity of seeing and of understanding the danger as his master has. The weight of authority, therefore, perhaps is that one employed in making an excavation takes the risk of injury from its caving in,—it being, in theory of the law, an obvious danger within the meaning of a rule already considered.⁴⁹ If a number of workmen are engaged

⁴⁶ *McMahon v. McHale*, 174 Mass. 320; s. c. 54 N. E. Rep. 854. State of evidence under which jury found that the fall of a derrick was not due to a violation of defendant's orders, and tending to show that it was due to *improper ballasting*, for which the master was responsible, and where the court held that a verdict for the plaintiff was not against the evidence: *Sherman v. J. W. Bishop Co.*, 23 R. I. 6; s. c. 49 Atl. Rep. 39. Condition of evidence under which it was within the prov-

ince of a jury to say that a servant assumed the risk of an unsafe derrick: *Walters v. George A. Fuller Co.*, 74 App. Div. (N. Y.) 388; s. c. 77 N. Y. Supp. 681.

⁴⁷ *Homersky v. Winkle Terra-Cotta Co.*, 178 Ill. 562; s. c. 6 Am. Neg. Rep. 34; 53 N. E. Rep. 346; aff'g s. c. 77 Ill. App. 42.

⁴⁸ *Swanson v. Great Northern R. Co.*, 68 Minn. 184; s. c. 70 N. W. Rep. 978.

⁴⁹ *Swanson v. Lafayette*, 134 Ind. 625; s. c. 33 N. E. Rep. 1033; Vin-

in an excavation, and are provided with suitable materials for the purpose of shoring it up, and are charged by their employer with the

cennes Water-Supply Co. v. White, 124 Ind. 376; s. c. 24 N. E. Rep. 747 (danger open alike to observation of servant and master); Griffin v. Ohio & C. R. Co., 124 Ind. 326; s. c. 24 N. E. Rep. 888 (a person engaged in digging a twenty-foot bed of gravel from under a thin stratum of common earth assumes the risk of the earth's caving and falling in); Michaelson v. Sergeant Bluffs & C. Co., 94 Iowa 725; s. c. 62 N. W. Rep. 15 (an employé who, without compulsion, goes upon a derrick standing beside a clay-bank, and in such a position that he cannot escape contact with clay picked down by him, cannot recover for an injury caused thereby); Rasmussen v. Chicago & C. R. Co., 65 Iowa 236; Morbach v. Home Min. Co., 53 Kan. 731 (employé engaged in sinking shaft in mine; knew danger arising from way shaft was timbered—no recovery); Hughes v. Malden & C. Gas-Light Co., 168 Mass. 395; Kletschka v. Minneapolis & C. R. Co., 80 Minn. 238; s. c. 83 N. W. Rep. 133 (conditions of fact under which it was held that the master was not guilty of negligence and that the servant assumed the risk); Olson v. McMullen, 34 Minn. 94; Pederson v. Rushford, 41 Minn. 289; Swanson v. Great Northern R. Co., 68 Minn. 184; s. c. 70 N. W. Rep. 978; Reiter v. Winona & C. R. Co., 72 Minn. 225; s. c. 75 N. W. Rep. 219; 11 Am. & Eng. R. Cas. (N. S.) 31 (servant injured by the caving in of an almost upright bank of gravel, twenty feet high, bound to take notice of familiar natural laws); Penderson v. Rushford, 41 Minn. 289; s. c. 42 N. W. Rep. 1063; Bradley v. Chicago & C. R. Co., 138 Mo. 293; s. c. 39 S. W. Rep. 763; 8 Am. & Eng. R. Cas. (N. S.) 728 (assumes the additional risk incident to the removal of an embankment by *undermining* the base and prying or blasting off the top, over that involved in taking the bank down from the top, but not that incident to the failure of the master to exercise reasonable care to remove the overhanging earth as the excavation proceeds); Curley v. Hoff, 62 N. J. L. 758; s. c. 5 Am. Neg. Rep. 668; 42

Atl. Rep. 731 (sheathing only came down to within two or three feet of bottom of trench; caving in caused by percolation of water, aided by the jarring of a blast; servant returned after the explosion, looked at the bank as he passed down into the trench, and was just resuming work when it fell upon him); Cordelia v. Dwyer, 9 Misc. (N. Y.) 399; s. c. 61 N. Y. St. Rep. 690; 29 N. Y. Supp. 1073; s. c. aff'd, 153 N. Y. 689 (employé engaged in making excavation cannot recover for injuries from improper laying or insufficient support of track on which dump-cars were run, he and his fellow employés having laid the track); McCarthy v. Washburn, 58 N. Y. Supp. 1125; s. c. 42 App. Div. (N. Y.) 252 (an employé engaged in moving sand from a sand-bank, familiar with that kind of labor, assumes the obvious risk of the caving in of overhanging gravel and sod, notwithstanding the prior promise of his employer to make the bank secure in a day or two) [distinguishing Hawley v. Northern & C. R. Co., 82 N. Y. 370]; Baker v. Sutton, 11 App. Div. (N. Y.) 271; s. c. 42 N. Y. Supp. 116 (servant knew that a large mass had already fallen and that another slide was imminent, but thought he could finish his task before another caving in would occur—and was mistaken); Larich v. Moies, 18 R. I. 513; s. c. 28 Atl. Rep. 661 (fall of an overhanging bank of sand, while he was getting a load of sand); Missouri & C. R. Co. v. Spellman (Tex. Civ. App.), 34 S. W. Rep. 298 (no off. rep.) (assumes the risk in going above an overhanging gravel-ledge and digging a ditch for the purpose of dislodging the ledge); Texas & C. R. Co. v. French, 86 Tex. 96; rev'g s. c. (Tex. Civ. App.), 22 S. W. Rep. 866 (inexperienced workman directed by foreman to dig a ditch alongside a heavy timber, and injured by the giving way of the bank, held bound to notice the ordinary laws of nature, and held to assume the risk of such injury); Allen v. Logan City, 10 Utah 279; s. c. 37 Pac. Rep. 496 (engaged in undermining a bank for the purpose of causing it

duty of shoring it up, then, according to one view, the failure to shore it up so as to avert disaster is either the contributory negligence of the servant injured or that of his fellow servant, in either of which cases there can be no recovery.⁵⁰ The view that the servant assumes the risk of such a danger, so far as it is obvious, carries with it the correlative conclusion that the duty of the master to keep the excavation safe extends only to the exercise of reasonable care to discover and to give the servant notice of any latent danger.⁵¹

§ 4823. **Risks Not Assumed by Employés in Excavating.**—It does not follow from the preceding paragraph that the law loads upon an employé engaged in excavating or at work in excavations the entire risk of the situation, without regard to what the employer may do or neglect to do.⁵² For example, if a trench is built or an excavation dug by an employer, and his employé enters it to do work in it, he has, within limits already indicated,⁵³ the right to assume that it has been made reasonably safe for his protection.⁵⁴ On the other hand, if the

to fall, and injured by an unusually large and unexpected fall of earth); *Showalter v. Fairbanks & Co.*, 88 Wis. 376; s. c. 60 N. W. Rep. 257 (knew that the trench had partially caved in, and hence assumed the risk of returning to work therein when ordered to do so by the superintendent); *Larsson v. McClure*, 95 Wis. 533; s. c. 70 N. W. Rep. 662 (employé working at bottom of frozen sand-bank, knowing that blasting had been resorted to in order to break it down); *Anderson v. Winston*, 31 Fed. Rep. 528.

⁵⁰ *Laporte v. Cook*, 22 R. I. 554; s. c. 48 Atl. Rep. 798; *Foley v. Grand Rapids Gaslight Co.*, 127 Mich. 671; s. c. 8 Det. Leg. N. 507; 87 N. W. Rep. 53. Compare *Laporte v. Cook*, 21 R. I. 158.

⁵¹ *Curley v. Hoff*, 62 N. J. L. 758; s. c. 5 Am. Neg. Rep. 668; 42 Atl. Rep. 731 [citing *Loughlin v. State*, 105 N. Y. 159; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c. 37 Am. Rep. 343; and distinguishing *Van Steenburgh v. Thornton*, 58 N. J. L. 160]; *Songstad v. Burlington & C. R. Co.*, 5 Dak. 517; s. c. 41 N. W. Rep. 755; *Western Stone Co. v. Muscial*, 85 Ill. App. 82 (an unusual rain had fallen; plaintiff, an experienced quarryman, in company with other employés of defendant, including the foreman of

the quarry, examined the ledge and pronounced it safe; defendant held not liable to plaintiff for an injury resulting from a subsequent slide, since he had assumed the risk, which had not been increased by any act of the defendant); *Chicago & C. R. Co. v. Simmons*, 11 Ill. App. 147 (removing hill by excavating lower part and wedging off upper part; danger known and voluntarily encountered; no recovery).

⁵² *Lynch v. Allen*, 160 Mass. 248; s. c. 35 N. E. Rep. 550; *La Salle v. Kostka*, 190 Ill. 130; s. c. 60 N. E. Rep. 72; aff'g s. c. 92 Ill. App. 91 (sides of trench which employé had helped to dig were negligently braced—master liable).

⁵³ *Ante*, §§ 4618, 4654.

⁵⁴ *Kranz v. Long Island R. Co.*, 123 N. Y. 5. For example, if the employé is inexperienced, and is set to work with a pick to undermine a high embankment of earth, he does not, as mere matter of law, by the fact of continuing at work, assume the risk attendant upon the temporary absence of the superintendent, although he knows of his absence and that he is no longer watching the bank, since he has the right to assume that the superintendent will return in time to warn him of the danger of the bank's falling; *Lynch v. Allen*, 160 Mass. 248; s. c. 35 N. E. Rep. 550.

master takes reasonable precautions to the end of protecting the servant in such situations, he is not liable;⁵⁵ but if he fails to exercise reasonable care in the adoption of such means and appliances as will give reasonable protection to the servant, he may become liable for an injury visited upon the latter in consequence of the master's negligence.⁵⁶ If the master puts his servants at work in a trench, in which water-pipes are being laid, which is cut through earth so soft as to make caving in probable, it may be found that he has been guilty of a want of reasonable care in the discharge of his duty toward his servants in failing to shore up the sides, and he may become liable to one of them injured in consequence of the excavation caving in.⁵⁷ Again, where the servant has not sufficient knowledge to enable him to form a belief as to whether the walls of an excavation or an overhanging bank is reasonably safe, if he appeals to the foreman, who examines it and pronounces it safe, and thereupon the servant continues at work upon this assurance of the foreman, he is not deemed to have assumed the risk as matter of law.⁵⁸ Nor is an unskilled laborer, shovelling earth at the bottom of a cistern, presumed, as matter of law, to have assumed the risk that the cistern-wall may fall upon him by reason of its negligent construction, unless the danger, springing from ordinary physical facts, is obvious to the comprehension of an ordinary person.⁵⁹ Nor is the risk of injury from the caving in of the sides of a ditch thirteen feet deep and eighteen inches wide assumed by a laborer who does not know of the danger, but who goes into it under peremptory orders to dig it deeper, where such ditches are usually dug not more than six feet or eight feet deep.⁶⁰ So, it has been held that a laborer was not, as matter of law, guilty of contributory negligence in working, under the direction of the foreman, in that part of a trench which was not sheathed or curbed, so as to preclude recovery for injuries caused by the caving in of the trench, when he had only worked in the trench for an hour when the accident happened, and was not familiar with the character of the soil, and the danger was not necessarily obvious to a person of his experience.⁶¹ So, where the wall of an excavation in which the servant was working fell in con-

⁵⁵ *Del Sejnore v. Hallinan*, 153 N. Y. 274; rev'g s. c. 91 Hun (N. Y.) 635.

⁵⁶ *Van Steenburgh v. Thornton*, 58 N. J. L. 160; s. c. 33 Atl. Rep. 380.

⁵⁷ *Baird v. Reilly*, 92 Fed. Rep. 884; s. c. 35 C. C. A. 78; 63 U. S.

⁵⁸ *Haas v. Balch*, 6 C. C. A. 201; s. App. 157.

s. c. 56 Fed. Rep. 984; 48 Alb. L. J. 327. As to assurances of the master

or his vice-principal, see *ante*, § 4664.

⁵⁹ *Mulcairns v. Janesville*, 67 Wis. 24.

⁶⁰ *Norfolk & C. R. Co. v. Ward*, 90 Va. 687; s. c. 24 L. R. A. 717; 19 S. E. Rep. 849.

⁶¹ *Laporte v. Cook*, 21 R. I. 158; s. c. 5 Am. Neg. Rep. 724; 42 Atl. Rep. 519.

sequence of the percolation of water, and the servant was not shown to have been required to perform similar services before, it could not be said, as matter of law, that he was guilty of contributory negligence,—that is to say, of accepting the risk of the situation,—since he could not be held to have known that it was saturated with percolating water and hence unsafe.⁶² It is a reasonable conclusion that, in the absence of palpable evidence of danger, the servant has the right to rely upon the conclusion that the master has done his duty, and is not bound to quit his work and institute a personal inspection of the sides of the excavation for the purpose of determining for himself whether he can, with reasonable safety, continue to work therein;⁶³ and even an experienced workman, engaged in excavating under the direction of the superintendent, does not, under all circumstances, and as matter of law, assume the risk of injury from the caving in of the walls of the excavation, where the weakness proceeds from sources with which he has had no experience.⁶⁴

§ 4824. **Particular Circumstances under which the Risk of Caving In of Excavation was Not Assumed.**—Such risks were not assumed where the workman was put to work upon a hillside beneath a large overhanging rock, which looked safe from where he was standing, although it was partly detached in the rear, by reason of blasting which had been previously done;⁶⁵ nor where the workman was injured from the fall of an overhanging mud-bank, the character of which, as distinguished from stone, was not open to visual inspection because of the admixture of sand and minerals therein, although its true character could have been determined by an examination made with the use of tools, it appearing that both stone and mud-banks were to be met with in that quarry;⁶⁶ nor where the workman was engaged in excavating a sewer under the direction of a foreman, and the foreman went to work at bracing the walls, which fact was deemed to authorize the injured workman to presume that the bracing was fully performed, and that the place was made safe for him to work in,—the conclusion being that he had a right to rely on such performance whether it was

⁶² *Finn v. Cassidy*, 165 N. Y. 584; s. c. 59 N. E. Rep. 311; *aff'g* s. c. 57 N. Y. Supp. 1138.

⁶³ *Bartolomeo v. McKnight*, 178 Mass. 242; s. c. 59 N. E. Rep. 804 (case of an *experienced* laborer—held that he must use reasonable care, but not inspect).

⁶⁴ *McCoy v. Westboro*, 172 Mass.

504; s. c. 52 N. E. Rep. 1064 (existence of cracks in the earth causing the ditch to cave in, caused by blasting).

⁶⁵ *Collins v. Greenfield*, 172 Mass. 78; s. c. 51 N. E. Rep. 454.

⁶⁶ *Peerless Stone Co. v. Wray*, 152 Ind. 27; s. c. 51 N. E. Rep. 326; 1 Repr. (Ind.) 52.

the duty of the foreman to perform the service or not;⁶⁷ nor where the excavation is being made in hardpan of such a consistency that it has to be blasted, in which case a workman is not held, as matter of law, to assume the risk of injury from an unexpected fall of earth which, unknown to him, is loose;⁶⁸ nor where the injury happens to a workman in the shaft of a mine in consequence of the removal of the bulkhead from under a column of dirt seventy-five feet long, and the loosening of the dirt from running water through it, where the workman does not know of the removal of the bulkhead;⁶⁹ nor where the injury proceeds from the caving in of a dark tunnel, in consequence of its being insufficiently braced and supported after its walls have been saturated with water released by the bursting of an adjoining cistern;⁷⁰ nor where the employé is injured in consequence of the caving in of a tunnel, due to the fact of the supports of the roof being insufficient, since he may rightfully rely upon the judgment of the superintendent as to the sufficiency of such supports;⁷¹ nor where a laborer engaged in digging a trench in which to lay water-pipes is injured by a tripod falling into the trench, which is negligently used under the direction of the superintendent of the work in hoisting stone from the trench, in place of a derrick, which would have been a safer appliance;⁷² nor where he is injured while working in a trench by the fall of earth lifted by a defective machine, unless he knows or ought to know of the danger to which he is exposed.⁷³

⁶⁷ *La Salle v. Kostka*, 92 Ill. App. 91; s. c. aff'd, 190 Ill. 130; 60 N. E. Rep. 72.

⁶⁸ *Hill v. Winston*, 73 Minn. 80; s. c. 75 N. W. Rep. 1030.

⁶⁹ *Mollie Gibson Consol. Min. Co. v. Sharp*, 23 Colo. 321; aff'g s. c. 5 Colo. App. 321; 38 Pac. Rep. 850. This was a case of special and unanticipated negligence of the master or his representative,—as to which see *ante*, § 4618. On the same principle, where it was not customary for rocks to be rolled from a tunnel down a gulch in which another tunnel was being built by the same company, the danger from a rock negligently rolled down such gulch, which culminated in injury to a workman below, was not apparent, nor naturally incident to such workman's employment, so as to preclude his recovery for the injury: *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; s. c. 64 Pac. Rep. 174.

⁷⁰ *Quigley v. Bambrick*, 58 Mo. App. 192.

⁷¹ *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; s. c. 63 N. W. Rep. 941.

⁷² *Powers v. Fall River*, 168 Mass. 60; s. c. 46 N. E. Rep. 408.

⁷³ *Higgins v. Williams*, 114 Cal. 176; s. c. 45 Pac. Rep. 1041. Case where the employé was injured while riding "an incline" on certain dirt-cars employed in construction-work along a canal, and where it was held that there was no evidence that the employer, a construction company, had not furnished appliances which were reasonably safe, and where the conclusion was that the employé had assumed the risk of using them, and was, hence, not entitled to recover: *Mattson v. Qualey Const. Co.*, 90 Ill. App. 260. For a condition of evidence under which it was held proper to refuse a peremptory instruction for the defendant, where the plaintiff, while working at the bottom of a quarry under the express direction of the defendant's foreman, in shovelling

§ 4825. **Risks Assumed by Sailors.**—The doctrine of assumption of risk by the servant in using appliances which he knows to be defective, does not apply to sailors or seamen in the same sense in which it applies to employes on land. The reason is that the contract of the seaman ceases to be voluntary after it is entered into, but he is obliged to perform the services which he is ordered to perform, however great the hazard may be, or else incur the risk of criminal punishment for insubordination. The doctrine that he accepts the risk by reason of voluntarily continuing in the service after becoming acquainted with the conditions from which the danger arises, is totally inapplicable to him, because his continuance in the service is not voluntary. If he deserts in a foreign port, he will be recaptured by the local authorities on the application of the consul of his country, and returned to his ship. If he deserts in a home port before his contract of service is expired, he will be liable to punishment under the statutes of the United States applicable to such cases.⁷⁴ Nor does he, when ordered by his superior into a dangerous service, assume the risk from the mere fact that he complies with the order without remonstrance, where disobedience of the order would, under the rules of the ship, subject him to punishment, and would also, under the law of the forum, subject him to imprisonment and to a forfeiture of his wages.⁷⁵

§ 4826. **Risks Assumed by Stevedores, Steamboat and Dock Laborers, etc.**—Stevedores and their employes, and steamboat-hands on our internal rivers, and dock-laborers generally, occupy a different relation to the service. Their service is voluntary in the same sense in which the service of a railway laborer is voluntary. They assume the risk of the insufficiency of the appliances with which they are required to labor, under the principles already stated,—the premise being that they know, or have a fair opportunity of knowing, the character of such appliances and of judging for themselves whether they may safely use them or not.⁷⁶ For instance, a person operating a canal-boat,

away mud and gravel which had fallen from the bank above during the night as the result of a rain, was injured by earth and gravel sliding from above and falling upon him,—see *Western Stone Co. v. Muscial*, 196 Ill. 382; s. c. 63 N. E. Rep. 664; aff'g s. c. 96 Ill. App. 288.

⁷⁴ *Robertson v. Baldwin*, 165 U. S. 275; s. c. 41 L. ed. 715; *Lafourche Packet Co. v. Henderson*, 94 Fed. Rep. 871; s. c. 36 C. C. A. 519.

⁷⁵ *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187; s. c. 48 N. Y. St. Rep.

257; 32 N. E. Rep. 66; aff'g s. c. 55 Hun (N. Y.) 309; 28 N. Y. St. Rep. 501; 8 N. Y. Supp. 433.

⁷⁶ *Red River Line v. Smith*, 99 Fed. Rep. 520; s. c. 39 C. C. A. 620 (holding that the risks attendant on service on a steamboat engaged in the river trade on the Mississippi, being well known by the people employed, are assumed by the crew). One of the crew of a steamboat, who slept on the vessel after it was tied to the dock and while it was being prepared for the winter, as-

who has agreed to tend the guy while the consignee discharges a cargo of coal therefrom, assumes the risk of the guy-rope, tied by an employé of the consignee, becoming untied, in consequence of which he falls and is injured, where he examines the knot before it becomes untied, and is convinced of its sufficiency.⁷⁷ So, where the owner of a steamboat, engaged in river trade on the Mississippi, had furnished both electric lights and lard-oil hand-lanterns as a substitute for them, which lanterns were the best that could be obtained and were formerly regarded as sufficient for such service, and a servant fell overboard while loading cotton, in consequence of the electric lights going out, a circumstance not shown to have been due to negligence on the part of the owner of the vessel,—a recovery of damages was denied on the ground that the deceased accepted the risk of the lights going out, it being a common incident in the employment of such lights.⁷⁸ So, where a dock-laborer attempted to make use in his labor of a large stone, irregular in shape, which had been left on the bed-piece of a marine railway for the obvious purpose of being used as ballast, and got injured in consequence of so doing, it was held that he accepted the risk;⁷⁹ and so, where a deck-hand on a tug-boat, a part of whose duty consisted in keeping the deck clear, stepped on a siphon-pipe lying on the deck, causing him to slip, and he caught in a coil of rope attached to a tow, the risk of the accident was one which he assumed.⁸⁰ But a longshoreman working in the hold of a vessel under an open hatch, and injured by the fall into the hatch of merchandise which was being loaded into another hatch, did not assume the risk.⁸¹

sumed the risk of danger from a fire breaking out in the night, he being familiar with the boat and with the method of lighting and heating it, and knowing that the night-watchman had been dismissed: *Lang v. H. W. Williams Transp. Line*, 119 Mich. 80; s. c. 77 N. W. Rep. 633; 5 Det. Leg. N. 728; 5 Am. Neg. Rep. 74; 31 Chic. Leg. N. 170.

⁷⁷ *Farrell v. Continental Iron Works*, 102 Fed. Rep. 514.

⁷⁸ *Red River Line v. Smith*, 99 Fed. Rep. 520; s. c. 39 C. C. A. 620. Circumstances under which the question whether a stevedore engaged in stowing away lumber in the hold of a vessel assumed the risk of injury from the lumber slipping out of a box in which it was being lowered, was a question for a jury: *Hennessy v. Bingham*, 125 Cal. 627; s. c. 58 Pac. Rep. 200. Circumstances under which a coal-

shoveller assumes the risk of injury from the fact of a tub used in hoisting coal from a barge becoming unlatched on striking the bulkhead: *Dolan v. Atwater*, 167 Mass. 274; s. c. 45 N. E. Rep. 742. Libel *in rem* maintainable by a member of a master stevedore's gang at work upon the vessel, for injuries caused by negligent misuse, by a servant of the vessel, of a proper appliance furnished for the prosecution of the work, and under the management of the vessel's officers: *The Anaces*, 93 Fed. Rep. 240; s. c. 34 C. C. A. 558; rev'g s. c. 87 Fed. Rep. 565.

⁷⁹ *Moore v. Stetson*, 96 Me. 197; s. c. 52 Atl. Rep. 767.

⁸⁰ *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 65; s. c. 69 S. W. Rep. 174.

⁸¹ *Young v. Hahn* (Tex. Civ. App.), 69 S. W. Rep. 203; s. c. rev'd on other grounds, 96 Tex. 99; 70

§ 4827. **Risks Assumed by Quarrymen.**—It has been held that an employé in a stone quarry assumes the risk of injury from the falling of stone from above, where such falling is due to seams of clay in the upper rock which run through it in all directions, rendering it liable to separate along the seams, the existence of which, and the danger therefrom, the injured employé knows as well as the foreman or superintendent;⁸² that a workman, employed in a quarry in which, by reason of the constant removal of stone, the conditions and surroundings are constantly changing, assumes the risk of the place becoming unsafe, so as to prevent a recovery for an injury due to the falling of a mass of stone loosened by successive blasts.⁸³

§ 4828. **Risks Assumed in Blasting.**—It has been held that an employé whose duty it is to do any work connected with the blasting of rock in a stone quarry cannot recover for injuries caused by an explosion while he is voluntarily drilling out a "missed hole" under the direction of the foreman, in the ordinary and usual manner;⁸⁴ that an employé, killed at his post by the fall of a projecting rock, caused by blasting in an adjacent street, where he has a better opportunity than his employer has for observing changes in the rock, assumes the risk of injury from it in the absence of any reason on the part of his employer to expect that the blasting would weaken the rock;⁸⁵ and that a laborer employed in levelling the bottom of a canal after it has been blasted, who knows that charges used are often left unexploded, assumes the risk of injury from an explosion of such a charge, caused by a co-employé carelessly striking it with his pick.⁸⁶ It seems that the duty of giving timely warning that the blast is about to be discharged is one of the primary or absolute duties which the law puts

S. W. Rep. 950. It has been held that a stevedore and the hands working under him do not necessarily assume the risk of injury from an imperfect or faulty appliance furnished and rigged by the ship, because it is arranged in a peculiar manner insisted upon by the stevedore, when such manner is not unreasonable and does not require unusual or extraordinary strength of material: *Steel v. McNeil*, 8 C. C. A. 512; s. c. 60 Fed. Rep. 105.

⁸² *Mielke v. Chicago & C. R. Co.*, 103 Wis. 1; s. c. 79 N. W. Rep. 22.

⁸³ *Mielke v. Chicago & C. R. Co.*, 103 Wis. 1; s. c. 79 N. W. Rep. 22.

⁸⁴ *Miller v. Western Stone Co.*, 61 Ill. App. 662.

⁸⁵ *Dolan v. McLaughlin*, 33 App. Div. (N. Y.) 628; s. c. 53 N. Y. Supp. 273; 87 N. Y. St. Rep. 273. But it has been held in the same State that an employé engaged in removing rock thrown down from the side of a hill by a blast does not assume the risk of the fall of a loosened rock from the hill, where the danger could have been ascertained by reasonable care on the part of the employer: *Perry v. Rogers*, 91 Hun (N. Y.) 243; s. c. 36 N. Y. Supp. 208; 71 N. Y. St. Rep. 105.

⁸⁶ *Hutchinson v. Parker*, 39 App. Div. (N. Y.) 133; s. c. 57 N. Y. Supp. 168; s. c. aff'd, 169 N. Y. 579; 61 N. E. Rep. 1130.

upon the master, to be discharged by him without reference to the grade of the servant to whom he commits it. For example, we find that it has been held that a quarryman does not assume the risk arising from failure to give timely warning of a blast, as he has the right to assume that the master will perform his duty in that respect; and that the failure of the foreman of the quarry to give warning of the blast, as it is his duty to do, in time to permit the quarryman to get out of danger, is imputable to the employer; and this whether the negligence arises from a defective system devised for the purpose of giving warnings or from a failure of the foreman properly to observe such system.⁸⁷

§ 4829. **Risk of Working with Insufficient Help.**⁸⁸—The risk of injury from working at a given task where the master has not employed sufficient help to perform it with safety, is one which the servant may or may not be deemed to assume, according to the nature of the case. The master, in the exercise of his duty to his servants, may be presumed to know, and if he exercises reasonable care and skill he ordinarily will know, the number of servants whom it will be necessary to detail to perform a given task with safety. On the other hand, the servant may be a common laborer, and may not have sufficient skill or experience to form a judgment on the question, in which case he will be entitled to rely upon the judgment of the master. Unless, therefore, the danger is obvious to his comprehension and imminent, he cannot be said, as matter of law, to take upon himself the risk of injury from that source from the mere fact that he continues in the employment.⁸⁹ But if he remains in the employment after discovering that the help is insufficient and that it is dangerous to proceed without more help, the conclusion being plain to his comprehension, then he is deemed to accept the risk of injury from that source.⁹⁰ If other men are near, whose presence would make the complement sufficient to avert the danger, and if the necessary tools and implements are also near, but the injured servant and his companions make no effort to call upon extra men or to procure the proper tools and implements,

⁸⁷ *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323; s. c. 38 Atl. Rep. 835; s. c. aff'd, 61 N. J. L. 253; 39 L. R. A. 834; 39 Atl. Rep. 764.

⁸⁸ See *ante*, §§ 3758, 3807, 4175, 4768; *post*, §§ 4865, 4868.

⁸⁹ Thus, it has been held that the danger from using a circular saw without a helper is not so imminent, as matter of law, as to prevent recovery for an injury to an employé

so using it at the order of his foreman, although he knew that it was ordinarily operated by two men: *Colson v. Craver*, 80 Ill. App. 99.

⁹⁰ *Swift & Co. v. Rutkowski*, 167 Ill. 156; s. c. 47 N. E. Rep. 362; *rev'd* s. c. 67 Ill. App. 209. See also, *McMullen v. Missouri & C. R. Co.*, 60 Mo. App. 231; *Southern & C. R. Co. v. Drake*, 53 Kan. 1; *Thorpe v. Missouri & C. R. Co.*, 89 Mo. 650.

there can, of course, be no recovery, by reason of the special contributory negligence.⁹¹

§ 4830. Risk of Injury from the Falling of a Pile of Lumber.—An employé who is directed by the superintendent to get upon a pile of lumber quickly, and throw off a piece of timber, does not, as a matter of law, assume the risk of the pile falling because the piling is improperly done, where he does not know that it is not properly piled.⁹² An employé of a stevedore who has a contract to unload lumber from a vessel, the employé being put to work merely to pass the lumber over the rail of the vessel to the defendant's yardmen, who are piling it up on the defendant's dock, does not assume the risk of injury from the falling of the piles of lumber; nor is he deemed to have presumptive knowledge of the danger, where the evidence is conclusive to the effect that such a danger is not ordinarily incident to such a business, and that such an accident never happened before the one in question; but such an accident is to be ascribed to the special or unforeseen negligence of the master, or of those for whose conduct the master is responsible,⁹³ under a principle already discussed.⁹⁴

§ 4831. Risks Assumed by Carpenters and Joiners.—Carpenters and joiners follow a more or less dangerous employment, where they are liable to injury from defective scaffoldings, stagings, and the like, —a subject elsewhere dealt with.⁹⁵ They assume the risk of injury from sources of danger which are obvious and continuous, in like manner with servants employed in other situations.⁹⁶ A carpenter at work on a ladder accepts the risk of the ladder being knocked down by a co-employé engaged in removing waste material with a horse and cart frequently passing in and out of the building, so as to require the removal and replacing of the ladder.⁹⁷

⁹¹ *Dunlap v. Barney Man. Co.*, 148 Mass. 51; s. c. 18 N. E. Rep. 599.

⁹² *Millard v. West-End St. R. Co.*, 173 Mass. 512; s. c. 6 Am. Neg. Rep. 287; 53 N. E. Rep. 900.

⁹³ *John Spry Lumber Co. v. Dugan*, 182 Ill. 218; s. c. 54 N. E. Rep. 1002; aff'g s. c. 80 Ill. App. 394.

⁹⁴ *Ante*, § 4618.

⁹⁵ *Ante*, §§ 3947, *et seq.*, 4817, 4818.
⁹⁶ *Fugler v. Bothe*, 117 Mo. 475; s. c. 22 S. W. Rep. 1113; rev'g s. c. 43 Mo. App. 44 (experienced carpenter sheathing air-shafts fell off a plank on which he had been standing and was killed).

⁹⁷ *Byrnes v. Brooklyn &c. R. Co.*,

36 App. Div. (N. Y.) 355; s. c. 55 N. Y. Supp. 269. But it has been held that an employé, twenty-six years old, who has been living in this country but four years, and is not a carpenter or acquainted with the construction or strength of a roof of a building in which he works, except what he derives from looking at it, has the right to assume that his employer will build a roof of sufficient strength to protect its employés from ice falling upon it from an adjoining building: *Gaul v. Rochester Paper Co.*, 72 Hun (N. Y.) 485; s. c. 54 N. Y. St. Rep. 853; 25 N. Y. Supp. 443;

§ 4832. **Risks Assumed by Servants in Charge of Steam-Boilers.**—An employé in charge of a boiler assumed the risk of the parting of the blowpipe as the steam was turned into it, at the point where the vertical section entered the elbow connecting it with the horizontal section, allowing the horizontal section to fly up and strike him, where a common laborer, who, shortly before the accident, had disconnected the pipe at the elbow in order to clean it, had informed him that there was only one thread on the pipe, and that it was barely caught in the elbow, and was instructed by him to replace it in the same condition.⁹⁸

§ 4833. **Risks Assumed by Employés Working in Ice-Houses.**—A laborer employed to fill an ice-house, whose work requires him to stand upon the tiers of ice-blocks, assumes, as a risk ordinarily incident to his employment, the danger of an injury caused by the *slipping of a cake of ice*.⁹⁹

§ 4834. **Risk of Injury from Straining in Lifting and from Overwork.**—In general, a servant is not entitled to recover damages from his master for injuries received in consequence of straining and overtaxing himself in lifting heavy objects in his master's service, since the servant is the judge of his own lifting capacity, and the risk of not overtaxing it rests upon him.¹⁰⁰

§ 4835. **Risk of Injury Incurred in Protecting the Master's Property from Fire.**—While a servant is under the duty of exerting himself to protect his master's property from destruction by fire, yet if, in doing so, he subjects himself to great and unusual hazard, he is deemed, by reason of his own voluntary act, to assume the risk attendant upon the undertaking.¹⁰¹

§ 4836. **Risk of Injury from Poisons, Microbes, etc.**—In a very peculiar case it appeared that the plaintiff was employed in the de-

s. c. aff'd *sub nom.* *Eagle v. Rochester Paper Co.*, 145 N. Y. 603.

⁹⁸ *Mackey v. Newberry Furnace Co.*, 119 Mich. 552; s. c. 5 Det. Leg. N. 909; 78 N. W. Rep. 783. Circumstances under which an employé in a blasting-furnace, who leaves the building at night for his own pleasure, and who, in returning, walks for his own convenience in front of a furnace which he knows is undergoing repairs and succeeds in falling into a hole in the floor in front of the furnace,

is deemed to assume the risk so that he cannot recover damages from the owner: *Hurley v. Lukens Iron & Co.*, 186 Pa. St. 187; s. c. 40 Atl. Rep. 321.

⁹⁹ *Shea v. Kansas City & C. R. Co.*, 76 Mo. App. 29.

¹⁰⁰ *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236; s. c. 61 S. W. Rep. 53.

¹⁰¹ *Maltbie v. Belden*, 167 N. Y. 307; s. c. 60 N. E. Rep. 645; 54 L. R. A. 52; rev'g s. c. *sub nom.* *Maltby v. Belden*, 60 N. Y. St. Rep. 824.

defendant's paper-mill in assorting rags and old paper. The rags and paper were brought in large sacks, and emptied on to the assorting-tables. A sack containing old paper gathered from some hospital, dumped on the table where the plaintiff worked, contained pieces of cotton saturated with blood and various medicines, and also pieces of decayed human flesh. These substances emitted an unbearable odor, which, as the evidence tended to show, so poisoned the plaintiff that she became violently ill. It was held that she did not assume the risk, but that the defendant was liable for the injury she sustained.¹⁰²

§ 4837. A Catalogue of Risks which the Servant Assumes.— Among such risks have been enumerated:—The risk of injury to an employé in a rolling mill from a deflection of rails in their exit from the rolls, where such deflection is of frequent occurrence and cannot be avoided by the exercise of ordinary and reasonable caution;¹⁰³ the risk of injury from moving heavy timbers which have not been squared along a narrow runway without blocking them so that they cannot roll from the "dolly" by means of which they are moved, where the employé is not required to do the work in any particular manner;¹⁰⁴ the risk of injury to an employé in a copper smelter from the explosion of slag adhering to hot bricks of the metal, which it is the duty of the employé to immerse in water, the explosion occurring in the ordinary process of the work;¹⁰⁵ the risk of injury to a locomotive-engineer through the failure to provide a sufficient bridge at a point where he is obliged to walk in order to oil his engine;¹⁰⁶ the risk of injury to a person of mature years and intelligence caused by having a stick which he uses in shifting a belt caught in the fringed edges of the belt and broken into pieces, one of which is hurled into his eye, destroying it, where the belt is in plain view, its velocity obvious, and its defects apparent;¹⁰⁷ the risk of injury from the falling of slabs of stone after they have been placed in an upright position on a car, to an employé whose duty it is to brace them in an upright position after they are so placed, so that they will not fall while the car is in motion;¹⁰⁸ the risk

¹⁰² *Nickel v. Columbia Paper Stock Co.*, 95 Mo. App. 226; s. c. 68 S. W. Rep. 955.

¹⁰³ *Inland Steel Co. v. Eastman*, 80 Ill. App. 59.

¹⁰⁴ *Agnew v. Supple*, 80 Ill. App. 437.

¹⁰⁵ *Fitzgerald v. Honkomp*, 44 Ill. App. 365.

¹⁰⁶ *Chicago &c. R. Co. v. Abend*, 7 Ill. App. 130 (doubtful decision).

¹⁰⁷ *Becker v. Baumgartner*, 5 Ind. App. 576; s. c. 32 N. E. Rep. 786.

¹⁰⁸ *Stone v. Bedford Quarries Co.*, 156 Ind. 432; s. c. 60 N. E. Rep. 35. The risk of stone placed beside the track falling on a servant engaged in loading stone on a dump-car, while he was pushing the car, has been held to be an ordinary risk of the service: *Smallwood v. Bedford Quarries Co.*, 28 Ind. App. 692; s. c. 63 N. E. Rep. 869.

of injury to a boy seventeen years old, who had worked in his employer's mill for two years and in the dye room for four weeks, due to his slipping on the wet floor of the dyeing room, falling into a vat and getting scalded;¹⁰⁹ the risk of injury to an employé of full age and ordinary intelligence, resulting from his slipping and falling while attempting, at the direction of the overseer of his employer, to hang a rope for holding a bag, while being filled with cotton taken from a dryer, over spikes driven into a beam so high above the top of the dryer that he could only reach it with his finger, which he had done once or twice before, and about which there was no concealed danger or defect;¹¹⁰ in the case of one who works on a raised platform which has no railing, assisting in guiding blocks of ice along a chute, the risk of falling off;¹¹¹ in the case of a weaver, the risk of being injured by a wire falling out of a carpet-loom,—it being held that she cannot recover of her employer, where it appears that there was no lack of inspection and no defects in the wire, and that in spite of the greatest care wires would fly out, to the knowledge of such weaver, whose duty it was to watch and replace them;¹¹² in the case of a boiler inspector, who represents that he possesses the requisite experience to perform such work and who sees and knows the conditions surrounding him, the risk of being injured by falling into a combustion chamber in which there are hot ashes and burning soot;¹¹³ in the case of a boy eighteen years of age, the risk of falling into an uncovered vat of molten metal on the edge of which he stood to hammer a cog-wheel;¹¹⁴ in the case of a servant who had daily used a steep stairway for a period of six months, the danger of falling down it while hastening to answer a telephone call which he supposed to be urgent;¹¹⁵ in the case of an employé familiar with the conditions, while passing from one part of the factory to another, the risk of falling into an unguarded vat of vitriol in the floor of the factory, which he was unable to see, either from the want of light or from steam arising from the vat;¹¹⁶ in the case of an employé who had worked in a shoe factory for ten years, where a planing-machine was in operation, the risk of being struck in the

¹⁰⁹ *Bessey v. Newichawanick Co.*, 94 Me. 61; s. c. 46 Atl. Rep. 806; *Roberts v. Indianapolis St. R. Co.*, 158 Ind. 634; s. c. 64 N. E. Rep. 217.

¹¹⁰ *Wilson v. Tremont & Co. Mills Co.*, 159 Mass. 154; s. c. 34 N. E. Rep. 90.

¹¹¹ *Moulton v. Gage*, 138 Mass. 390.

¹¹² *Daly v. Alexander Smith & Co. Carpet Co.*, 69 Hun (N. Y.) 77; s. c. 53 N. Y. St. Rep. 55; 23 N. Y. Supp. 269.

¹¹³ *Westville Coal Co. v. Milka*, 75 Ill. App. 638.

¹¹⁴ *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250; s. c. 64 N. E. Rep. 476.

¹¹⁵ *Mann v. Moore*, 24 Ky. L. Rep. 253; s. c. 68 S. W. Rep. 402 (no off. rep.).

¹¹⁶ *Carrigan v. Washburn & Co. Man. Co.*, 170 Mass. 79; s. c. 48 N. E. Rep. 1079.

eye by a small piece of wood from the planer, where he had seen sawdust and chips fly from the planer in his direction whenever it was in operation.¹¹⁷

§ 4838. **Further Risks which the Servant Assumes.**—In the case of an employé in a mill in which, after work closed, the lights were usually out by the time the plaintiff passed down the main alley of the room, the risk of slipping and falling after the lights were out, where, on previous nights, there had been sufficient natural light for her to see her way out, and on the night of the accident other conditions were the same as on previous nights, but there was less natural light;¹¹⁸ in the case of a servant who left his machine to seek one of his employers in order to have a cause of danger to him removed, but who, not finding the one sought, returned to the machine, the risk of injury from such danger;¹¹⁹ in the case of a servant familiar with the custom of iron merchants to keep their stock of metal bars standing against the walls of their store, between racks made of pegs set in the walls, the risk of the falling of a metal bar which was placed in a rack wherein there was not sufficient room for it to lean against the wall, where the cause of its falling was not shown, and the only evidence of negligence was that half of the thickness of the bar projected beyond the ends of the pegs;¹²⁰ in the case of a servant having charge of the boiler-room in a mill, the risk of falling into a tank under the floor, used to receive drippings and exhaust steam from the engine, which had a cover consisting of pieces of flooring tongued and grooved but not fastened together, where the servant had worked in the same place for three and one-half years, and was familiar with the tank and cover;¹²¹ in the case of a servant who was helping to uncouple a pipe which had been bent to avoid a rock and covered with earth to hold it in place, the danger of the pipe springing back when uncoupled and knocking him into a nearby excavation, where the method of uncoupling the pipe was left to the men themselves;¹²² in the case of a man of large size ordered to clean beneath vats in a brewery, resting on supports at a distance of about thirteen inches from the floor, the risk of becoming stuck between the vat and the floor and injuring himself in attempting to get out;¹²³ in the case of an experienced servant attempt-

¹¹⁷ *McAuliffe v. Gale*, 180 Mass. 361; s. c. 62 N. E. Rep. 269.

¹¹⁸ *Donovan v. American Linen Co.*, 180 Mass. 127; s. c. 61 N. E. Rep. 808.

¹¹⁹ *Dobbins v. Lang*, 181 Mass. 397; s. c. 63 N. E. Rep. 911.

¹²⁰ *Langley v. Wheelock*, 181 Mass. 474; s. c. 63 N. E. Rep. 944.

¹²¹ *Sherlock v. Sherlock*, 66 App.

Div. (N. Y.) 328; s. c. 72 N. Y. Supp. 712.

¹²² *O'Sullivan v. Flynn*, 67 App. Div. (N. Y.) 516; s. c. 73 N. Y. Supp. 1108.

¹²³ *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430; s. c. 50 Atl. Rep. 841; s. c. on second appeal, 23 R. I. 611; 51 Atl. Rep. 203.

ing to perform his work without the customary assistance, knowing that it is dangerous to do so, and without any coercion whatever other than an instruction from his foreman to do the best he can when alone, the risks incident to such an attempt;¹²⁴ in the case of a head brakeman and conductor of a logging-train, whose duty it was to see that the cars were properly loaded, the risk of injury from a log which fell or was thrown from a car while he was engaged in making up the train, where there was no evidence to show negligence on the part of the defendant in respect to the place where the work was done or the appliances, or in the employment of fellow servants, nor any direct evidence of the manner in which the injury occurred;¹²⁵ in the case of a boy seventeen years old, employed to carry rivets from a forge to other workmen, the risk of falling into an unguarded air-shaft, which he knew lay along his path, where he elected to continue his work notwithstanding the danger;¹²⁶ in the case of one employed to place wood in the cellar of a building with a projecting roof, the risk of an injury from the fall of ice and snow from the roof, where neither the master nor the servant had actual notice of the danger, but the servant's knowledge of the likelihood of such danger was equal to that of the master's, and he had equal reasons for anticipating such accident;¹²⁷ in the case of one employed to guide cloth through a machine and see that it went through smoothly, the risk of injury from the roughness of the table, where such roughness had always been present,—such facts not showing an emergency relieving the servant from the rule as to assumption of risk.¹²⁸

§ 4839. **Various Other Risks Assumed.**—By an employé in a glass factory, who knows that it is the custom of other employés to wear gauntlets, the risk of working without them in case the employer fails to furnish them or to promise to do so;¹²⁹ by an employé in a tin factory, familiar with the premises and knowing of the custom of applying sawdust to the floor to absorb oil which was frequently spilled thereon, of which he made no complaint, the risk of slipping upon oil thus covered with sawdust and falling into an adjacent vat

¹²⁴ *Mayott v. Norcross*, 24 R. I. 187; s. c. 52 Atl. Rep. 894 (mere fact that his employer was in a hurry for the work to be done did not create such an emergency as justified his attempt).

¹²⁵ *Williams v. Northern Lumber Co.*, 113 Fed. Rep. 382.

¹²⁶ *Terry v. Schmidt*, 116 Fed. Rep. 627.

¹²⁷ *Dugal v. People's Bank*, 34 N. B. 581.

¹²⁸ *Morancy v. Hennessey*, 24 R. I. 205; s. c. 52 Atl. Rep. 1021.

¹²⁹ *Myers v. W. C. De Pauw Co.*, 138 Ind. 590; s. c. 38 N. E. Rep. 37.

in open view;¹³⁰ by an employé, the risk of injury by the fall of a ladder having one of the side rails broken off about twenty inches from the top, which had been used with safety in that condition for a year or more, the defect being obvious;¹³¹ by an employé sent into a room to clear away the ruins after the explosion of a flywheel, the risk of a piece of iron falling upon him from the ceiling;¹³² by an experienced employé in a candy factory, well acquainted with a furnace, which has no rings belonging to it for the use of kettles of different sizes, the risk that a ring belonging to another furnace, selected by him and laid on the furnace in use, may cling to a kettle full of melted sugar and fall to the floor while he is removing the kettle;¹³³ by an employé engaged in driving piles, whose duty requires him to be at the top of the piles to swing them into position, the risk of injury from the fall of the driving-hammer, upheld by a chocking-guard, by the accidental pulling away of such guard by the carelessness of a fellow workman;¹³⁴ the risk of injury from stepping into a depression in a passageway, to a servant familiar with the place, and the length and nature of whose services were such that he must have been familiar with it;¹³⁵ by an employé of a towboat company, the risk of injury from stepping upon a cover over a round hole in the deck, causing it to tip up so that he falls astride of it, where it is a part of his duty to take it off and put it on, and he is more familiar with its condition than any one else, and has never complained of its condition;¹³⁶ by an employé in a mill, the risk arising from the substitution of hot water for steam in a cornmeal-dryer which it is his duty to repair when out of order;¹³⁷ by a laborer in a foundry, the risk of injury from horses, not unhitched, becoming restive while an object is being unloaded from the wagon,—the danger being as obvious to the workman as to the superintendent, and an incident of the business which should have been anticipated and provided against;¹³⁸ by a female domestic servant, who knows that a ladder which she has previously used to reach a pigeon-loft is too long, the risk

¹³⁰ *Hattaway v. Atlanta Steel & Co.*, 155 Ind. 507; s. c. 58 N. E. Rep. 718.

¹³¹ *Jenney Elec. L. & Co. v. Murphy*, 115 Ind. 566; s. c. 15 West. Rep. 507; 18 N. E. Rep. 30.

¹³² *Kanz v. Page*, 168 Mass. 217; s. c. 46 N. E. Rep. 620.

¹³³ *Barnard v. Schrafft*, 168 Mass. 211; s. c. 46 N. E. Rep. 621.

¹³⁴ *McPhee v. Scully*, 163 Mass. 216; s. c. 39 N. E. Rep. 1007.

¹³⁵ *Whalen v. Whitcomb*, 178 Mass. 33; s. c. 59 N. E. Rep. 666.

¹³⁶ *Watts v. Boston Towboat Co.*, 161 Mass. 378; s. c. 37 N. E. Rep. 197.

¹³⁷ *Glover v. Meinrath*, 133 Mo. 292; s. c. 34 S. W. Rep. 72 (unless it was so deceptively changed that an ordinarily competent and prudent engineer could not by reasonable care have observed the change, although the manufacturer of such dryer contemplated the use of steam therein).

¹³⁸ *Steffen v. Mayer*, 96 Mo. 420; s. c. 9 S. W. Rep. 630.

of using it for that purpose;¹³⁹ by an employé in a storage-house, who is acquainted with the business and who knows the manner in which a tier of bales of ropes is piled, and that such manner is unsafe, and that the pile of ropes will not stand without support,—the risk of injury from removing other goods which support the pile of ropes;¹⁴⁰ by an employé in a factory, the risk of injury from the fact of the windows leading to the fire-escapes being screwed down, where he knows the fact, or has worked upon the premises for such a length of time and under such circumstances as to charge him with knowledge of it;¹⁴¹ by an employé, knowing the conditions, and that a trap-door is frequently left open through the negligence of the employés upon a lower floor, the risk of injury in consequence of falling through the trap-door so open contrary to the instructions of the foreman.¹⁴²

§ 4840. **Still Other Risks Assumed.**—By an employé, accustomed to wheel a barrow back and forth over a narrow platform, both by day and by night,—the risk of wheeling it off the platform, he never having complained of its being too narrow;¹⁴³ by a laborer, the risk of injury while loading a wagon at the factory, in consequence of the slipping of the gang-plank leading to the wagon, he having been in the service seven months and having acquired full knowledge of the nature of his employment and of the appliances used, and having made no complaint;¹⁴⁴ by a servant who goes into the mouth of an elevator-bin to cave down cotton-seed which has become lodged there,—the risk of the cotton-seed caving and crushing him in consequence of his digging in the bottom of the bin;¹⁴⁵ by a mill-sawyer, the risk of injury by the breaking of a rope used to hold back the saw, set in a swinging frame, when not in use, when he might easily have examined it and discovered its defective condition, but did not;¹⁴⁶ by a skilled workman, the danger of working in a sawmill where steam

¹³⁹ *Steinhauser v. Spraul*, 127 Mo. 541; s. c. 27 L. R. A. 441; 28 S. W. Rep. 620; 30 S. W. Rep. 102.

¹⁴⁰ *McFadden v. Campbell*, 158 N. Y. 723; aff'g s. c. 13 Misc. (N. Y.) 158; 68 N. Y. St. Rep. 183; 34 N. Y. Supp. 136 (this is more properly referred to contributory negligence).

¹⁴¹ *Huda v. American Glucose Co.*, 154 N. Y. 474; aff'g s. c. 13 Misc. (N. Y.) 657; 34 N. Y. Supp. 931. See *ante*, §§ 3941, 4702.

¹⁴² *Anthony v. Leeret*, 105 N. Y. 591; s. c. 15 N. E. Rep. 561.

¹⁴³ *Kaare v. Troy Steel & Co.*, 139 N. Y. 369; s. c. 54 N. Y. St. Rep. 653; 34 N. E. Rep. 901.

¹⁴⁴ *Wilkinson v. H. W. Johns Man. Co.*, 198 Pa. St. 634; s. c. 48 Atl. Rep. 810.

¹⁴⁵ *Brown v. Miller* (Tex. Civ. App.), 62 S. W. Rep. 547 (no off. rep.).

¹⁴⁶ *Schulz v. Johnson*, 7 Wash. 403; s. c. 35 Pac. Rep. 130 (held to have been contributory negligence not to examine it).

issues from a leak in such quantities as to make it difficult to see, and when the machinery and rollers are slippery because of the freezing of the steam;¹⁴⁷ by a workman, the risk of working on a dam whose surface has an angle of about 135 degrees with the surface of the water, where the current is so swift that he cannot swim out of it, there being nothing to prevent him from seeing and appreciating his peril;¹⁴⁸ by a civil engineer whose duties are to look after the building and maintenance of railroad bridges and trestles, the risk of injury from the failure of the company to provide a watchman at a bridge which gives way under a train, the civil engineer being presumed to know that no watch is kept at such bridge;¹⁴⁹ by an employé who continues to use for a walk, upon dismounting from railway-cars, a piece of timber originally eighteen inches wide, after it has been worn until it is only two or three inches wide on the top,—the risk of so using it;¹⁵⁰ by an employé thirty-five years old, and possessing fourteen years' experience in machinery, the risk of injury from letting down a saw four feet in diameter, cracked three inches from the outside, on a large iron plate, for the purpose of cutting it in two;¹⁵¹ by an employé in a lumber-yard, who had worked there for four or five years, and who was engaged to push a car loaded with lumber along a track in a yard, from the mill to a place where the lumber was to be piled,—the risk of injury from the falling of a pile of lumber which had been piled by other employés of the owner of the yard;¹⁵² and the risks indicated in the other cases cited in the margin.¹⁵³

¹⁴⁷ *Peterson v. Sherry Lumber Co.*, 90 Wis. 83; s. c. 62 N. W. Rep. 948.

¹⁴⁸ *Bullivant v. Spokane*, 14 Wash. 577; s. c. 45 Pac. Rep. 42.

¹⁴⁹ *Texas &c. R. Co. v. Smith*, 67 Fed. Rep. 524; s. c. 31 L. R. A. 321.

¹⁵⁰ *Brewer v. Tennessee Coal &c. Co.*, 97 Tenn. 615; s. c. 37 S. W. Rep. 549.

¹⁵¹ *Erdman v. Illinois Steel Co.*, 95 Wis. 6; s. c. 69 N. W. Rep. 993.

¹⁵² *Brinkley Car Works &c. Co. v. Lewis*, 68 Ark. 316; s. c. 57 S. W. Rep. 1108 (having voluntarily entered the employment, without complaint, and without any promise that the place in which he was to work would be made safer, he waived the right to a safer place to work). See also, *Baldwin v. St. Louis &c. R. Co.*, 68 Iowa 37.

¹⁵³ *Lynch v. Chicago &c. R. Co.*, 8 Ind. App. 516; s. c. 36 N. E. Rep. 44 (risk of injury from a crack between the boards of a track over

which the employé was required to roll car-wheels, by reason of a wheel running into the crack; knew the condition of the track, and, by the exercise of reasonable care, might have known that a wheel which he was rolling was liable to run into it and fall); *McGoldrick v. Metcalf*, 44 N. Y. St. Rep. 476; s. c. 18 N. Y. Supp. 169 (risk of the breaking of a stick or rung used to hold a heavy cylinder in place which the injured employé was attempting to move without calling for help, which he might have had); *Beichert v. Reed*, 20 App. Div. (N. Y.) 635; s. c. 47 N. Y. Supp. 119 (risk of injury from the rebounding of iron rails when thrown upon other rails, although the employer failed to furnish tongs or other appliances proper and convenient for the work); *Thompson v. Cary Man. Co.*, 62 App. Div. (N. Y.) 279; s. c. 70 N. Y. Supp. 1086 (circumstances under which an experienced

§ 4841. **Various Other Risks Not Assumed.**—It has been held that the following risks are not, as matter of law, assumed by the servant named in each case:—By an employé in a stone-mill, the risk of injury from a dangerous projection from a carriage used in shifting stones, from the mere fact that he has been assisting in replacing the wheel of another carriage upon the track,—the latter fact not charging him with knowledge of the dangerous condition of other cars;¹⁵⁴ by a stone-cutter in a stone-yard, the risk of injury from a stone falling upon him in consequence of its not being securely propped, while he is engaged in dressing another stone, although it is his duty, when he reaches the stone to dress it, to prop it up more securely;¹⁵⁵ the risk of a rope breaking, by an employé who has no knowledge of a defect in it, and who is not himself engaged in using it;¹⁵⁶ by a servant engaged upon a work of such nature and magnitude as to require orders regulating the conduct of employés and directing them where to work, the risk arising from the dangerous condition of the place in which he is directed to work, where such danger is not obvious, but can be ascertained by a proper inspection by the master;¹⁵⁷ by a servant employed in tearing down a wall of stone and mortar, the risk arising from the method adopted of removing the stones which are held at the bottom of the wall;¹⁵⁸ by a driver of a fire-engine or hose-cart going to and from a fire, the risk of injury from obstructions in the street negligently allowed to remain there by the city;¹⁵⁹ by an employé at work at a lathe, the risk of being injured by the fall of an unfastened plank reaching from a runway to the countershaft timbers, and used to obtain access to a pulley for the purpose of adjusting a belt, he not knowing of its unsafe condition;¹⁶⁰ by a section-man engaged in repairing the track, the risk of being injured by a claw-bar

workman assumed the risk of injury from attempting to put on a belt after having requested the foreman to do so, who refused because he did not have time); *Cantancarito v. Siegel-Cooper Co.*, 23 Misc. (N. Y.) 664; s. c. 52 N. Y. Supp. 29 (the risk of an employé, familiar with the conditions and not complaining of them, losing his outer garment).

¹⁵⁴ *Salem Stone &c. Co. v. Griffin*, 139 Ind. 141; s. c. 38 N. E. Rep. 411.

¹⁵⁵ *Blondin v. Oolite Quarry Co.*, 11 Ind. App. 395; s. c. 39 N. E. Rep. 200.

¹⁵⁶ *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59; s. c. 72 N. W. Rep. 40; 4 Det. Leg. N. 485.

¹⁵⁷ *Carlson v. Northwestern Tel. Exch. Co.*, 63 Minn. 428; s. c. 2 Am. & Eng. Corp. Cas. (N. S.) 675; 65 N. W. Rep. 914.

¹⁵⁸ *Wolf v. Great Northern R. Co.*, 72 Minn. 435; s. c. 75 N. W. Rep. 702; 4 Am. Neg. Rep. 413; 12 Am. & Eng. R. Cas. (N. S.) 619; distinguishing *Pederson v. Rushford*, 41 Minn. 289; s. c. 42 N. W. Rep. 1063.

¹⁵⁹ *Farley v. New York*, 152 N. Y. 222; s. c. 46 N. E. Rep. 506; rev'g s. c. 9 App. Div. (N. Y.) 536; 41 N. Y. Supp. 622.

¹⁶⁰ *Quimby v. Boston &c. R. Co.*, 69 N. H. 334; s. c. 12 Am. & Eng. R. Cas. (N. S.) 517; 41 Atl. Rep. 266.

which was battered and cracked at the edges, the sight of his eye being destroyed by a sliver of steel projected from it when he struck it with a hammer as requested,—the danger not being so obvious as to charge him with contributory negligence in not quitting the employment when he discovered it;¹⁶¹ by a female employé, the risk of having her arm caught between two cylinders of a mangle revolving toward each other,—the danger not being so obvious as to put upon her an acceptance of the risk as matter of law;¹⁶² the risk of injury from putting damp lead into molten lead, this danger not being so well known and obvious that an employé will be presumed to have known and understood it upon entering the employment;¹⁶³ by a person employed to trim and clean electric lamps, who used the crossbar as a means of support, the risk of injury from the giving way of the crossbar owing to the rotten condition of the top of the pole, although another employé of the company who had instructed him as to the performance of his duties did not support himself upon the crossbar, the injured employé not having been warned not to do so;¹⁶⁴ by an employé who, under the master's direction, loads a wagon with lumber, the risk of injury from the breaking down of a wheel, he never having used the wagon before, and having no knowledge of its unsafe condition, which is not obvious.¹⁶⁵

¹⁶¹ *Booth v. Kansas City &c. Air Line*, 76 Mo. App. 516.

¹⁶² *Kilkeary v. Thackery*, 165 Pa. St. 584; s. c. 30 Atl. Rep. 1013, 1014.

¹⁶³ *Redmund v. Butler*, 168 Mass. 367; s. c. 47 N. E. Rep. 108. Where plaintiff continued to operate an air-hoist after a check-valve, not strong enough to resist the possible pressure, had been substituted for the one formerly in use, he did not assume the risk, so as to bar a recovery in an action for injuries caused by the bursting of the valve, since he was not chargeable with knowledge that an insufficient valve had been adapted to the use to which it was put: *Slattery v. Walker &c. Man. Co.*, 179 Mass. 307; s. c. 60 N. E. Rep. 782.

¹⁶⁴ *McQuillan v. Willimantic Electric Light Co.*, 70 Conn. 715; s. c. 40 Atl. Rep. 928.

¹⁶⁵ *Boelter v. Ross Lumber Co.*, 103 Wis. 324; s. c. 79 N. W. Rep. 243. In an action for the death of a servant, employed in putting the lumber in a saw, it appeared that the servant put the lumber in the saw as he had always put it in, and that the saw kicked and threw it back again. There was nothing to show that he knew, or in the exercise of reasonable care could have known, that the saw was out of order. It was held sufficient to warrant a finding that such servant *did not assume the risk*: *McLean v. Paine*, 181 Mass. 287; s. c. 63 N. E. Rep. 883.

PART III.

THE FELLOW-SERVANT DOCTRINE.

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THE FELLOW-SERVANT DOCTRINE.

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§ 4846. **General Rule as to Negligence of Fellow Servants in the Same Common Employment.**—Under the principles of the common law, the maxim *respondet superior*, discussed in a preceding chapter,¹ does not apply so as to make a master responsible for injuries inflicted upon his servant by the negligence of a fellow servant engaged in the same common employment, unless such injuries are traceable to the personal negligence of the master, or to the negligence of some agent of the master for whose conduct in the particular case the master is responsible.² Whatever exceptions to the rule may exist in other

¹ Vol. I, § 518, *et seq.*

² Walker v. Bolling, 22 Ala. 294; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Mobile &c. R. Co. v. Smith, 59 Ala. 245; s. c. 6 Rep. 264; 7 Cent. L. J. 212; Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71; Hogan v. Central Pac. R. Co., 49 Cal. 128; McLean v. Blue Point Gravel Min. Co., 51 Cal. 255; Summerhays v. Kansas Pac. R. Co., 2 Colo. 484; Colorado &c. R. Co. v. Ogden, 3 Colo. 499; Burke v. Norwich &c. R. Co., 34 Conn. 474; Nolan v. New York &c. R. Co., 70 Conn. 159; s. c. 39 Atl. Rep. 115; 43 L. R. A. 305; Mills v. Orange &c. R. Co., 2 McArth. (D. C.) 314; Camp v. Hall, 39 Fla. 535; s. c. 22 South. Rep. 792 (in the absence of statute); Parrish v. Pensacola &c. R. Co., 28 Fla. 251; s. c. 9 South. Rep. 696

(before the passage of Florida Laws 1887, ch. 3744); Shields v. Yonge, 15 Ga. 349; s. c. 60 Am. Dec. 698 [*contra*, Georgia R. &c. Co. v. Rhodes, 56 Ga. 645]; McGovern v. Columbus Man. Co., 80 Ga. 227; s. c. 5 S. E. Rep. 492; Davis v. Muscogee Man. Co., 106 Ga. 126; s. c. 32 S. E. Rep. 30; Kerr v. Crown Cotton Mills, 105 Ga. 510; s. c. 31 S. E. Rep. 166; Railey v. Garbutt, 112 Ga. 288; s. c. 37 S. E. Rep. 360 (except in the case of railway companies by virtue of statute, Ga. Code, §§ 2083, 3033, 3036, as to which see *post*, § 5293); Snyder v. Viola Min. &c. Co., 2 Idaho 771; s. c. 26 Pac. Rep. 127; Zienke v. Northern Pac. R. Co., — Idaho —; s. c. 66 Pac. Rep. 828; Honner v. Illinois &c. R. Co., 15 Ill. 550; Illinois &c. R. Co. v. Cox, 21 Ill. 20; s. c. 71 Am. Dec. 298; Chicago &c. R. Co. v. Keefe, 47

relations, the rule is of full and perfect application, when not modi-

Ill. 108; Columbus &c. R. Co. v. Troesch, 68 Ill. 545; s. c. 18 Am. Rep. 578; Toledo &c. R. Co. v. Durkin, 76 Ill. 395; Chicago &c. R. Co. v. Rush, 84 Ill. 570; Harms v. Sullivan, 1 Bradw. (Ill.) 251; Chicago &c. R. Co. v. Merckes, 36 Ill. App. 195 (where the gross negligence of the servant or his fellow servants caused the injury or *materially contributed* to it); Anglo-American Packing &c. Co. v. Lewandowski, 26 Ill. App. 629; Ohio &c. R. Co. v. Robb, 36 Ill. App. 627; McAlonan v. McArthur Bros. Co., 96 Ill. App. 13; Chicago &c. R. Co. v. Thompson, 99 Ill. App. 277; Madison &c. R. Co. v. Bacon, 6 Ind. 205; Wilson v. Madison &c. R. Co., 18 Ind. 226; Thayer v. St. Louis &c. R. Co., 22 Ind. 26; s. c. 85 Am. Dec. 409; Ohio &c. R. Co. v. Hammersley, 28 Ind. 371; Columbus &c. R. Co. v. Arnold, 31 Ind. 174; s. c. 99 Am. Dec. 615; Sullivan v. Toledo &c. R. Co., 58 Ind. 26; Ohio &c. R. Co. v. Collarn, 73 Ind. 261; s. c. 7 Rep. 143; 8 Cent. L. J. 12; 38 Am. Rep. 134; Dow v. Kansas &c. R. Co., 8 Kan. 642; Louisville &c. R. Co. v. Caven, 9 Bush (Ky.) 559 (when neither servant is superior to the other); Casey v. Louisville &c. R. Co., 84 Ky. 79 (same point); Hubgh v. New Orleans &c. R. Co., 6 La. An. 495; s. c. 54 Am. Dec. 565 [compare Camp v. Church Wardens, 7 La. An. 321]; Carle v. Bangor &c. R. Co., 43 Me. 269; Beaulieu v. Portland Co., 48 Me. 291; Stewart v. International Paper Co., 96 Me. 30; s. c. 51 Atl. Rep. 237; O'Connell v. Baltimore &c. R. Co., 20 Md. 212; s. c. 83 Am. Dec. 549; Shauk v. Northern Cent. R. Co., 25 Md. 462; Cumberland Coal &c. Co. v. Scally, 27 Md. 589; Wonder v. Baltimore &c. R. Co., 32 Md. 411; s. c. 3 Am. Rep. 143; Hanrathy v. Northern Cent. R. Co., 46 Md. 280; s. c. 5 Rep. 698; Farwell v. Boston &c. R. Co., 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924; 38 Am. Dec. 339; King v. Boston &c. R. Co., 9 Cush. (Mass.) 112; Seaver v. Boston &c. R. Co., 14 Gray (Mass.) 466; Gilman v. Eastern R. Co., 10 Allen (Mass.) 233; s. c. 87 Am. Dec. 635; s. c. on second appeal, 13 Allen (Mass.) 433; 90 Am. Dec. 210; Johnson v. Boston, 118 Mass. 114; O'Connor v. Roberts, 120 Mass. 227; Wood v. New Bedford Coal Co., 121 Mass. 252; Zeigler v. Day, 123 Mass. 152; Smith v. Lowell Man. Co., 124 Mass. 114; Felch v. Allen, 98 Mass. 572; Cunningham v. Washington Mills Co. (Mass.), 26 N. E. Rep. 235 (no off. rep.); Connors v. Holden, 152 Mass. 598; s. c. 26 N. E. Rep. 137; Healey v. George F. Blake Man. Co., 180 Mass. 270; s. c. 62 N. E. Rep. 270; Marquette &c. R. Co. v. Taft, 28 Mich. 289; Michigan &c. R. Co. v. Dolan, 32 Mich. 510; Hammond v. Chicago &c. R. Co., 83 Mich. 334; s. c. 47 N. W. Rep. 965 (if liable at all for negligence of superior servant, not liable, at least, where his negligent act is participated in and consented to by the servant injured); Walkowski v. Penokee &c. Consol. Mines, 115 Mich. 629; s. c. 41 L. R. A. 33; 4 Det. Leg. N. 1005; 73 N. W. Rep. 895 (master not liable for an injury to an employé due to a single negligent act of a competent fellow servant); Foster v. Minnesota Cent. R. Co., 14 Minn. 360; Aderson v. L. T. Sowle Elevator Co., 37 Minn. 539; s. c. 35 N. W. Rep. 382; New Orleans &c. R. Co. v. Hughes, 49 Miss. 258; Howd v. Mississippi &c. R. Co., 50 Miss. 178; Memphis &c. R. Co. v. Thomas, 51 Miss. 637; McDermott v. Pacific R. Co., 30 Mo. 115; Rohback v. Pacific R. Co., 43 Mo. 187; Gibson v. Pacific R. Co., 46 Mo. 163; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 944; 2 Am. Rep. 497; Brothers v. Cartter, 52 Mo. 372; McGowan v. St. Louis &c. R. Co., 61 Mo. 528 (and *prima facie*, all employés on a train are fellow servants); Lee v. Detroit Bridge &c. Works, 62 Mo. 565; Whalen v. Centenary Church, 62 Mo. 326 (but a superintendent in charge of work is a vice-principal); Marshall v. Schricker, 63 Mo. 308; Daubert v. Pickel, 4 Mo. App. 591; Moran v. Brown, 27 Mo. App. 487; Worheide v. Missouri Car &c. Co., 32 Mo. App. 367; Hawk v. McLeod Lumber Co., 166 Mo. 121; s. c. 65 S. W. Rep. 1022; Chicago &c. R. Co. v. Kellogg, 54

fied by statute, with respect to servants of the same grade or rank

Neb. 127; s. c. 74 N. W. Rep. 454; s. c. aff'd on rehearing, 55 Neb. 754; 76 N. W. Rep. 462 (in the absence of statutory provision); Hanley v. Grand Trunk R. Co., 62 N. H. 274; Manning v. Manchester Mills, 70 N. H. 582; s. c. 49 Atl. Rep. 91; Harrison v. Central R. Co., 31 N. J. L. 293; McAndrews v. Burns, 39 N. J. L. 7; Levene v. Standard Oil Co., 64 N. J. L. 63; s. c. 44 Atl. Rep. 847; Keegan v. Western R. Co., 8 N. Y. 175; s. c. 59 Am. Dec. 476; Ross v. New York & C. R. Co., 5 Hun (N. Y.) 488; Cruty v. Erie R. Co., 3 Thomp. & C. (N. Y.) 244; Coon v. Syracuse & C. R. Co., 5 N. Y. 492; aff'g s. c. 6 Barb. (N. Y.) 231; Karl v. Mail-lard, 3 Bosw. (N. Y.) 591; Boldt v. New York & C. R. Co., 18 N. Y. 432; Hofnagle v. New York & C. R. Co., 55 N. Y. 608; aff'g s. c. 1 Thomp. & C. (N. Y.) 346; Sammon v. New York & C. R. Co., 62 N. Y. 251; aff'g s. c. 49 How. Pr. (N. Y.) 348; 6 Jones & Sp. (N. Y.) 414; Faulkner v. Erie R. Co., 49 Barb. (N. Y.) 324; Tinney v. Boston & C. R. Co., 62 Barb. (N. Y.) 218; s. c. aff'd, 52 N. Y. 632; Anderson v. New Jersey Steamboat Co., 7 Robt. (N. Y.) 611; Carr v. North River Const. Co., 48 Hun (N. Y.) 266; s. c. 17 N. Y. St. Rep. 945; Wall v. Delaware & C. R. Co., 54 Hun (N. Y.) 454; s. c. 28 N. Y. St. Rep. 132; 7 N. Y. Supp. 709; s. c. aff'd, 125 N. Y. 727 (*mem.*); 26 N. E. Rep. 757; Harvey v. New York & C. R. Co., 88 N. Y. 481; rev'g s. c. 25 Hun (N. Y.) 61 (master not liable for injury to employé due to single negligent act of competent fellow servant); McCosker v. Long Island R. Co., 84 N. Y. 77; rev'g s. c. 21 Hun (N. Y.) 500 (the act being within the range of the common employment of both, and not in the performance of any duty owed by the master to the servant); Kemmerer v. Manhattan R. Co., 81 Hun (N. Y.) 444; s. c. 63 N. Y. St. Rep. 323; 31 N. Y. Supp. 82; Ponton v. Wilmington & C. R. Co., 6 Jones L. (N. C.) 245; Hardy v. Carolina & C. R. Co., 76 N. C. 5; aff'g on rehearing s. c. 74 N. C. 734; Cleveland & C. R. Co. v. Keary, 3 Ohio St. 201 (where no power or con-trol is given to one over the other); Whaalan v. Mad River & C. R. Co., 8 Ohio St. 249 (same point); Anderson v. Bennett, 16 Or. 515; s. c. 8 Am. St. Rep. 311; 19 Pac. Rep. 765; Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; Mitchell v. Pennsylvania R. Co. (Pa.), 1 Am. L. Reg. 717 (no off. rep.); Strange v. McCormick, 1 Phila. (Pa.) 156; s. c. 5 Pa. L. J. Rep. 10; Caldwell v. Brown, 53 Pa. St. 453; Weger v. Pennsylvania R. Co., 55 Pa. St. 460; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239; s. c. 98 Am. Dec. 336; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Hoffman v. Clough, 124 Pa. St. 505; s. c. 46 Phila. Leg. Int. 361; 20 Pitts L. J. (N. S.) 61; 23 W. N. C. (Pa.) 399; 17 Atl. Rep. 19; Wischam v. Rickards, 136 Pa. St. 109; s. c. 10 L. R. A. 97; 20 Am. St. Rep. 900; 42 Alb. L. J. 522; 8 Rail. & Corp. L. J. 491; 26 W. N. C. (Pa.) 467; 48 Phila. Leg. Int. 198; 20 Atl. Rep. 532 (whether he is paid for his services or not); Duncan v. A. & P. Roberts Co., 194 Pa. St. 563; s. c. 45 Atl. Rep. 330 (no opinion) (boss of a gang of reamers in a bridge-shop of iron-works is a fellow servant of one of the workmen); Brodeur v. Valley Falls Co., 16 R. I. 448; s. c. 17 Atl. Rep. 54; Murray v. South Carolina R. Co., 1 McMull. (S. C.) 385; s. c. 36 Am. Dec. 268; Boatwright v. Northeastern R. Co., 25 S. C. 128; Fox v. Sandford, 4 Sneed (Tenn.) 36; s. c. 67 Am. Dec. 587; Washburn v. Nashville & C. R. Co., 3 Head (Tenn.) 638; s. c. 75 Am. Dec. 784 [*contra*, Haynes v. East Tennessee & C. R. Co., 3 Coldw. (Tenn.) 222]; Price v. Houston Direct Nav. Co., 46 Tex. 535, and cases cited; Robinson v. Houston & C. R. Co., 46 Tex. 540; Gulf & C. R. Co. v. Blohn, 73 Tex. 637; s. c. 4 L. R. A. 764; 11 S. W. Rep. 867; Hard v. Vermont & C. R. Co., 32 Vt. 473; Cochran v. Shanahan, 51 W. Va. 137; s. c. 41 S. E. Rep. 140; Moseley v. Chamberlain, 18 Wis. 700; Cooper v. Milwaukee & C. R. Co., 23 Wis. 668; Brabbits v. Chicago & C. R. Co., 38 Wis. 289 (these last three cases *overruling* Chamber-

engaged in the same field of labor,³ when working together under one

Iain v. Milwaukee &c. R. Co., 11 Wis. 238; *Jones v. Yeager*, 2 Dill. (U. S.) 64; s. c. 5 Chic. Leg. N. 25; *Kielley v. Belcher &c. Min. Co.*, 3 Sawy. (U. S.) 500; *Malone v. Western Trans. Co.*, 5 Biss. (U. S.) 315; *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S.) 319; *Quebec S. S. Cor v. Merchant*, 133 U. S. 375; s. c. 33 L. ed. 656; 7 Rail. & Corp. L. J. 432; 10 Sup. Ct. Rep. 397; *Weeks v. Scharer*, 49 C. C. A. 372; s. c. 111 Fed. Rep. 330; *Abraham v. Reynolds*, 5 Hurl. & N. 143; s. c. 6 Jur. (N. S.) 53; 8 Wkly. Rep. 181; *Bartonshill Coal Co. v. Reid*, 4 Jur. (N. S.) 767; s. c. 3 Macq. H. L. Cas. 266; 1 Pat. Sc. App. 785; *Conway v. Belfast &c. R. Co.*, 1 R. 9 C. L. 498; *Degg v. Midland R. Co.*, 1 Hurl. & N. 733; s. c. 3 Jur. (N. S.) 395; 26 L. J. (Exch.) 171 (rule applies to one voluntarily assisting servants in their work); *Gallagher v. Piper*, and *Lovegrove v. London &c. R. Co.*, 16 C. B. (N. S.) 669; *Hall v. Johnson*, 3 Hurl. & Colt. 589; s. c. 11 Jur. (N. S.) 180; 34 L. J. (Exch.) 222; 13 Wkly. Rep. 411; 11 L. T. (N. S.) 779; *Hutchinson v. York &c. R. Co.*, 5 Exch. 343; s. c. 6 Eng. Rail. Cas. 580; 14 Jur. 837; 19 L. J. (Exch.) 296; *Howells v. Landore &c. Steel Co.*, L. R. 10 Q. B. 62; s. c. 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Wkly. Rep. 335; 31 L. T. (N. S.) 433; *Lovell v. Howell*, 1 C. P. Div. 161; *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149; s. c. 5 Best & S. 736; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; aff'g s. c. 5 Best & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Wkly. Rep. 1031; *Murphy v. Smith*, 19 C. B. (N. S.) 361; s. c. 12 L. T. (N. S.) 605; *Ormond v. Holland*, El. Bl. & El. 102; *Potter v. Faulkner*, 1 Best & S. 800; s. c. 8 Jur. (N. S.) 259; 31 L. J. (Q. B.) 30; 10 Wkly. Rep. 93; 5 L. T. (N. S.) 455 (volunteer); *Priestley v. Fowler*, 3 Mee. & W. 1; s. c. *Murph. & H.* 305; s. c. in full, 2 Thomp. Neg. (1st ed.), p. 919; *Searle v. Lindsay*, 11 C. B. (N. S.) 429; s. c. 8 Jur. (N. S.) 746; 31 L. J. (C. P.) 106; 10 Wkly. Rep. 89; 5 L. T. (N. S.) 427; *Tarrant v. Webb*, 18 C. B. 797; s. c. 25 L. J. (C. P.) 261; *Tunney v.*

Midland R. Co., L. R. 1 C. P. 291; s. c. 12 Jur. (N. S.) 691; *Waller v. South Eastern R. Co.*, 2 Hurl. & Colt. 102; s. c. 9 Jur. (N. S.) 501; 32 L. J. (Exch.) 205; 11 Wkly. Rep. 731; 8 L. T. (N. S.) 325; *Wiggett v. Fox*, 11 Exch. 832; s. c. 2 Jur. (N. S.) 955; 25 L. J. (Exch.) 188; *Wigmore v. Jay*, 5 Exch. 354; s. c. 14 Jur. 837; 19 L. J. (Exch.) 300; *Wilson v. Merry*, L. R. 1 Sc. & Div. App. Cas. 326. In *civil-law countries* the common-law rule as to fellow servants is not in force. For example, in the *Province of Quebec* it is held that the exemption of a master from liability for an injury to one servant through the negligence of a fellow servant is not in force in such Province: *Filion v. Reg.*, 4 Can. Exch. 134; s. c. aff'd *sub nom.* *Reg. v. Filion*, 24 Can. S. C. 482 [following Canadian Pac. R. Co. v. Robinson, 14 Can. S. C. 114]. Thus, in an action by a workman against the Crown for an injury sustained, while repairing a public canal in such Province, through the negligence of a superintendent and foreman in regard to a derrick, the fact that they were fellow servants with the plaintiff was no defense: *Reg. v. Filion*, 24 Can. S. C. 482; aff'g s. c. *sub nom.* *Filion v. Reg.*, 4 Can. Exch. 134. So, a mining company was liable in damages for the death of an employé from an explosion of dynamite which fellow servants of such employé had allowed to accumulate in unnecessary quantities and in dangerous proximity to other employés, in a situation where opportunity for damage might occur from the nature of the substance, or through carelessness, or otherwise,—and this though the direct cause of such explosion was unknown: *Asbestos &c. Co. v. Durand*, 30 Can. S. C. 285; s. c. 20 Occ. N. 195 [following, as to fellow servants, *Reg. v. Filion*, *supra*; *Reg. v. Grenier*, 30 Can. S. C. 42].

³ *Newport News &c. R. Co. v. Eifort*, 15 Ky. L. Rep. 600; s. c. 49 Alb. L. J. 289 (no off. rep.) (and although, under the Kentucky rule, the negligence of the servant inflicting the injury may be *gross*.

common directing superior;⁴ or when in the employ of the same master, engaged in the same common work, and performing services for the same general purpose.⁵ The doctrine is frequently expressed by saying, as a premise, that where the master discharges all those positive or unalienable duties for the protection of his servant which the law devolves upon him, then he is not liable for an injury visited upon one of his servants through the negligence of a fellow servant. For instance, where the master furnishes a safe place for the servant to work, proper appliances with which he is to work, competent servants with whom he is to work, and proper regulations for the conduct of his business, to the end of promoting the safety of his servants,—then he is not liable to one servant for an injury happening to him in consequence of the negligence of a fellow servant.⁶

§ 4847. This Doctrine a Part of the Doctrine of Accepting the Risk.—It should not escape attention that this doctrine is really a part of the doctrine of *Accepting the Risk*, which has been treated of in the preceding Part of this Title. The meaning is that the risk of injury from the negligence of fellow servants is one of the ordinary risks of the service, the assumption of which, on the part of the servant, is deemed, in law, to be impliedly a part of his contract of service.⁷ The meaning is that one who enters the employment of another there-

⁴ *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165; s. c. 21 S. W. Rep. 916.

⁵ *Lewis v. Seifert*, 116 Pa. St. 628; s. c. 2 Am. St. Rep. 631; 11 Atl. Rep. 514; 20 W. N. C. (Pa.) 145, and cases cited. Extending this, through different expressions used by the courts, we find that it is held that a railroad employé who regularly works in the same service with several others, receiving the same price, under the general superintendence of another, is a fellow servant with those working with him, and that his sole or principal duty is not that of superintendence, although he gives them directions about the work in the absence of the general superintendent: *Dowd v. Boston & C. R. Co.*, 162 Mass. 185; s. c. 38 N. E. Rep. 440.

⁶ *Cochran v. Shanahan*, 51 W. Va. 137; s. c. 41 S. E. Rep. 140.

⁷ *Ante*, § 4712; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591; *Doyle v. White*, 9 App. Div. (N. Y.)

521; s. c. 41 N. Y. Supp. 628; 75 N. Y. St. Rep. 628; *Hicks v. Southern R. Co.*, 63 S. C. 559; s. c. 41 S. E. Rep. 753; rev'g on rehearing (granted in 38 S. E. Rep. 866), s. c. 38 S. E. Rep. 725 (error to instruct the jury that an employé does not assume the risk of accident happening from the incompetency or misconduct of a co-laborer); *Baltimore & C. R. Co. v. McKenzie*, 81 Va. 71; *Melville v. Missouri & C. R. Co.*, 4 McCrary (U. S.) 194 (assume risk of negligence of skillful co-laborers). One court has reasoned that the test of a master's liability for injuries to one servant caused by the negligence of another servant, is whether or not the injury is within the risk ordinarily incident to the service undertaken: *St. Louis & C. R. Co. v. Triplett*, 54 Ark. 289; s. c. 11 L. R. A. 773; 15 S. W. Rep. 831; 16 S. W. Rep. 266. But this seems to turn the proposition, as generally stated by the courts, upside down.

by assumes the risk of the negligence of his fellow servants in the performance of all acts which they do while they are not discharging a positive duty of the master.⁸

§ 4848. Rule Made to Rest upon the Doctrine of Implied Contract.—The rule is generally made to rest upon the doctrine of implied contract. The meaning is that, in consideration of being given the employment and of being paid the agreed wages, the law implies a contract that the servant shall assume the risk of injury that may result from the negligence of fellow servants, whether in point of fact he agrees to assume such risk or not.⁹

§ 4849. Conflict of Laws with Respect to the Fellow-Servant Doctrine.—It has been held that the doctrine that a master is not liable for injuries to a servant caused by the negligence of a fellow servant, was not a part of the common law existing at the date of our separation from England, and hence the courts of one State cannot presume that such rule exists in another State, so as to throw on a plaintiff, who has been injured in such other State by the negligence of a fellow servant, the burden of proving that the rule has been abrogated by statute.¹⁰ The courts of Illinois will not refuse to enforce a statute of another State abolishing the common-law fellow-servant rule, in a suit by one of its own citizens against one of its own corporations to recover damages for the death of one of its own citizens in an accident occurring in the other State.¹¹

§ 4850. Distinction between Construction and Operation.—Many of the cases present and draw a distinction between negligence in the construction of machinery or appliances, and negligence in operating

⁸ Weeks v. Scharer, 49 C. C. A. 372; s. c. 111 Fed. Rep. 330.

⁹ Farwell v. Boston & C. R. Co., 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924; 38 Am. Dec. 339; Hughson v. Richmond & C. R. Co., 2 App. (D. C.) 98; s. c. 22 Wash. L. Rep. 55 and many of the cases cited in § 4846, *supra*.

¹⁰ Williams v. Southern R. Co., 128 N. C. 286; s. c. 38 S. E. Rep. 893. In this case a servant of a railroad company operating lines in North Carolina was injured in Tennessee by the negligence of a fellow servant. An action for such injuries was held to be an action in contract, and not in tort; and

hence, in the absence of any showing as to where the contract was made, the North Carolina court had jurisdiction of the action; and the Fellow-servant Act of 1897 of that State applied to it, making the railroad company liable; the act being applicable to the employé of "any railroad operating in the State," and not being limited to injuries received in the State: Williams v. Southern R. Co., *supra*.

¹¹ Chicago & C. R. Co. v. Rouse, 78 Ill. App. 286; s. c. *aff'd*, 178 Ill. 132; 44 L. R. A. 410; 52 N. E. Rep. 951; 12 Am. & Eng. R. Cas. (N. S.) 706; 5 Am. Neg. Rep. 549.

them. The distinction is that the duty of constructing or causing to be constructed the machine or appliance so that it shall be reasonably safe for the purposes intended, is the duty of the master; whereas the duty of operating it in a reasonably safe manner is the duty of his servant or servants. Applying this distinction to a railroad, it has been held that the duty of so operating a safely constructed railroad, subject to the rules and general supervision of the railroad company, as to keep it in a reasonably safe condition for those employed upon it, is not a positive duty of the master, but a primary duty of his servants.¹² So, where a plank had been provided to cover a drain in the floor of the defendant's pulp-mill, which plank, when down over the drain, formed a part of the floor, and in order to use the drain it was necessary to remove the plank,—it was held that the servant whose duty it was to remove the plank and then replace it was not performing a duty which the master owed to his employes, so as to render him liable for injuries incurred by one of them through the failure of such servant to replace the plank.¹³

§ 4851. Distinction between Repairs of Machinery, Structures, etc., and Mere Details of Work.—As already seen,¹⁴ some of the courts make a distinction between repairs of machinery, structures, etc., the duty of making which the law imposes upon the master, and those repairs and readjustments which take place as the work progresses, which are generally, though not always, made by the servants conducting the work, and which are regarded as among the mere details of the work, for which the master is not liable in case of negligence or unskillfulness in making them, such negligence or unskillfulness being regarded as that of fellow servants.¹⁵ Thus, it has been held that an employé in a fruit-canning factory does not cease to be a fellow servant of another employé merely because he is directed by the superintendent to look after a barrel used for heating water with steam, so as to render the employer liable for his negligence in inserting a plug in, or failing to remove it from, the pipe through which the steam escapes, causing an explosion of the barrel, as the operation

¹² *Brady v. Chicago &c. R. Co.*, 114 Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712; *St. Louis &c. R. Co. v. Needham*, 63 Fed. Rep. 107; s. c. 25 L. R. A. 833; 11 C. C. A. 56 (duty of operating a switch not a personal duty, but may be delegated, and the railroad company will not be responsible for the negligence of the switch-

man whereby another railway servant is injured).

¹³ *Stewart v. International Paper Co.*, 96 Me. 30; s. c. 51 Atl. Rep. 237.

¹⁴ *Ante*, §§ 3761, 3999.

¹⁵ *Fox v. Le Comte*, 2 App. Div. (N. Y.) 61; s. c. 37 N. Y. Supp. 316; 72 N. Y. St. Rep. 502; s. c. aff'd, 153 N. Y. 680 (*mem.*); 48 N. E. Rep. 1104.

of the barrel was but a detail of the work in which they were engaged.¹⁶ So, where an employé in a rubber mill, employed in feeding rubber scrap to a grinding-mill, was injured by falling upon a slippery floor, rendered so by grease left thereon by two other employés, who had been directed by defendant's foreman to clean out a pit formerly occupied by the gearing of a machine,—it was held that the injury was caused by a fellow servant, for whose carelessness the master was not liable, such work being a part of the duty of the servant rather than of the master, and the grease not having been left on the floor long enough to charge the master with constructive notice of the unsafe condition of his premises.¹⁷

§ 4852. **Suitable Materials and Appliances Furnished by Master, but Negligently Selected or Used by Servants.**^{17a}—If the master furnishes suitable materials or appliances to be used by his servants in conducting the work which they are appointed to perform; and if he commits to them the duty of selecting the materials to be used out of those which he furnishes, and of using them, or commits to them the details of using such appliances, they being competent so to do; and in consequence of the negligent selection or the negligent use made by some of them, or in consequence of the failure to use such materials or appliances, others of them are injured,—the master will not be liable, for the reason that this will be deemed the negligence of fellow servants, under the rule under consideration.¹⁸ In such a case, if the servant making the negligent selection, or the negligent use of the materials or appliances, is the *foreman* of the work, then, according to the prevailing conception, the conclusion will be the same.¹⁹

¹⁶ Crowell v. Thomas, 18 App. Div. (N. Y.) 520; s. c. 46 N. Y. Supp. 137; 80 N. Y. St. Rep. 137.

¹⁷ Burke v. National India Rubber Co., 21 R. I. 446; s. c. 44 Atl. Rep. 307.

^{17a} See *ante*, §§ 3760, 3953, 3954, 3999, *et seq.*

¹⁸ Moore v. McNeill, 35 App. Div. (N. Y.) 323; s. c. 54 N. Y. Supp. 956 (negligence of a foreman in charge of the construction of a scaffolding, in choosing, from a suitable supply for the purpose, an unsuitable plank); Thomas v. Ann Arbor R. Co., 114 Mich. 59; s. c. 4 Det. Leg. N. 485; 72 N. W. Rep. 40; Manning v. Manchester Mills, 70 N. H. 582; s. c. 49 Atl. Rep. 91; Rosa v. Volkening, 64 App. Div. (N. Y.) 426; s. c. 72 N. Y. Supp. 236 (plaintiff injured by negligence

of fellow servants in overloading a safe and proper derrick).

¹⁹ Moore v. McNeill, 35 App. Div. (N. Y.) 323; s. c. 54 N. Y. Supp. 956; Thomas v. Ann Arbor R. Co., 114 Mich. 59; s. c. 4 Det. Leg. N. 485; 72 N. W. Rep. 40; Lambert v. Missisquoi Pulp Co., 72 Vt. 278; s. c. 47 Atl. Rep. 1085; O'Connor v. Hall, 52 App. Div. (N. Y.) 428; s. c. 65 N. Y. Supp. 136; McKinnon v. Norcross, 148 Mass. 533; s. c. 3 L. R. A. 320; 20 N. E. Rep. 183; Kelly v. New Haven Steamboat Co., 74 Conn. 343; s. c. 50 Atl. Rep. 871 (mate of vessel failed to use fender which ship-owner had furnished, by reason of which the hawser slipped and a deck-hand trying to make the boat fast to the pier was injured,—the test as to whether such mate was a vice-principal being whether

§ 4853. **Application of the Rule as to Proximate and Remote Cause to Injuries by Fellow Servants.**—We may start out with the premise that in order to a recovery of damages from the master the proximate cause of the injury must have been one for which the master was responsible, and not the mere negligence of a fellow servant. Thus, where a collision of a switch-engine with a railway-train was caused by the negligence of a brakeman in handling the switch, and the water-tank of an engine, insufficiently secured to withstand the shock of the collision, or defectively secured, was thereby thrown forward upon a brakeman riding on the engine,—the proximate cause of the injury was deemed to have been the negligence of a fellow servant, thus preventing a recovery.²⁰ The failure of one servant to start a machine was not deemed the proximate cause of an injury to his fellow servant, the plaintiff, where, upon his failure to start the machine, the foreman started it and warned the plaintiff to look out for some cogwheels at the end, but the plaintiff was nevertheless injured by the cogwheels while attempting, without orders, to tighten some wedges in the sideboard of the machine after calling out to the foreman that they were loose.²¹ The injury received by an inexperienced man, who was directed by the person whose orders he was required to obey, to start an engine which had stopped upon the center, by prying the flywheel over with an iron bar, from the engine starting quickly under great pressure of steam, and catching him on the bar and throwing him into the gearing,—was held to have arisen directly and proximately from his obedience to the order and direction of such person, and not from the action of another workman in opening the throttle-valve so as to let on the full force of the steam, where there was evidence tending to show that the person in charge knew, or by the exercise of ordinary care might have known, of the valve being open and of the hazard to such employé attempting the operation.²² If the proximate cause of an injury to an employé is his contributory negligence, mingled with the negligence of a co-employé, he cannot recover damages from the common master, because he could not recover them if he himself had not been guilty of contributory negligence, the cause of the injury

the duty violated was one resting on the master; and the conclusion being that the master was under no duty to see that appliances which he had furnished were used). Compare *Lake Shore & C. R. Co. v. Corcoran*, 14 Ohio C. C. 377; s. c. 6 Ohio C. D. 773; 3 Ohio Dec. 641; *Wiggins Ferry Co. v. Heilig*, 43 Ill. App. 238.

²⁰ *Vizelich v. Southern Pac. Co.*, 126 Cal. 587; s. c. 59 Pac. Rep. 129.

²¹ *McGuerty v. Hale*, 161 Mass. 51; s. c. 36 N. E. Rep. 682.

²² *Gartside Coal Co. v. Turk*, 147 Ill. 120; s. c. 35 N. E. Rep. 467; aff'g s. c. 47 Ill. App. 332.

being the negligence of a fellow servant merely.²³ As elsewhere shown,²⁴ where the negligence of the master commingles in producing the accident, the master is liable because his negligence was one of the proximate or efficient causes of the injury. Thus, a railroad company is liable for injuries received by a brakeman while performing his duty of keeping a passenger off the step of a car, by being struck by a train upon another track, at a curve where the tracks were too close together for the safe passage of trains, although the engineer of one of the trains was negligent in undertaking to pass at that point.²⁵ On obvious grounds, an employé cannot recover damages for an injury shown to have been caused by one of several of his fellow servants, where it is not shown which one of them caused the injury.²⁶

§ 4854. Doctrine that Servant does Not Assume the Risk of Extraordinary Dangers from Negligence of Fellow Servants.—In two or three jurisdictions the rule is encountered that while a servant ordinarily assumes the risk of injury from the negligence of his fellow servants, yet this rule is not applicable to cases where he is exposed by the master to extraordinary dangers from such negligence under conditions created after his employment, without notice to him of such dangerous conditions.²⁷ Following this supposed principle, it has been held that an employé who is given charge of dangerous instruments, such as dynamite, represents his master in the care and custody thereof, and is not a fellow servant; and hence the master is liable for injuries to employés through such servant's negligence in the care of such articles.²⁸

²³ *Alabama &c. R. Co. v. Roach*, 110 Ala. 266; s. c. 20 South. Rep. 132 (car inspector going under a car at night when cars were being switched in the yards, failed to set out signals, or give notice that he was under the car; switch-foreman ran cars against car under which plaintiff was at work without giving any signal—no recovery).

²⁴ *Post*, § 4856, *et seq.*

²⁵ *Mulvaney v. Brooklyn City R. Co.*, 1 Misc. (N. Y.) 425; s. c. 49 N. Y. St. Rep. 637; 21 N. Y. Supp. 427; s. c. *aff'd*, 142 N. Y. 651.

²⁶ *Kemmerer v. Manhattan R. Co.*, 81 Hun (N. Y.) 444; s. c. 63 N. Y. St. Rep. 323; 31 N. Y. Supp. 82.

²⁷ *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915; s. c. 6 C. A. 636; 12 U. S. App. 688 (fel-

low servants taking down trestle under which servant was working, unknown to him; master liable for injury to servant caused by their negligence in taking it down); *Burke v. Anderson*, 16 C. C. A. 442; s. c. 69 Fed. Rep. 814; 34 U. S. App. 132 (plaintiff, inexperienced in the use of dynamite or in the work where it was used, was set to digging at a place where a blast had been negligently conducted, without informing him of the peril; master liable to him for an injury caused by his pick striking an unexploded charge).

²⁸ *Rush v. Spokane Falls &c. R. Co.*, 23 Wash. 501; s. c. 63 Pac. Rep. 500 (following *Allen v. Spokane Falls &c. R. Co.*, 21 Wash. 324; s. c. 58 Pac. Rep. 244).

ARTICLE II. NEGLIGENCE OF MASTER OR HIS REPRESENTATIVE, CONCURRING WITH NEGLIGENCE OF FELLOW SERVANT.

SECTION

4856. If negligence of master mingles with that of fellow servant, master liable.
4857. Further of the effect of negligence of fellow servant combined with negligence of master.
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SECTION

4860. Negligence of master in failing to provide sufficient servants, commingling with negligence of fellow servant.
4861. Negligence of vice-principal commingling with that of fellow servant—Master liable.
4862. Negligence of foreman concurring with that of fellow servant.
4863. Always assuming that the negligence of the master is a proximate cause of the injury.

§ 4856. **If Negligence of Master Mingles with that of Fellow Servant, Master Liable.**—On a principle already considered,¹ if the negligence of the master, or of one for whose conduct the master is answerable, mingles with that of one who stood in the relation of a fellow servant to the servant receiving the injury; and if the negligence of the master or his representative was a proximate or efficient cause of the injury, the master will be liable, and will not be allowed to escape liability on the ground that the injury *also* proceeded from the negligence of one for whose conduct he was not answerable.² A different statement of the doctrine is to say that in

¹ Vol. 1, § 75.

² *Fisk v. Central &c. R. Co.*, 72 Cal. 38; s. c. 13 Pac. Rep. 144; *Denver &c. R. Co. v. Sipes*, 26 Colo. 17; s. c. 55 Pac. Rep. 1093; 5 Am. Neg. Rep. 305; *Norris v. Illinois Cent. R. Co.*, 88 Ill. App. 614; *Swift & Co. v. O'Neill*, 88 Ill. App. 162; s. c. aff'd, 187 Ill. 337; 58 N. E. Rep. 416; *Chicago &c. R. Co. v. Gillison*, 173 Ill. 264; s. c. 50 N. E. Rep. 657; 64 Am. St. Rep. 117; aff'g s. c. 72 Ill. App. 207; *Swift & Co. v. Rutkowski*, 82 Ill. App. 108; s. c. aff'd, 182 Ill. 18; 54 N. E. Rep. 1038; *Illinois Cent. R. Co. v. Johnson*, 95 Ill. App. 54; s. c. aff'd, 191 Ill. 594; 61 N. E. Rep. 334 (master held lia-

ble where his negligence mingles with that of fellow servant, and neither standing alone is the efficient cause); *Louisville &c. R. Co. v. Heck*, 151 Ind. 292; s. c. 11 Am. & Eng. R. Cas. (N. S.) 382; 50 N. E. Rep. 988; *Rogers v. Leyden*, 127 Ind. 50; s. c. 26 N. E. Rep. 210; *Pugh v. Chesapeake &c. R. Co.*, 101 Ky. 77; s. c. 19 Ky. L. Rep. 149; 8 Am. & Eng. R. Cas. (N. S.) 303; 2 Am. Neg. Rep. 159; 39 S. W. Rep. 695; *Faren v. Sellers*, 39 La. An. 1011; s. c. 3 South. Rep. 363; *Myers v. Hudson Iron Co.*, 150 Mass. 125; s. c. 22 N. E. Rep. 631; *Drommie v. Hogan*, 153 Mass. 29; s. c. 26 N. E. Rep. 237; *Cayzer v. Tay-*

order to relieve the master from liability for an injury to one of his servants, the negligence of a fellow servant must have been the *sole*

lor, 10 Gray (Mass.) 274; Hunn v. Michigan &c. R. Co., 78 Mich. 513; s. c. 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452; Delude v. St. Paul City R. Co., 55 Minn. 63; s. c. 56 N. W. Rep. 461; Olson v. St. Paul &c. R. Co., 34 Minn. 477; Franklin v. Winona &c. R. Co., 37 Minn. 409; s. c. 5 Am. St. Rep. 856; 34 N. W. Rep. 898; Dewees v. Meramec Iron Min. Co., 128 Mo. 423; s. c. 31 S. W. Rep. 110; aff'g s. c. 54 Mo. App. 476; Browning v. Wabash &c. R. Co., 124 Mo. 55; s. c. 27 S. W. Rep. 644; aff'g s. c. 24 S. W. Rep. 731; Young v. Shickle &c. Iron Co., 103 Mo. 324; s. c. 15 S. W. Rep. 771; Craig v. Chicago &c. R. Co., 54 Mo. App. 523; Bluedorn v. Missouri &c. R. Co., 108 Mo. 439; s. c. 18 S. W. Rep. 1103 (running train by time-card, at prohibited speed); Irmer v. St. Louis Brew. Co., 69 Mo. App. 17; Ellingson v. Chicago &c. R. Co., 60 Mo. App. 679; s. c. 1 Mo. App. Repr. 298; Cole v. Warren Man. Co., 63 N. J. L. 626; s. c. 44 Atl. Rep. 647; Paulmier v. Erie R. Co., 34 N. J. L. 151; Lutz v. Atlantic &c. R. Co., 6 N. Mex. 496; s. c. 16 L. R. A. 819; 53 Am. & Eng. R. Cas. 478; 30 Pac. Rep. 912; Whittaker v. Delaware &c. Canal Co., 49 Hun (N. Y.) 400 (unless the accident would not have happened without the master's negligence); Crowell v. Thomas, 90 Hun (N. Y.) 193; s. c. 70 N. Y. St. Rep. 651; 35 N. Y. Supp. 936; Busch v. Buffalo Creek R. Co., 29 Hun (N. Y.) 112; Bryant v. New York &c. R. Co., 81 Hun (N. Y.) 164; s. c. 62 N. Y. St. Rep. 670; 30 N. Y. Supp. 737; Tetherton v. United States Talc. Co., 165 N. Y. 665; s. c. 59 N. E. Rep. 1131; aff'g s. c. 41 App. Div. (N. Y.) 613; 58 N. Y. Supp. 55; Bennett v. Long Island R. Co., 21 App. Div. (N. Y.) 25; s. c. 47 N. Y. Supp. 258; Warn v. New York &c. R. Co., 80 Hun (N. Y.) 71; s. c. 61 N. Y. St. Rep. 585; 29 N. Y. Supp. 897; Ring v. Cohoes, 77 N. Y. 83; Auld v. Manhattan Life Ins. Co., 165 N. Y. 610; s. c. 58 N. E. Rep. 1085; aff'g s. c. 54 N. Y. Supp. 222; 34 App. Div. (N. Y.) 491; Hollingsworth v. Long Island R. Co., 91 Hun (N. Y.) 641; s. c. 36 N. Y. Supp. 1126; 70 N. Y. St. Rep. 903; Coppins v. New York &c. R. Co., 122 N. Y. 557; s. c. 34 N. Y. St. Rep. 214; 44 Am. & Eng. R. Cas. 618; 19 Am. St. Rep. 523; 25 N. E. Rep. 915; aff'g s. c. 48 Hun (N. Y.) 292; 17 N. Y. St. Rep. 916; Donahue v. Brooklyn &c. R. Co., 38 N. Y. St. Rep. 485; s. c. 14 N. Y. Supp. 639; Booth v. Boston &c. R. Co., 73 N. Y. 38; Crutchfield v. Richmond &c. R. Co., 76 N. C. 320; Kaiser v. Flaccus, 138 Pa. St. 332; s. c. 22 Atl. Rep. 88; Louisville &c. R. Co. v. Kenley, 92 Tenn. 207; s. c. 21 S. W. Rep. 326; Illinois &c. R. Co. v. Spence, 93 Tenn. 173; s. c. 23 S. W. Rep. 211 (railway company liable for an injury to an employé caused by the negligence of its engineer, if the negligence of the conductor, representing the company, materially contributed thereto); St. Louis &c. R. Co. v. McClain, 80 Tex. 85; s. c. 15 S. W. Rep. 789; International &c. R. Co. v. Bonatz (Tex. Civ. App.), 48 S. W. Rep. 767 (no off. rep.); Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. Rep. 118 (no off. rep.); Houston &c. R. Co. v. Kelley (Tex. Civ. App.), 35 S. W. Rep. 878 (no off. rep.); Texas &c. R. Co. v. Maupin (Tex. Civ. App.), 63 S. W. Rep. 346 (no off. rep.); Hamilton v. Galveston &c. R. Co., 54 Tex. 556 (railroad company employing minor without consent of parent, liable to parent for injury through negligence of his co-employés); Sincere v. Union Compress &c. Co. (Tex. Civ. App.), 40 S. W. Rep. 326 (no off. rep.); Missouri &c. R. Co. v. Rains (Tex. Civ. App.), 40 S. W. Rep. 635 (no off. rep.); Texas &c. R. Co. v. Eberhart (Tex. Civ. App.), 40 S. W. Rep. 1060 (no off. rep.); s. c. aff'd, 91 Tex. 321; 43 S. W. Rep. 510; Missouri &c. R. Co. v. Ferch, 18 Tex. Civ. App. 46; s. c. 44 S. W. Rep. 317; Pool v. Southern Pac. R. Co., 20 Utah 210; s. c. 58 Pac. Rep. 326; Wright v. Southern Pac. R. Co., 14 Utah 383; s. c. 46 Pac. Rep. 374; 5 Am. & Eng. R. Cas. (N. S.) 559; Handley v. Daly Min. Co., 15 Utah 176; s. c. 49 Pac. Rep. 295; Jenkins v. Mammoth Min. Co., 24 Utah 513; s. c.

cause of the injury, and not commingled or combined with the negligence of the master or of his representative.³

§ 4857. Further of the Effect of Negligence of Fellow Servant Combined with Negligence of Master.—The reason of this rule is, that while the servant impliedly agrees to take the risk of negligence on the part of fellow servants, which the master cannot prevent, he does not impliedly agree to take the risk of any negligence on the part of the

68 Pac. Rep. 845 (the injured servant assumes the risk of the negligence of a fellow servant, but not that of the master); *Morrissey v. Hughes*, 65 Vt. 553; s. c. 27 Atl. Rep. 205; *Richmond & C. R. Co. v. George*, 88 Va. 223; s. c. 15 Va. L. J. 625; 13 S. E. Rep. 429; *Baltimore & C. R. Co. v. McKenzie*, 81 Va. 71; *Norfolk & C. R. Co. v. Phelps*, 90 Va. 665; s. c. 19 S. E. Rep. 652 (negligence of yardmaster, who was vice-principal of railway company, resulting in injury to engine-hostler, made company liable although the negligence of a brakeman contributed to the injury); *Norfolk & C. R. Co. v. Phillips*, 100 Va. 362; s. c. 41 S. E. Rep. 726; *Lago v. Walsh*, 98 Wis. 348; s. c. 74 N. W. Rep. 212; *Cowan v. Chicago & C. R. Co.*, 80 Wis. 284; s. c. 50 N. W. Rep. 180; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; s. c. 27 L. ed. 266; *Brown v. Coxe*, 75 Fed. Rep. 689; *Northern R. Co. v. Poirier*, 67 Fed. Rep. 881 (provided the accident would not have happened had not the master himself been negligent); *New Jersey & C. R. Co. v. Young*, 49 Fed. Rep. 723; s. c. 1 U. S. App. 96; *Mexican & C. R. Co. v. Glover*, 107 Fed. Rep. 356; s. c. 46 C. C. A. 334 (negligence of railway company in ordering two trains to meet at a certain place, concurring with the negligence of fellow servants, the conductor and engineer of one of the trains, in operating it without lights); *Clyde v. Richmond & C. R. Co.*, 59 Fed. Rep. 394; *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988; s. c. 6 C. C. A. 205 (master liable where his negligence is a proximate cause of the injury); *Pullman's Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; s. c. 5

C. C. A. 326; *Crew v. St. Louis & C. R. Co.*, 20 Fed. Rep. 87; *Felton v. Harbeson*, 104 Fed. Rep. 737; s. c. 44 C. C. A. 188 (where the negligence of a vice-principal was a proximate contributing cause, although the negligence of a fellow servant also contributed to the accident); *Quebec S. S. Co. v. Marchant*, 133 U. S. 375; s. c. 33 L. ed. 656; 7 Rail. & Corp. L. J. 432; 10 Sup. Ct. Rep. 397; *Young v. New Jersey & C. R. Co.*, 46 Fed. Rep. 160; *Killien v. Hyde*, 63 Fed. Rep. 172 (negligence of owner of tug in leaving his post in a difficult situation and substituting a deck-hand in his place at the wheel, whereby a collision occurred, rendered him liable although the man he put at the wheel, a fellow servant of the fireman killed, was also at fault); *Terre Haute & C. R. Co. v. Mansberger*, 65 Fed. Rep. 196; s. c. 12 C. C. A. 574; rehearing denied, 67 Fed. Rep. 67 (negligence of car-inspector mingled with that of the engineer, injuring a brakeman); *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915; s. c. 6 C. C. A. 636 (superintendent ordering trestle-work to be torn down without notifying the men working under it that it is to be done,—master liable, although the negligence of a foreman, who was a fellow servant of the men, contributed also to the injury); *The Anchoria*, 113 Fed. Rep. 982.

³*Deweese v. Meramec Iron Min. Co.*, 128 Mo. 423; s. c. 31 S. W. Rep. 110. Liability of master for standing by and seeing a negligent and dangerous act about to be committed, and failing to object or oppose: *Cannon v. Mears*, 7 Kulp (Pa.) 281; s. c. 11 Lanc. L. Rep. 215.

master.⁴ This happens where the negligence of the master in furnishing defective machinery or appliances, or an insufficient force of co-laborers, combines with the negligence of the servant whose duty it is to oversee and use the particular machinery, whereby another servant is injured;⁵ or where the negligence of the master in selecting an incompetent servant combines with the negligence of such servant;⁶ or where the negligence of a railway company in not furnishing a sufficient number of brakemen for the manning of a train combines with the negligence of a particular servant in starting the train while thus insufficiently manned.⁷ It is necessarily a part of this rule that the master is liable to his servant for injury resulting from a defect in his machinery, appliances, etc., which the master could have discovered and prevented by the exercise of reasonable care, although the negligence of a fellow servant contributes to the accident produced by such a defect.⁸ Referring to some (but not all) of the duties of the master, the doctrine has been stated by saying that the exemption from liability on the part of a master for injuries visited upon one servant by the negligence of another servant, engaged in a common service, is permitted only when the master has exercised reasonable care to furnish a reasonably safe place for the injured servant to work in, and to provide safe tools and appliances for doing the work, and has used proper diligence in the hiring of reasonably safe and competent men to perform their respective duties, and (in the case of railway service) has adopted and promulgated proper rules for the conduct of the business.⁹

⁴ "The servant does not agree to take the chances of any negligence on the part of his employer; and no case has gone so far as to hold that where such negligence contributes to the injury the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty of his misconduct in neglecting to provide for the security of his servant. Contributory negligence, to defeat a right of action, must be negligence of the party injured": Beasley, C. J., in *Paulmier v. Erie R. Co.*, 34 N. J. L. 151, 155.

⁵ *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151. In this latter case, the track over a trestle-work was not capable of supporting an engine, and the engineer in charge had orders not to put the engine thereon, but disobeyed orders, and a fireman who was on the engine,

and who was unaware of the orders or of the danger, was killed in consequence of the trestle-work giving way. It was held a case for damages.

⁶ Case put by Reade, J., in *Crutchfield v. Richmond &c. R. Co.*, 76 N. C. 323.

⁷ *Booth v. Boston &c. R. Co.*, 73 N. Y. 38. Compare *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270, which case, in *Cayzer v. Taylor*, *supra*, is said by Thomas, J., to proceed upon the ground that the injury was caused by the negligence of a workman,—his failure to be in his place and discharge his duty,—so that the fact that the train was short of hands was wholly immaterial.

⁸ *Cayzer v. Taylor*, 10 Gray (Mass.) 274.

⁹ *Bosworth v. Rogers*, 82 Fed. Rep. 975; s. c. 53 U. S. App. 620; 27 C. C. A. 385.

§ 4858. **Negligence of Master in Furnishing Dangerous Premises, Machinery, Tools, or Appliances, Commingling with that of Fellow Servant—Master Liable.**—It is merely to state an illustration of the doctrine of the preceding section to say that where the master fails in his duty to the injured servant of furnishing safe premises, machinery, tools, or appliances, and this failure is a proximate cause of the injury, the fact that the negligence of a fellow servant also commingles with it as a proximate or efficient cause will not exonerate the master from liability.¹⁰ Cases abound furnishing apt illus-

¹⁰ *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256; s. c. 68 Pac. Rep. 771; *Savannah &c. R. Co. v. Pughsley*, 113 Ga. 1012; s. c. 39 S. E. Rep. 473 (master furnished a defective tool to servant, and a fellow servant was injured in consequence of the defect, and of the negligence of the servant in using the tool,—master liable); *Pullman's Palace Car Co. v. Laack*, 143 Ill. 242; s. c. 18 L. R. A. 215; 32 N. E. Rep. 285 (failure of master to provide adequate means for cutting off the flow of burning oil, commingled with negligence of fellow servant in failing to cut off the supply with the means provided); *Union Shoe Case Co. v. Blindauer*, 75 Ill. App. 358; s. c. aff'd, 175 Ill. 325; 51 N. E. Rep. 709 (injury from the fall of an elevator through its defective construction, commingled with the negligence of a co-employé); *Ohio &c. R. Co. v. Stein*, 140 Ind. 61; s. c. 39 N. E. Rep. 246 (defective brake, commingled with negligence of fellow trainmen); *Hancock v. Keene*, 5 Ind. App. 408; s. c. 32 N. E. Rep. 329 (unsafe place in which to work, commingled with negligence of fellow servant); *Stucke v. Orleans R. Co.*, 50 La. An. 172; s. c. 23 South. Rep. 342 (failure to provide reasonably safe place to work, commingled with negligence of fellow servant); *Johnson v. Field-Thurber Co.*, 171 Mass. 481; s. c. 51 N. E. Rep. 18 (master furnished no guards for trap-door in a passageway of a building; fellow servant left the trap-door open and plaintiff fell through it and was injured—master liable); *Tvedt v. Wheeler*, 70 Minn. 161; s. c. 72 N. W. Rep. 1062 (failure of master to perform a statutory duty, commingled with negligence of fellow serv-

ant); *Auld v. Manhattan L. Ins. Co.*, 34 App. Div. (N. Y.) 491; s. c. 54 N. Y. Supp. 222 (negligence of operator, combined with negligence of master in furnishing improper doors for elevator); *Stringham v. Stewart*, 100 N. Y. 516 (where the injury would not have happened if the machine had been suitable, although the negligence of a fellow servant contributed to the accident); *Dodd v. Bell*, 15 App. Div. (N. Y.) 258; s. c. 44 N. Y. Supp. 198 (dangerous pulley combined with negligence of fellow servant); *Myers v. Sault St. Marie Pulp &c. Co.*, 3 Ont. L. Rep. 600 (master negligent in leaving cog-wheel unguarded and in failing to fasten a stepladder near by—fellow servant negligently removed the ladder, in consequence of which the plaintiff had his leg caught in the cog-wheel—master liable); *Missouri Pac. R. Co. v. James* (Tex.), 10 S. W. Rep. 332 (no off. rep.) (master liable for an injury to his servant in consequence of defects in a car and track, although a fellow servant of the injured servant had neglected his duty to see that the car and track were in good order); *Gulf &c. R. Co. v. Kizziah*, 86 Tex. 81; s. c. 23 S. W. Rep. 578; rev'g s. c. 4 Tex. Civ. App. 362; 22 S. W. Rep. 110; 26 S. W. Rep. 242; *International &c. R. Co. v. Williams* (Tex. Civ. App.), 34 S. W. Rep. 161 (no off. rep.) (defective hand-car, commingled with negligence of fellow servant); *Trinity &c. R. Co. v. Brown*, 91 Tex. 673; s. c. 46 S. W. Rep. 926 (unsafe railroad-track, commingled with negligence of fellow servants); *Missouri &c. R. Co. v. Woods* (Tex. Civ. App.), 25 S. W. Rep. 741 (no off. rep.) (defective road-bed, commingled with negligence of the

trations of this doctrine; but one is peculiarly illustrative. In the case referred to, a person employing men to work at night upon tall timbers above a sidewalk, which were required to be supported by guys suspended across the street, was negligent in failing to provide a watchman to warn drivers in charge of vehicles upon the street to avoid the guys, and was consequently liable to one of his workmen for an injury caused by a vehicle striking the guy, although his fellow workmen, in moving the guy as the work progressed, were also negligent in placing it where it would be struck by passing vehicles.¹¹

§ 4859. Negligence of Master in Selecting Unfit Servants, Commingling with Negligence of Fellow Servant.—Upon the same principle, where the negligence of the master or his representative in selecting or in retaining in his employment an incompetent, unfit servant with knowledge of his unfitness results in an injury to another employé, the fact that the negligence of a co-employé contributed to produce the result will not exonerate the master.¹²

§ 4860. Negligence of Master in Failing to Provide Sufficient Servants, Commingling with Negligence of Fellow Servant.—Upon the same principle, where the negligence of the master in failing to provide a sufficient number of hands to do a given piece of

engineer, who was a fellow servant of the injured brakeman); *International &c. R. Co. v. Sipole* (Tex. Civ. App.), 29 S. W. Rep. 686 (no off. rep.) (injury to brakeman from negligence of company in not having a hand-hold on a car, commingled with the negligence of a co-employé); *San Antonio &c. R. Co. v. Harding*, 11 Tex. Civ. App. 497; s. c. 3 Am. & Eng. R. Cas. (N. S.) 389; 33 S. W. Rep. 373 (injury from failure of railway company to keep headlight in good condition, commingled with negligence of a co-employé); *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108; s. c. 2 Va. Law Reg. 284; 25 S. E. Rep. 226 (negligence of railway company in failing to furnish suitable coupling-appliance, commingled with negligence of a fellow servant); *Farmers' Loan &c. Co. v. Toledo &c. R. Co.*, 67 Fed. Rep. 73; s. c. 2 Ohio Leg. N. 305; 1 Wayne Co. Leg. N., No. 47, p. 5; aff'g s. c. 2 Ohio Leg. N. 184 (negligence of railway company in maintaining an unsafe road-bed, commingled with negligence of a

fellow servant in placing an oil-car in close proximity to a locomotive); *St. Louis &c. R. Co. v. Needham*, 69 Fed. Rep. 823; s. c. 32 U. S. App. 635; 16 C. C. A. 457 (negligence of railroad company in failing to maintain a target on a switch, commingled with negligence of fellow servants in leaving the switch open); *Kennedy v. Grace &c. Co.*, 92 Fed. Rep. 116; *Smith v. Memphis &c. R. Co.*, 18 Fed. Rep. 304 (defective railway-track, commingled with negligence of a fellow servant); *Maupin v. Texas &c. R. Co.*, 99 Fed. Rep. 49; s. c. 40 C. C. A. 234 (negligence of railway company in permitting the use of a defective hand-car, commingled with the negligence of a fellow servant); *Finley v. Richmond &c. R. Co.*, 59 Fed. Rep. 419 (defective machinery, commingled with negligence of fellow servant); *McMahon v. Henning*, 1 McCrary (U. S.) 516.

¹¹ *Kennedy v. Grace &c. Co.*, 92 Fed. Rep. 116.

¹² *Terrell v. Russell*, 16 Tex. Civ. App. 573; s. c. 42 S. W. 129.

work is a proximate cause of an injury befalling one of his servants, he will be liable for the damages, although the negligence of fellow servants may also have contributed to produce the result.¹³ For example, where a railroad company neglected to provide a sufficient number of brakemen on a train when it started out on its trip, it became liable to the servant who was injured in consequence of such neglect, without contributory negligence on his part, although the immediate negligence in so starting the train with an insufficient provision of hands, was the negligence of a co-employé.¹⁴

§ 4861. **Negligence of Vice-Principal Commingling with that of Fellow Servant—Master Liable.**—On the same principle, if the negligence of a fellow servant commingles with that of a vice-principal of the master, resulting in an injury to one of his servants, the master will be liable for the damages; for the vice-principal stands in the place of the master.¹⁵ Thus, where the *superintendent* of the defendant negligently ordered a fellow servant of the servant receiving the injury to do certain work in a stone quarry, from which the injury resulted, the defendant was liable, although the immediate cause of the injury may have been negligence of the fellow servant.¹⁶

§ 4862. **Negligence of Foreman Concurring with that of Fellow Servant.**—Whether an employer will be liable where the negligence of his foreman concurs with that of a fellow servant of the employé receiving the injury, will depend upon the question whether the foreman is to be regarded as a vice-principal or merely as a fellow servant. If the former, then his negligence is that of the master, and it has been shown that the master is liable where his own negligence concurs with the negligence of one of his servants in inflicting an injury upon another servant.¹⁷

¹³ Booth v. Boston &c. R. Co., 73 N. Y. 38.

¹⁴ Booth v. Boston &c. R. Co., *supra*.

¹⁵ Houston &c. R. Co. v. White, 23 Tex. Civ. App. 280; s. c. 56 S. W. Rep. 204; Augusta v. Owens, 111 Ga. 464; s. c. 36 S. E. Rep. 830; Cincinnati &c. R. Co. v. Clark, 6 C. C. A. 281; s. c. 57 Fed. Rep. 125 (negligence of vice-principal, commingled with negligence of locomotive-engineer, causing death of fireman).

¹⁶ Augusta v. Owens, 111 Ga. 464; s. c. 36 S. E. Rep. 830. Opposed to the doctrine of the text, and badly

decided, is Maryland Clay Co. v. Goodnow, 95 Md. 331; s. c. 51 Atl. Rep. 292.

¹⁷ Thus it was that an employé who was injured while attempting to support one end of a switch-point which was being unloaded from a car, might recover therefor, although the negligence of his fellow servants in lifting the switch-point too quickly contributed to his injury, where the negligence of the foreman, regarded as a vice-principal, in failing to give assistance as he had been doing, was a concurrent cause of the injury: Missouri &c. R. Co. v. Hannig, 20 Tex.

§ 4863. **Always Assuming that the Negligence of the Master is a Proximate Cause of the Injury.**—All that is contained in the preceding paragraphs assumes that the negligence of the master is a proximate cause of the injury which befalls the servant. If the proximate cause of the injury, commingling with the negligence of a fellow servant, is something for which the master is not responsible, there can, of course, be no recovery.¹⁸ The meaning is made plainer when it is said that although the master may have been negligent, yet if, notwithstanding the negligence of the master, the proximate cause of the injury was not his negligence, but the negligence of a fellow servant, the master will not be liable.¹⁹ For example, the fact that an appliance furnished by an employer was defective will not entitle an injured employé to recover, where the injury was not the result of the defect, but of the negligence of a co-employé in the use

Civ. App. 649; s. c. 49 S. W. Rep. 116. It will not escape attention that, under the rule of the common law, as ordinarily understood and administered, the foreman was, in this case, performing the act of a fellow servant, and hence the master would not, ordinarily, be liable. Where a foreman allowed a servant whose work he was directing, to drop the end of a heavy piece of timber down a tower in process of construction, knowing that the plaintiff was working below, the mere fact that the foreman did not know that the servant dropping the timber was incompetent and reckless, was held not to preclude a recovery for the injury resulting from the concurring negligence of the fellow servant and the foreman, who was a vice-principal: *American Cotton Co. v. Smith* (Tex. Civ. App.), 69 S. W. Rep. 443 (no off. rep.). So, an employer is not relieved from liability for the death of an employé from the fall of a scaffold, caused by other employés overloading it with stone, merely because the foreman told such fellow servants not to pile so much stone on the scaffold, where he did nothing further to prevent the overloading: *Fournier v. Lamoureux*, Rap. Jud. Que. 21 C. S. 99. The so-called "fellow-servant doctrine" is not in force in the Province of Quebec, as has been noted in another place: *Ante*, § 4846, n. 2. One of a gang of workmen en-

gaged in repairing a bridge on the defendant's railroad left a heavy iron hammer or sledge with which he was driving spikes, lying on the bridge. It was the duty of the foreman to see that all obstructions were removed from the bridge before the passing of any train. When the train approached the foreman was alone on the bridge near the place where the hammer lay, but he failed to see or to remove it, and it was struck by the train and thrown some distance from the track, where it struck and severely injured the plaintiff, who was one of the workmen. It was held that, conceding the workman who left the hammer to have been negligent in so doing, his negligence was not the proximate cause of the injury, which was the negligence of the foreman in failing to see or remove it on the approach of the train, and hence that the company was liable: *Texas & C. R. Co. v. Carlin*, 49 C. C. A. 605; s. c. 111 Fed. Rep. 777.

¹⁸ *New York & C. R. Co. v. Perri-guey*, 138 Ind. 414; s. c. 34 N. E. Rep. 233.

¹⁹ *New York & C. R. Co. v. Perri-guey*, 138 Ind. 414; s. c. 34 N. E. Rep. 233 (failure of railroad company to furnish proper headlight held not the proximate cause of an injury to a fireman caused by the failure of the engineer to obey a signal).

or handling of the appliance.²⁰ So, a railway company is not liable for injuries sustained by an employé in consequence of a collision, where, although the company was negligent in not having a sufficient and proper headlight, the proximate cause of the accident was the negligence of a co-employé of the injured person in not putting up and lighting the hand-lights provided by the company as a substitute for the regulation headlight, which lamps would have been sufficient, if put up and lighted, to prevent the accident.²¹ Some of the decisions upon this branch of the inquiry go to the length of holding that in order to admit of a recovery where the negligence of a fellow servant commingles with that of the master, the negligence of the master must have been such that but for it the injury would not have been sustained.²² Whether this view is tenable has been considered in a former volume.²³

ARTICLE III. VARIOUS MINOR DOCTRINES AND APPLICATIONS.

SECTION	SECTION
4865. Failure to employ enough competent servants.	4869. Negligence of fellow servant does not preclude a recovery against a third party.
4866. Application of the fellow-servant doctrine as between minor and adult employés.	4870. Effect of habitual violation of master's rules.
4867. What if the child is too young and inexperienced to understand the risks of the service.	4871. Injury in consequence of obeying the direction of a fellow servant.
4868. Employment of inadequate help ascribed to master, and not to a fellow servant.	4872. Master liable for injuries inflicted by one servant on the wife of a fellow servant.
	4873. Sunday employment.

§ 4865. **Failure to Employ Enough Competent Servants.**—A master is responsible, not only for failure to employ *competent* persons to do his work, but for failure to employ *enough* of them to do it safely, as respects their fellow servants, at all times.¹ And where a servant was injured by reason of the master's failure to furnish sufficient men to do certain work in safety, it was held to be immaterial to the master's liability whether or not the plaintiff and the

²⁰ *Harvey v. New York &c. R. Co.*, Div. (N. Y.) 45; s. c. 44 N. Y. Supp. 57 Hun (N. Y.) 589; s. c. 32 N. Y. St. Rep. 817; 10 N. Y. Supp. 645.

²¹ *New York &c. R. Co. v. Perri-guey*, 138 Ind. 414; s. c. 37 N. E. Rep. 976.

²² *McCabe v. Brainard*, 17 App.

²³ Vol. I, §§ 56, 76.

¹ *Hill v. Big Creek Lumber Co.*, 108 La. 162; s. c. 32 South. Rep. 372; *ante*, §§ 3807, 4768, 4829; *post*, § 4868.

foreman whom he was assisting were fellow servants.² But where the master has employed a sufficient number of servants, and an employé is injured by reason of the *absence of a co-employé* from a post of duty, and his absence is not due to any fault on the part of the master, the master is not liable.³

§ 4866. **Application of the Fellow-Servant Doctrine as between Minor and Adult Employés.**—A minor employé, of sufficient age and discretion to comprehend the dangers of the employment, assumes the risks of the same in like manner as an adult.⁴ Among these risks is the risk of being injured through the negligence of a fellow servant engaged in the same common employment with him. The *father* of the minor, who has given his assent to the contract of employment, in like manner, assumes for the minor the same risks; so that if the minor is injured through the negligence of his co-employé, under such conditions as would cut off his right of recovery if he were an adult, both he and his father will be debarred from recovering damages for the injury.⁵ In other words, the mere fact of minority does not operate to abrogate the rule which puts upon the servant the assumption of the ordinary risks of the employment, unless the minor be of tender years and unable to judge intelligently for himself concerning the nature and extent of such risks.⁶ An injured servant is no less a fellow servant merely because he might have avoided the contract under which he was working, on the ground of infancy,—such contract not being void, but only voidable.⁷ Nor does the fact that an employer negligently or wrongfully employed a minor without his parents' knowledge or consent, render the employer liable for the negligence of a fellow servant resulting in injury or death to the minor.⁸ So, where an infant volunteers to assist the servant of a third person, and in so doing is injured, or where he attempts to

² *Supple v. Agnew*, 191 Ill. 439; s. c. 61 N. E. Rep. 392; rev'g s. c. *sub nom.* *Agnew v. Supple*, 80 Ill. App. 437.

³ *Reichel v. New York & C. R. Co.*, 130 N. Y. 682; s. c. 42 N. Y. St. Rep. 510; 29 N. E. Rep. 763; 3 Silv. C. (N. Y.) 662; rev'g s. c. 9 N. Y. Supp. 960; 29 N. Y. St. Rep. 999.

⁴ *Ante*, § 4685, *et seq.*

⁵ *Lovell v. DeBardelaben Coal & C. Co.*, 90 Ala. 13; s. c. 7 South. Rep. 756 (doctrine not modified by statutes giving a right of action for wrongful death—right of action, if any, held to be in personal representative, and not in father).

⁶ *Fisk v. Central & C. R. Co.*, 72 Cal. 38; s. c. 13 Pac. Rep. 144; *Curran v. Merchants' Man. Co.*, 130 Mass. 374; s. c. 39 Am. St. Rep. 457; *Houston & C. R. Co. v. Miller*, 51 Tex. 270.

⁷ *North Chicago Rolling Mills Co. v. Benson*, 18 Ill. App. 194 (switchman seventeen years old, engaged in coupling cars, is a fellow servant with the other employés having the care and management of the train, through whose negligence he is injured).

⁸ *Harris v. McNamara*, 97 Ala. 181; s. c. 12 South. Rep. 103.

assist such servant at his request and is injured in so doing, then he becomes subject to the rule elsewhere considered,⁹ which prevents a recovery of damages in such cases; and the fact that he is an infant does not take his case out of the rule, provided he is of sufficient age and discretion to understand the danger which he thereby assumes.¹⁰

§ 4867. What if the Child is Too Young and Inexperienced to Understand the Risks of the Service.—As intimated in some of the cases cited in the preceding paragraph, the rule which prevents a minor employé from recovering damages from the employer, for an injury visited upon him through the negligence of a co-employé, does not apply where the injured employé is so young and inexperienced that he is incapable of understanding and appreciating the risks of the service. On principle, this rule will apply to cases where the infant servant is too young to understand and appreciate the risk of being injured through the negligence of fellow servants, as much as to any other risks; and it has been so held.¹¹ But another court has undertaken to make the untenable distinction between the danger of the negligence of fellow servants and the danger of the work, as though the danger of the negligence of fellow servants were not one of the dangers of the work: holding that the fact that a young and inexperienced employé did not comprehend the danger of the work will not authorize recovery for injuries resulting from the negligence of fellow servants, and not directly from the dangerous character of the work.¹²

§ 4868. Employment of Inadequate Help Ascribed to Master, and Not to a Fellow Servant.—This may be illustrated by a decision to the effect that the fall of a block and tackle, injuring a person rightfully upon a vessel, due to the employment of an insufficient number of men in its management, is a fault due to the management of the vessel itself, rendering its owner liable, and is not that of a fellow workman or employé of the person injured so as to prevent his recovery.¹³ But a master who employs a sufficient number of servants is

⁹ *Ante*, §§ 3756, 4677; *post*, § 4982, *et seq.*

¹⁰ *Cincinnati &c. R. Co. v. Finnell*, 108 Ky. 135; s. c. 22 Ky. L. Rep. 86; 55 S. W. Rep. 902 (boy seventeen years old, in size a man, fatally injured while assisting a railroad brakeman, at his request, in loading a piano on a train—railroad company not liable).

¹¹ *Hinckley v. Horazdowsky*, 133 Ill. 359; s. c. 24 N. E. Rep. 421; 8 L. R. A. 492; *aff'g* s. c. 33 Ill. App. 259.

¹² *Craven v. Smith*, 89 Wis. 119; s. c. 61 N. W. Rep. 317.

¹³ *Boden v. Demwolf*, 56 Fed. Rep. 846. Compare *ante*, §§ 3758, 3807, 4768, 4829.

not liable to an employé for injuries caused by the absence of a co-employé from a post of duty, where such co-employé is absent without any fault on the part of the master.¹⁴

§ 4869. Negligence of Fellow Servant does not Preclude a Recovery against a Third Party.—The doctrine which puts upon a servant an acceptance of the risk of injury from the negligence of his fellow servants applies only in favor of the common master, and not in favor of a third party.¹⁵ Thus, an employé of a railroad company is not prevented from recovering damages from *another railroad company* for injuries caused by its negligence, on the ground that the negligence of a fellow servant of the plaintiff commingled with that of the defendant in causing the injury.¹⁶

§ 4870. Effect of Habitual Violation of Master's Rules.—A railroad company is not liable for injuries to a brakeman arising from the negligence of a fellow brakeman in leaving a switch open and unguarded, contrary to its rule requiring the employé opening a switch to remain at it until it is closed or he is relieved, because of such brakeman's habitual violations of the rule for four months, where neither the company nor its officers have learned of such violation, and another rule requires all employés to make prompt reports of any disobedience of rules.¹⁷

§ 4871. Injury in Consequence of Obeying the Direction of a Fellow Servant.—If a servant is injured in consequence of obeying the direction of a fellow servant placed in authority over him, so as to become the vice-principal of the master, then whether he will be prevented from recovering damages from the master will depend on the solution of the question whether the direction of the fellow servant was negligent. Thus, if a railway trainman is ordered by the engineer or by any other person in charge of the train at the time to couple the engine to a car having drawbars of unequal height, whereby the servant is injured, his right to recover damages from the railway company will, it has been held, depend upon the

¹⁴ *Reichel v. New York &c. R. Co.*, 130 N. Y. 682; s. c. 42 N. Y. St. Rep. 510; 29 N. E. Rep. 763; 3 Silv. C. A. (N. Y.) 662; rev'g s. c. 9 N. Y. Supp. 960; 29 N. Y. St. Rep. 999.

¹⁵ *Fort Worth &c. R. Co. v. Mackney*, 83 Tex. 410; s. c. 18 S. W. Rep. 949 (collision of two trains belong-

ing to separate companies at the crossing of their tracks).

¹⁶ *Ft. Worth &c. R. Co. v. Bell*, 5 Tex. Civ. App. 28; s. c. 23 S. W. Rep. 922.

¹⁷ *Cameron v. New York &c. R. Co.*, 145 N. Y. 400; s. c. 64 N. Y. St. Rep. 839; 10 Nat. Corp. Rep. 203; 40 N. E. Rep. 1.

answer to the inquiry whether the engineer or fellow servant giving the order, knew that the drawbars were of unequal height.¹⁸ But if the fellow servant whose orders were given and obeyed, had no right to command, then the question whether his orders were negligent and improper becomes immaterial, since the master was not responsible for them: it is merely the case of one servant being injured through the negligence or fault of a fellow servant.¹⁹

§ 4872. Master Liable for Injuries Inflicted by One Servant on the Wife of a Fellow Servant.—The fellow-servant doctrine does not extend so far as to exonerate the master from liability for an injury ter is responsible, not only for failure to employ *competent* persons inflicted by one of his servants, through negligence, upon the *wife* of a fellow servant.²⁰

§ 4873. Sunday Employment.—The rule that an employer is not liable for an injury caused to his servant by a fellow servant, is in no way affected by the fact that both servants, at the time of the accident, were illegally employed, the day being Sunday. The fact of their being employed on Sunday does not change their relation as fellow servants.²¹

ARTICLE IV. QUESTIONS OF PROCEDURE CONNECTED WITH THE FELLOW-SERVANT DOCTRINE.

SECTION	SECTION
4877. Questions of pleading in fellow-servant cases.	4879. Examples of questions of fact for the jury in this relation.
4878. Question of fellow servant or vice-principal, whether a question for court or for jury.	4880. When the question whether the relation of master and servant exists is a question of fact for a jury.

§ 4877. Questions of Pleading in Fellow-Servant Cases.¹—If a complaint in an action for the death or injury of a servant states facts showing the accident was caused through the intervention of a fellow servant, then, in order to state a cause of action, it must set up a condition of facts which shows that, notwithstanding the interven-

¹⁸ *Lawless v. Connecticut River R. Co.*, 136 Mass. 1.

¹⁹ *Toomey v. Avery Stamping Co.*, 20 Ohio C. C. 183; s. c. 11 Ohio C. D. 216; *Felch v. Allen*, 98 Mass. 572.

²⁰ *Campbell v. Harris*, 4 Tex. Civ. App. 636; s. c. 23 S. W. Rep. 35.

²¹ *Houston & C. R. Co. v. Rider*, 62 Tex. 267.

¹ See *post*, § 4905.

tion of the act of the fellow servant, the master was negligent either (1) in failing to furnish safe and suitable appliances and machinery, or (2) in employing the servant through whose negligence the accident happened, he being incompetent or unfit.^{1a} If the action is grounded upon the incompetency or unfitness of the fellow servant, then the plaintiff must allege that he did not know of such incompetency or unfitness.² A complaint which avers that the defendant knowingly placed an incompetent person in charge of engines and boilers in its blast furnace, and that the plaintiff, who was a fellow servant of such person, was injured by the latter's negligent acts, does not show any causal connection between the incompetency of such person and the injuries to plaintiff, and therefore does not take the case out of the fellow-servant rule. The complaint should show, directly or by reasonable inference, from some allegation of fact, that the negligence complained of was the result of the incompetency.³ A petition or complaint, in an action for personal injuries to a railway brakeman alleged to have been caused by the negligence of the conductor, averring that such conductor was incompetent and that the company knew of his incompetency, or might have known of it by due care and diligence, and that plaintiff had no knowledge thereof,—was held good on general demurrer, notwithstanding the other allegations showed the conductor to be the brakeman's fellow servant.⁴ Where a complaint shows on its face that the plaintiff was injured in consequence of the negligence of a *fellow servant*, and no facts are alleged taking the case out of the fellow-servant rule, then it is not necessary for the defendant to plead that the plaintiff was injured in this way, but the objection may be raised by the *demurrer* to the complaint.⁵ If a petition avers facts showing that the negli-

^{1a} American Sugar-Ref. Co. v. Johnson, 60 Fed. Rep. 503; American Sugar-Ref. Co. v. Tatum, 60 Fed. Rep. 514.

² Dunmead v. American Min. & Co., 4 McCrary (U. S.) 244. It was also held in this case that the plaintiff must allege that the injury was not caused or contributed to by his own negligence; but this is no longer the rule in the Federal courts: Vol. I, § 366.

³ Kliefoth v. Northwestern Iron Co., 98 Wis. 495; s. c. 74 N. W. Rep. 356.

⁴ Campbell v. Cook, 86 Tex. 630; s. c. 26 S. W. Rep. 486; rev'g s. c. (Tex. Civ. App.), 24 S. W. Rep. 977 (no off. rep.).

⁵ Mann v. O'Sullivan, 126 Cal. 61;

s. c. 58 Pac. Rep. 375. A complaint in an action by a section-hand for injuries caused by being struck by defendant's hand-car, which was negligently operated by the section-master, in whose charge it was, must set out the name of the person in charge of the car, or that his name is unknown to plaintiff: Central & R. Co. v. Lamb, 124 Ala. 172; s. c. 26 South. Rep. 969. A declaration, in an action against a railroad company for personal injuries to an employé, sufficiently shows that the negligence of the employé which caused the accident was not that of a fellow servant, in averring that plaintiff was a fence-builder, that the employé who carelessly injured him was a locomotive-

gence complained of by the injured employé was that of a *vice-principal*, it will support a judgment in favor of such employé against his employer, although it may also contain averments not established by the evidence, charging the defendant with negligence in retaining such vice-principal in its employ after knowledge of his incompetency.⁶ So, the declaration need not allege that the co-employé whose negligent act caused the injury was *not* a fellow servant with the plaintiff.⁷ The *defense* that a servant's injuries were caused by the negligence of his fellow servants is admissible under a *general denial*.⁸

§ 4878. **Question of Fellow Servant or Vice-Principal, Whether a Question for Court or for Jury.**—The question whether the servant through whose negligence or misconduct another servant of the same master is killed or injured is a fellow servant of the killed or injured servant, or a vice-principal of the master, within the meaning of the rule under consideration, is plainly a question of law for the court where the facts are established or conceded;⁹ in other cases it is a question for the jury, under proper instructions from the court as to what constitutes one servant a fellow servant of another;¹⁰ in other

engineer, and that while the plaintiff was attempting to get on a car for a proper purpose he was injured through the negligence of the engineer in suddenly starting the train: *Louisville & C. R. Co. v. Hawthorn*, 147 Ill. 226; s. c. 35 N. E. Rep. 534; aff'g s. c. 45 Ill. App. 635. A complaint in an action against a railway company under a statute making railroad companies liable for damages sustained by an employé without contributory negligence when such damage is caused by the negligence of any train-dispatcher, telegraph-operator, superintendent, yardmaster, conductor, or engineer, or of any other employé having charge or control of any stationary signal, target-point, block, or switch, must show clearly the relation relied upon between the negligent party and the company, and the proofs must be confined to the allegations made: *Albrecht v. Milwaukee & C. R. Co.*, 87 Wis. 105; s. c. 58 N. W. Rep. 72.

⁶ *Clark v. Hughes*, 51 Neb. 780; s. c. 71 N. W. Rep. 776.

⁷ *Duffy v. Kivilin*, 98 Ill. App. 483; s. c. aff'd, 195 Ill. 630; 63 N. E. Rep. 503.

⁸ *Kaminski v. Tudor Iron Works*, 167 Mo. 462; s. c. 67 S. W. Rep. 221.

⁹ *MacCarthy v. Whitcomb*, 110 Wis. 113; s. c. 85 N. W. Rep. 707; *Duffy v. Kivilin*, 98 Ill. App. 483; s. c. aff'd, 195 Ill. 630; 63 N. E. Rep. 503; *Ashmore v. Charleston Light & C. Co.*, 99 Ill. App. 262. See also, *Chicago City R. Co. v. Leach*, 80 Ill. App. 354 (unless different conclusions can be drawn from the proved facts and from the inferences to be drawn from them); *Chicago & C. R. Co. v. Driscoll*, 176 Ill. 330; s. c. 52 N. E. Rep. 921 (*Magruder J.*, dissenting); *Yates v. McCullough Iron Co.*, 69 Md. 370; s. c. 16 Atl. Rep. 280; *Norfolk & C. R. Co. v. Hoover*, 79 Md. 253; s. c. 29 Atl. Rep. 994; 25 L. R. A. 71.

¹⁰ *Shedd v. Moran*, 10 Ill. App. 618 (whether the foreman whose negligence inflicted the injury and the servant who received the injury were in the same line of employment, so as to make them fellow servants, was held to be a question of fact for the jury; so that an instruction that they were not fellow servants was error); *Illinois & C. R. Co. v. Swisher*, 74 Ill. App. 164 (question of fact whether switchmen and the enginemen, and an engineer and a fireman, were fellow servants); *Malott v. Crow*, 90 Ill. App. 628 (is one of fact to be de-

words, it is what is sometimes called a *mixed question of law and fact*,—the meaning being that it is for the court, by appropriate instructions, to define the relation of fellow servants, and for the jury to determine whether the relation, as thus defined, in fact existed.¹¹ Where the solution of the inquiry depends upon a *disputed question of fact* with respect to which the evidence speaks both ways, then the question is always for the jury.¹²

§ 4879. **Examples of Questions of Fact for the Jury in this Relation.**—The following examples may be given of questions of fact for the jury under the preceding statement of doctrine:—Whether the proximate cause of the fall of a shaft by which a servant was injured while it was being lowered was the failure of a fellow servant so to hitch the chain as to prevent it from slipping;¹³ whether the injury

determined by the jury under proper instructions from the court as to what constitutes fellow servants; *Maxwell v. Zdarski*, 93 Ill. App. 334 (“question for the jury, if there was any evidence to warrant them in finding that he was such vice-principal”); *Norton v. Nadebok*, 190 Ill. 595; s. c. 60 N. E. Rep. 843 (plaintiff was operator’s helper; evidence tended to show that operator had authority to direct the movements of the helper, that he stopped the machine and ordered the helper to put his hand in and remove an obstruction, and that, without waiting for the helper to withdraw his hand, the operator started up the machine and injured the helper,—whether they were fellow servants was held to be a question for the jury); *Perras v. Booth*, 82 Minn. 191; s. c. 84 N. W. Rep. 739; 85 N. W. Rep. 179; *Devine v. Tarrytown & Co. Gas-light Co.*, 22 Hun (N. Y.) 26 (whether a superintendent of a gas company was to be regarded as the *alter ego* of the company, and whether he was an improper person for his position); *Cincinnati & C. R. Co. v. Thompson*, 21 Ohio C. C. 778; s. c. 12 Ohio C. D. 326 (whether a fireman and a brakeman are fellow servants is a question for the jury); *Hass v. Philadelphia & C. S. S. Co.*, 88 Pa. St. 269 (whether a night-watchman who was injured by the negligence of a stevedore acting under a special contract to unload the steamer was a fellow servant

of the stevedore. There was no evidence that the company had placed the entire charge of its business in the hands of either the master or chief stevedore, so as to make their negligence its negligence. It was left to the jury to say whether chief stevedore was a simple agent—with the instruction that if he was, the company was liable; but if he was in an independent employment, the company was not liable) (*per curiam* decision, following *Mullan v. Philadelphia & C. S. S. Co.*, 78 Pa. St. 25).

¹¹ *Consolidated Coal Co. v. Gruber*, 91 Ill. App. 15; s. c. aff’d, 188 Id. 584; 59 N. E. Rep. 254; *Potter v. Chicago & C. R. Co.*, 46 Iowa 399.

¹² *Dallemand v. Saalfeldt*, 175 Ill. 310; s. c. 17 Nat. Corp. Rep. 439; 51 N. E. Rep. 645; aff’g s. c. 73 Ill. App. 151; 15 Nat. Corp. Rep. 698.

¹³ *Knight v. Overman Wheel Co.*, 174 Mass. 455; s. c. 54 N. E. Rep. 890 (defendant contended that the shaft fell on account of the slipping of a cat’s-paw hitch made by a fellow servant, and that the cat’s-paw hitch should have been guarded by a half-hitch made over it,—instruction that there was no evidence that the injury was not caused by the negligence of a fellow servant held to have been properly refused, since the court could not say what the proximate cause was, or whether the fellow servant failed to hitch the chain properly or not, these being questions of fact).

was due to the negligence of a fellow servant in not seeing that the cable was attached to a car by which the plaintiff was injured before shoving it down an incline,—the claim of the plaintiff that the cable was weak and unsafe and that it broke by reason of a slight jerk, being fully presented;¹⁴ whether the foreman over the servant who was killed, who had ordered him to load freight on an elevator, and, without warning him, had removed the elevator to another floor for another person to use, so that the intestate backed into the elevator-shaft with a load and was killed,—was acting as a vice-principal or as a fellow servant;¹⁵ whether the continuing in the employment after knowledge of the incompetency of a fellow servant, in consequence of whose negligence the servant so continuing was afterwards injured, was contributory negligence on his part;¹⁶ whether the foreman of a section-gang was guilty of negligence and a member of the gang who was injured was guilty of contributory negligence, where the injured section-man was struck by a hand-car which he, with others who were riding thereon, attempted, by order of the foreman, to remove from the track upon seeing a train approaching, where the foreman ordered the men to “get out of the way,” but too late to enable the plaintiff to avoid being struck by the hand-car when it was thrown off the track by the engine;¹⁷ whether a quarryman who was injured by a blast which was fired while he was operating a derrick upon which another employé was at work, was guilty of contributory negligence in failing to abandon the derrick and seek a place of safety as soon as he was warned of the anticipated blast, the evidence being that it was a part of his duty to lower his fellow employés to the ground as soon as the warning of the blast was given;¹⁸ whether a railway construction company was negligent in employing an incompetent engineer by whose negligence another employé was injured;¹⁹ whether or not a superintendent was

¹⁴ *Hennig v. Globe Foundry Co.*, 112 Mich. 616; s. c. 4 Det. Leg. N. 12; 71 N. W. Rep. 156.

¹⁵ *Perras v. Booth*, 82 Minn. 191; s. c. 84 N. W. Rep. 739; 85 N. W. Rep. 179.

¹⁶ *Williams v. Missouri &c. R. Co.*, 109 Mo. 475; s. c. 18 S. W. Rep. 1098.

¹⁷ *Schroeder v. Chicago &c. R. Co.*, 108 Mo. 322; s. c. 18 S. W. Rep. 1094.

¹⁸ *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323; s. c. 38 Atl. Rep. 835; s. c. aff'd, 61 N. J. L. 253; 39 L. R. A. 834; 39 Atl. Rep. 764.

¹⁹ *Newell v. Ryan*, 40 Hun (N. Y.) 286; s. c. aff'd, 116 N. Y. 656. In this case it appeared that the

plaintiff was employed as a locomotive-engineer by a construction company. The collision was due to another engineer of the same company operating his train without the headlight being lighted, and entering upon the main track. Whether his neglect to light his headlight, as his duty required, arose from the circumstance that he was inexperienced and unfit to be an engineer, was a question for the jury, where the evidence showed that the night of the accident was the first time that he had had charge of an engine; that for five or six months prior thereto he had been a fireman, with no experience as an engineer except that derived

negligent in turning steam into an ordinary whisky barrel used for hot water in a canning factory, while a vent for the escape of the steam was closed with a plug, and in failing to caution an employé, when he directed him to draw water from it, of the danger.²⁰

§ 4880. **When the Question Whether the Relation of Master and Servant Exists is a Question of Fact for a Jury.**—The importance of this question lies in the consideration that where a person is injured by the negligence of the servant of another, he may recover damages from that other, under the rule of *respondeat superior*, provided he stands as a stranger to the superior, and not as his servant; whereas, if he is a servant of the superior, and hence a fellow servant of the person who brings upon him the injury, then the fellow-servant rule applies and he cannot recover damages. Cases sometimes arise where the question whether he is such servant, and, consequently, such fellow servant, is properly submitted to the jury as a question of fact.²¹

from a few short trips in the day-time.

²⁰ Crowell v. Thomas, 90 Hun (N. Y.) 193; s. c. 70 N. Y. St. Rep. 651; 35 N. Y. Supp. 936.

²¹ For such a condition of evidence,—see Shultz v. Chicago &c. R. Co., 40 Wis. 489.

CHAPTER CXXIV.

NEGLIGENCE OF MASTER IN SELECTING INCOMPETENT OR UNFIT FELLOW SERVANTS.

ART. I. Grounds of Liability for such Negligence, §§ 4882-4901.

ART. II. Questions of Procedure in Actions Founded on such Liability, §§ 4905-4914.

ARTICLE I. GROUNDS OF LIABILITY FOR SUCH NEGLIGENCE.

SECTION	SECTION
4882. Liability of master for injury to servant in consequence of employing or retaining incompetent, unskillful, habitually negligent, drunken, or otherwise unfit fellow servants.	4892. Notice to master of incompetency or unfitness of servant.
4883. This duty a primary, absolute, and unassignable duty.	4893. Constructive notice of the master of unfitness of servant.
4884. This duty discharged by the exercise of ordinary or reasonable care.	4894. Knowledge of master of habitual negligence of his vice-principal immaterial.
4885. Duty of master to make inquiries as to fitness of servant before employing him.	4895. Contributory negligence of servant in not discovering unfitness of fellow servant.
4886. How far master may rely upon presumption of servant's competency and fitness.	4896. In continuing to work with fellow servant known to be unfit.
4887. Right of employer to presume that person soliciting employment is competent.	4897. Complaint of incompetency or unfitness of fellow servant and promise to discharge him.
4888. Placing incompetent or unfit servants over others.	4898. Unfitness in consequence of disease, such as epilepsy.
4889. Unfitness of fellow servant must be the proximate cause of the injury.	4899. Liability under statutes for employing incompetent or unfit fellow servants.
4890. Incompetency of volunteers, intermeddlers and interlopers.	4900. Instructions to juries on this subject.
4891. Liability of master for employing servants addicted to intoxication.	4901. Whether existence of grounds on which master is chargeable is question of law or fact.

§ 4882. **Liability of Master for Injury to Servant in Consequence of Employing or Retaining Incompetent, Unskillful, Habitually Negligent, Drunken, or Otherwise Unfit Fellow Servants.**¹—The master's liability is grounded upon his own personal negligence or upon the personal negligence of his *alter ego* or vice-principal; and this negligence may consist in employing, or retaining in his employ, incompetent, unskillful, habitually negligent, drunken, or otherwise unfit servants, through whose incompetency, unskillfulness, negligence, drunkenness, or other unfitness a fellow servant is killed or injured. In such cases the so-called "fellow-servant rule,"^{1a} which exonerates the master from liability, does not apply; the servant does not ordinarily assume the risk of injury from the master's negligence in this particular;² but the master is liable by reason of having acted negligently or wrongfully in selecting or in retaining in his employ the servant whose negligence or misconduct led to the injury visited upon the fellow servant.³ To warrant a recovery for an injury result-

¹ See also, *ante*, § 4048, *et seq.*

^{1a} *Hall v. Bedford Quarries Co.*, 156 Ind. 460; s. c. 60 N. E. Rep. 149.

² *Hicks v. Southern R. Co.*, 63 S. C. 559; s. c. 41 S. E. Rep. 753; *rev'd* on rehearing s. c. 38 S. E. Rep. 725, 866; *Rounds v. Carter*, 94 Me. 535; s. c. 48 Atl. Rep. 175 (servant assumes risk of injury from negligence of fellow servant if fellow servant is competent and fit for the service required of him); *Wyman v. The Duart Castle*, 6 Can. Exch. 387 (same statement and qualification).

³ *Tyson v. South &c. R. Co.*, 61 Ala. 554 (yardmaster, an experienced and competent man, with power to appoint and remove engineers at will, negligently put an incompetent man in charge of an engine); *Louisville &c. R. Co. v. Davis*, 91 Ala. 487; s. c. 8 South. Rep. 552 (negligence in failing to put a competent and physically capable brakeman on a car); *Mobile &c. R. Co. v. Smith*, 59 Ala. 245; *McDonald v. Hazeltine*, 53 Cal. 35 [following *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255]; *Mathews v. Bull* (Cal.), 47 Pac. Rep. 773 (no off. rep.) (master bound to exercise ordinary care in the selection and retention of sufficient and competent servants properly to conduct the business); *Stephens v. Doe*, 73 Cal. 26; s. c. 14 Pac. Rep. 378

(foreman of a mine, and a miner under him, are fellow servants; and the master is not liable for an injury caused by the foreman, unless he has failed to use ordinary care in selecting him) [but see California cases cited in § 5291, *post*, qualifying this doctrine]; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; s. c. 38 Pac. Rep. 596; *Kindel v. Hall*, 8 Colo. App. 63; s. c. 44 Pac. Rep. 781; *Giordano v. Brandywine Granite Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332; *Ingram v. Hilton &c. Lumber Co.*, 108 Ga. 194; s. c. 33 S. E. Rep. 961 (distinction between the negligence of a competent fellow servant and the unskillfulness of an incompetent fellow servant should be clearly pointed out to the jury); *Keith v. Walker Iron &c. Co.*, 81 Ga. 49; s. c. 7 S. E. Rep. 166 (injury to carpenter from negligence of mason, a fellow servant; no recovery if due care exercised in selecting the mason); *Webster Man. Co. v. Schmidt*, 77 Ill. App. 49 (master must exercise all reasonable care to employ competent and prudent fellow servants); *Chicago &c. R. Co. v. Myers*, 83 Ill. App. 469; *Calumet &c. St. R. Co. v. Peters*, 88 Ill. App. 112; *Fraser v. Schroeder*, 163 Ill. 459; s. c. 45 N. E. Rep. 288; *aff'g* s. c. *sub nom.* *Fraser v. Schroeder*, 60 Ill. App. 519 (inexperienced employé, ordered by his

ing from the negligence of a fellow servant, the plaintiff must prove that the servant was incompetent or unfit, and that his master em-

foreman to stop a windlass, so operated a lever as to slip the machinery into fast gear instead of into the proper gear to stop it); *Illinois Steel Co. v. Paschke*, 51 Ill. App. 456; *Indiana Man. Co. v. Millican*, 87 Ind. 87 (master liable for an injury to a servant caused by the negligence of a fellow servant hired by him in entire ignorance of his qualifications, and without inquiry in reference thereto); *Peterson v. New Pittsburg Coal & C. Co.*, 149 Ind. 260; s. c. 63 Am. St. Rep. 298; 49 N. E. Rep. 8 (prior to the statutory change in Indiana which relieved the plaintiff of the burden of alleging and proving his own freedom from negligence, he had to allege his ignorance of the incompetency charged); *Brown v. Levy*, 108 Ky. 163; s. c. 21 Ky. L. Rep. 1724; 55 S. W. Rep. 1079; *Rounds v. Carter*, 94 Me. 535; s. c. 48 Atl. Rep. 175; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; note to *Norfolk & R. Co. v. Hoover* (79 Md. 253), in 25 L. R. A. 710; *Kean v. Detroit Copper & C. Mills*, 66 Mich. 277; s. c. 9 West. Rep. 699; 33 N. W. Rep. 395 (habitual intoxication); *Lyttle v. Chicago & C. R. Co.*, 84 Mich. 289; s. c. 47 N. W. Rep. 571; *Lewis v. Emery*, 108 Mich. 641; s. c. 2 Det. Leg. N. 986; 66 N. W. Rep. 569; *Crandall v. McIlrath*, 24 Minn. 127; *Smith v. E. W. Backus Lumber Co.*, 64 Minn. 447; s. c. 67 N. W. Rep. 358 (negligence of master in retaining in his employ an habitually careless or negligent fellow servant, known by him to be such, by reason of which another servant is injured); *Nutzmann v. Germania Life Ins. Co.*, 78 Minn. 504; s. c. 81 N. W. Rep. 518; s. c. on second appeal, 82 Minn. 116; 84 N. W. Rep. 730; *Loe v. Chicago & C. R. Co.*, 57 Mo. App. 350; *Huffman v. Chicago & C. R. Co.*, 78 Mo. 50 (must be shown that the master knew of the specific act of carelessness testified to, or was culpably ignorant thereof); *Kersey v. Kansas City & C. R. Co.*, 79 Mo. 362; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330; s. c. 10 S. W. Rep. 185; 11 S. W. Rep. 736; *Dysart v. Kansas City & C. R. Co.*, 145

Mo. 83; s. c. 46 S. W. Rep. 751; *Nelson v. Kansas City & C. R. Co.*, 85 Mo. 599; *Voss v. Delaware & C. R. Co.*, 62 N. J. L. 59; s. c. *sub nom.* *Delaware & C. R. Co. v. Voss*, 12 Am. & Eng. R. Cas. (N. S.) 820; 5 Am. Neg. Rep. 55; 41 Atl. Rep. 224; *Wood v. New York & C. R. Co.*, 32 App. Div. (N. Y.) 606; s. c. 53 N. Y. Supp. 162; 87 N. Y. St. Rep. 162; *Lyons v. New York & C. R. Co.*, 39 Hun (N. Y.) 385 (intoxication); *O'Donnell v. American Sugar Ref. Co.*, 41 App. Div. (N. Y.) 307; s. c. 58 N. Y. Supp. 640; 92 N. Y. St. Rep. 640; 6 Am. Neg. Rep. 322 (known incompetency of a foreman); *Probst v. Delamater*, 100 N. Y. 266; s. c. 3 N. E. Rep. 184; aff'g s. c. 17 Wkly. Dig. (N. Y.) 355 (intoxication); *Coppins v. New York & C. R. Co.*, 122 N. Y. 557; s. c. 34 N. Y. St. Rep. 214; 44 Am. & Eng. R. Cas. 618; 25 N. E. Rep. 915; 19 Am. St. Rep. 523; aff'g s. c. 48 Hun (N. Y.) 292; 17 N. Y. St. Rep. 916 (habitual negligence); *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270; s. c. 28 Atl. Rep. 1087; *Huntsinger v. Trexler*, 181 Pa. St. 497; s. c. 37 Atl. Rep. 574 (brakeman on log-train injured by negligence of conductor in failing to protect log-train from an approaching train); *Hicks v. Southern R. Co.*, 63 S. C. 559; s. c. 41 S. E. Rep. 753; rev'g on rehearing s. c. 38 S. E. Rep. 725, 866; *East Tennessee & C. R. Co. v. Gurley*, 12 Lea (Tenn.) 46 (switch-tender known to the company to be incompetent); *Houston & C. R. Co. v. Patton* (Tex.), 9 S. W. Rep. 175 (no off. rep.); *Postal & C. Co. v. Coote* (Tex. Civ. App.), 57 S. W. Rep. 912 (no off. rep.) (foreman of a telegraph company in charge of the construction of its lines is the vice-principal of the company, and it is responsible for an injury resulting from his negligence in hiring incompetent men); *Houston & C. R. Co. v. Myers*, 55 Tex. 110 (must show that master had not used reasonable care in selecting and retaining such fellow servants); *Pilkinton v. Gulf & C. R. Co.*, 70 Tex. 226; s. c. 7 S. W. Rep. 805; *Mexican & C. R. Co. v. Mussett*, 7 Tex. Civ. App. 169; s. c. 24 S. W. Rep.

ployed him, or retained him in his employ, either with actual knowledge that he was incompetent or unfit, or under such circumstances that he was legally chargeable with such knowledge, and that the injury was the result of the servant's negligence.⁴

§ 4883. This Duty a Primary, Absolute, and Unassignable Duty.—This duty of the master, like the duty of taking care to the end that the place at which, and the appliances with which, the servant is required to work, are reasonably safe for the purpose intended, is one of those positive, absolute, and unassignable duties which he cannot delegate to another so as to escape responsibility for the exercise of reasonable care in its performance; but the person to whom he delegates the duty, whatever his relation to the master or whatever his rank or grade in the service of the master, becomes the vice-principal of the master, so that his negligence in the performance of the duty is the negligence of the master. For the present purpose we may adopt for a statement of the doctrine a well-drawn syllabus in a Federal case: "A master owes the duty of using proper diligence in the employment of competent men to perform the duties for which they are engaged, and he cannot escape this responsibility by delegating his duty to an agent who is a fellow servant of the injured employé; and after the employment of the servant it is the duty of the master to keep himself advised as to his fitness."⁵

§ 4884. This Duty Discharged by the Exercise of Ordinary or Reasonable Care.—As in other cases, this duty is not absolute in the sense that the master is required to perform it at all events and is liable as an *insurer* of its performance; but the law exonerates him if he exercises reasonable or ordinary care to this end.⁶

520; s. c. *aff'd*, 86 Tex. 708; 24 L. R. A. 642; 26 S. W. Rep. 1075; Gulf &c. R. Co. v. Pierce, 87 Tex. 144; s. c. 27 S. W. Rep. 60; *aff'g* s. c. 25 S. W. Rep. 1052; Norfolk &c. R. Co. v. Ampey, 93 Va. 108; s. c. 2 Va. Law Reg. 284; 25 S. E. Rep. 226; Carlson v. Wilkeson Coal &c. Co., 19 Wash. 473; s. c. 53 Pac. Rep. 725; Maitland v. Gilbert Paper Co., 97 Wis. 476; s. c. 72 N. W. Rep. 1124 (insufficient capacity to understand and obey rules may constitute incompetency; and so may carelessness in obeying rules); Curran v. A. H. Stange Co., 98 Wis. 598; s. c. 74 N. W. Rep. 377; Jordan v. Wells, 3 Woods (U. S.) 527; Olsen v. North Pac. Lumber Co.,

40 C. C. A. 427; s. c. 100 Fed. Rep. 384; Baltimore &c. R. Co. v. Henthorne, 73 Fed. Rep. 634; s. c. 19 C. C. A. 623; 43 U. S. App. 113; Wyman v. The Duart Castle, 6 Can. Exch. 387.

⁴ Chicago &c. R. Co. v. Myers, 83 Ill. App. 469.

⁵ Brady v. Western Union Tel. Co., 113 Fed. Rep. 909; s. c. 51 C. C. A. 539.

⁶ McDonald v. Hazeltine, 53 Cal. 35 (ordinary care); Chicago &c. R. Co. v. Libey, 68 Ill. App. 144; Webster Man. Co. v. Schmidt, 77 Ill. App. 49 (master must exercise all reasonable care to employ competent and prudent fellow servants); Calumet &c. St. R. Co. v. Peters, 88

§ 4885. **Duty of Master to Make Inquiries as to Fitness of Servant before Employing Him.**—This obligation of exercising reasonable care in the selection of servants necessarily implies a duty on the part of the master of making reasonable inquiries as to the competency and fitness of his servant before employing him. Negligence has been imputed to a master where an injury was visited upon one of his servants by another servant whom the master had employed on the day of the accident without making any inquiries about him, and without knowing anything with respect to his fitness for the employment.⁷ Inquiries made of the servant himself, without requiring him to produce credentials, and without making any inquiry of others as to his competency and fitness, may in like manner be regarded as insufficient and as affording evidence of negligence, especially in the case of a locomotive-engineer, whose negligence may result in great injury to others.⁸ On the other hand, an employer who inquires of the

Ill. App. 112 (ground of liability is that master knew or should have known of the incompetency of the fellow servant); Louisville & C. R. Co. v. Berkey, 136 Ind. 181; s. c. 35 N. E. Rep. 3 (sufficient that the unfitness of the fellow servant could have been known to the master by the exercise of reasonable diligence); Cherokee & C. Coal Co. v. Britton, 3 Kan. App. 292; s. c. 45 Pac. Rep. 100 (exercise of ordinary care in the employment of competent and skillful mine operators and superintendents is the measure of the duty of the mine owner or operator); Huffman v. Chicago & C. R. Co., 78 Mo. 50 (must be shown that the master knew of the specific acts of carelessness testified to or was culpably ignorant thereof); Dysart v. Kansas City & C. R. Co., 145 Mo. 83; s. c. 46 S. W. Rep. 751; Coppins v. New York & C. R. Co., 122 N. Y. 557; s. c. 34 N. Y. St. Rep. 214; 44 Am. & Eng. R. Cas. 618; 25 N. E. Rep. 915; 19 Am. St. Rep. 523; aff'g s. c. 84 Hun (N. Y.) 292; 17 N. Y. St. Rep. 916 (master liable for injury to a servant caused by the negligence of a co-servant whose habit of neglecting duties and safeguards affecting the injured servant was known, or ought with reasonable care and attention to have been known, by the master); Mulhern v. Lehigh Valley Coal Co., 161 Pa. St. 270; s. c. 28 Atl. Rep. 1087 (master not liable unless he knew, or should have

known, that the fellow servant was incompetent); Huntsinger v. Trexler, 181 Pa. St. 497; s. c. 37 Atl. Rep. 574 (master not liable unless he knew or ought to have known of the incompetency of the fellow servant); San Antonio & C. R. Co. v. Taylor (Tex. Civ. App.), 35 S. W. Rep. 855 (no off. rep.); Houston & C. R. Co. v. Myers, 55 Tex. 110 (must show that master had not used reasonable care in selecting and retaining such fellow servants); Pilkinton v. Gulf & C. R. Co., 70 Tex. 226; s. c. 7 S. W. Rep. 805; Maitland v. Gilbert Paper Co., 97 Wis. 476; s. c. 72 N. W. Rep. 1124 (error to instruct that the master is bound to furnish competent employes, and that if he fails to do so he is liable for injuries caused by their incompetency, unless the co-employé assumes the risk); Baltimore & C. R. Co. v. Henthorne, 73 Fed. Rep. 634; s. c. 19 C. C. A. 623; 43 U. S. App. 113; Buckley v. Gould & C. Silver Min. Co., 14 Fed. Rep. 833; s. c. 8 Sawy. (U. S.) 394.

⁷ Fines v. Sillery, 73 Hun (N. Y.) 549; s. c. 26 N. Y. Supp. 181; 58 N. Y. St. Rep. 461. See also, Indiana Man. Co. v. Millican, 87 Ind. 87.

⁸ Where a company operating a railroad employed an engineer, and assigned him to the duty of running a locomotive, with no knowledge of him as an engineer, without requiring him to produce credentials, and without inquiry, except such as was made of him, the com-

former employer of one who tenders himself for a contract of service, with respect to his competency and carefulness, is not negligent by reason of failing to make such inquiries of the employé himself, so as to become liable to a fellow servant of such employé for an injury caused by his carelessness.⁹

§ 4886. How Far Master may Rely upon Presumption of Servant's Competency and Fitness.—A doctrine occasionally crops out which cannot possibly be sound law, because it absolves the master altogether from the duty of making inquiry as to the competency or fitness of an employé at the time when he hires him, but suffers him to wait to discover any incompetency or unfitness through his subsequent acts or negligence in the service, although such acts or negligence may endanger the lives or limbs of his other servants. The proposition is that a master is not negligent in employing a workman who proves to be incompetent, where, prior to the act of the workman complained of, no incompetency was suggested or known to the master, and all the workman's previous acts evinced care on his part.¹⁰ A variation of the proposition is to say that a master who has exercised due care in the employment of a servant may rely upon the presumption of competency until he has notice or knowledge to the contrary; and although the employé may frequently use machinery in a negligent manner, yet if such use leaves no trace behind it which it is the duty of the master, on inspection, to see, no presumption of knowledge on his part arises.¹¹

§ 4887. Right of Employer to Presume that Person Soliciting Employment is Competent.—No doubt, as between the employer and the employé himself, the employer may presume, when the employé seeks the employment, that he is competent to discharge the duties of the employment which he seeks;¹² but as between the employer and a fellow servant of the person thus employed, there can be no such rule, since the existence of such a rule would totally discharge the obliga-

pany was held to be guilty of negligence, and was held liable for injuries resulting to a fellow servant from the incompetency of the engineer: *Bell v. Globe Lumber Co.*, 107 La. 725; s. c. 31 South. Rep. 994.

⁹ *Gier v. Los Angeles &c. R. Co.*, 108 Cal. 129; s. c. 41 Pac. Rep. 22.

¹⁰ *Bruce v. Penn Bridge Co.*, 197 Pa. St. 439; s. c. 47 Atl. Rep. 354.

¹¹ *Walkowski v. Penokee &c. Consol. Mines*, 115 Mich. 629; s. c. 41 L. R. A. 33; 4 Det. Leg. N. 1005; 73 N. W. Rep. 895. See also, *Cameron v. New York &c. R. Co.*, 145 N. Y. 400; *Chapman v. Erie R. Co.*, 55 N. Y. 579.

¹² *Huber v. Jackson &c. Co.*, 1 Marv. (Del.) 374; 41 Atl. Rep. 92.

tion of the employer to use diligence and make reasonable inquiries to ascertain the fitness of the employé.

§ 4888. **Placing Incompetent or Unfit Servants over Others.**—A master is under a duty toward his servants not to place incompetent, unskillful or unfit servants in authority over other servants; but is as much bound to provide his workmen with a reasonably competent and fit foreman as to provide them with reasonably safe tools.¹³ If, therefore, a mill-owner places a man generally reputed to be ill-tempered to children and to other help, over a boy ten years old, he will be liable in damages for his violent handling in urging him to the proper performance of his work.¹⁴ So, where the foreman of a machine-shop, with knowledge of the danger, ordered an unskilled apprentice to obey another employé who was not sufficiently skilled to direct in the work, by reason of which the apprentice was injured, it was held that the master was liable.¹⁵

§ 4889. **Unfitness of Fellow Servant must be the Proximate Cause of the Injury.**—It is enough merely to suggest the conclusion that the plaintiff must show that the unfitness of the fellow servant was the proximate or efficient cause of the injury; otherwise the master will not be liable.¹⁶

¹³ O'Dowd v. Burnham, 19 Pa. Super. Ct. 464; Evansville &c. R. Co. v. Guyton, 115 Ind. 450; s. c. 17 N. E. Rep. 101; 14 West. Rep. 301.

¹⁴ Lamb v. Littman, 128 N. C. 361; s. c. 38 S. E. Rep. 911; 53 L. R. A. 852. But what can be said of a civilization that allows a boy *ten years old* to be kept at work in a mill?

¹⁵ Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424.

¹⁶ Welsh v. Pennsylvania R. Co., 192 Pa. St. 69; s. c. 16 Lanc. L. Rev. (Pa.) 257; 14 Am. & Eng. R. Cas. (N. S.) 569; 43 Atl. Rep. 402 (action grounded upon theory of intoxication of fellow servant—no recovery); Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228; s. c. 37 W. N. C. (Pa.) 544; 33 Atl. Rep. 1104; 27 Pitts. L. J. (N. S.) 37 (injury must be the result of the fellow servant's incompetency); Norfolk &c. R. Co. v. Phillips, 100 Va. 362; s. c. 41 S. E. Rep. 726 (the same conclusion); Bonnet v. Galveston &c. R. Co., 89 Tex. 72; s. c.

33 S. W. Rep. 334 (incompetency of a fellow servant from want of strength to perform the work, where such want of strength in no degree contributed to the accident). Somewhat connected with this subject we find decisions to the following effect:—That a master does not excuse himself by the fact of employing experienced and competent servants, when he insists upon their doing an act which they warn him is dangerous and likely to cause injury to another: Hammond v. Schiff, 100 N. C. 161; s. c. 6 S. E. Rep. 763. That an employé engaged in towing cars with a horse cannot recover damages for injuries received in coupling a car, on the ground that his employer caused an inexperienced, negligent and incompetent helper, knowing him to be such, to assist the plaintiff in coupling cars, and that the injury was caused by the negligent failure of such helper to tighten the brakes, without producing evidence that such helper was employed, or was expected, to drive

§ 4890. **Incompetency of Volunteers, Intermeddlers and Interlopers.**—A master will not, in general, be liable for injuries inflicted upon his servants through the acts or negligence of volunteers, intermeddlers or interlopers whom he does not employ;¹⁷ though it is supposed that circumstances may exist, where, even for such injuries, he may become liable for his negligent failure to protect his instrumentalities against interference by such persons. An employer who retained an incompetent employé with knowledge of his incompetency was held liable for an injury resulting to a fellow servant from the negligence of such incompetent employé in disturbing parts of the machinery with which he had nothing to do and which he was prohibited from touching.¹⁸ It has been held that the incompetency of one employed in a railway roundhouse as a “wiper” or “fire-puller,” to run an engine, afforded no ground to a coemployé for recovery from the company on account of injuries caused by his negligence or unskillfulness in operating the engine, where his duties did not include the running of the engine, and he was in fact forbidden to do so, and he had never before but once, and then without the knowledge of any of his superiors, attempted to do so.¹⁹

§ 4891. **Liability of Master for Employing Servants Addicted to Intoxication.**—It need not be said that if a master puts in control and direction of persons required to use dangerous machinery a servant addicted to the habitual use of intoxicating liquors, the master having knowledge of such habits, and an injury results to another servant therefrom, the master will be liable.²⁰ The fact that a servant

a horse, or apply the brake, or to have anything to do with the coupling: *Blah v. West Chicago St. R. Co.*, 100 Ill. App. 393. That the unskillfulness and incompetency of a servant will not of itself make the master liable for an accident where the circumstances were such that a skillful servant in the same situation could not have prevented the accident: *Central Trust Co. v. East Tennessee & C. R. Co.*, 68 Fed. Rep. 635. That a railroad company cannot be made liable for an injury caused by cars escaping from a side-track on which they had been placed, through the failure of the conductor of a freight-train to set the brakes in accordance with a rule with which he was familiar, on the ground that the company was negligent in employing such conductor to run a train over the

division of the road when he had never before run a freight-train over such division: *Cooper v. New York & C. R. Co.*, 25 App. Div. (N. Y.) 383; s. c. 49 N. Y. Supp. 481.

¹⁷ *West v. New York & C. R. Co.*, 17 App. Div. (N. Y.) 116; s. c. 45 N. Y. Supp. 93; 79 N. Y. St. Rep. 93.

¹⁸ *Maitland v. Gilbert Paper Co.*, 97 Wis. 476; s. c. 72 N. W. Rep. 1124.

¹⁹ *Smith v. St. Louis & C. R. Co.*, 151 Mo. 391; s. c. 14 Am. & Eng. R. Cas. (N. S.) 609; 52 S. W. Rep. 378.

²⁰ *Kean v. Detroit Copper & C. Mills*, 66 Mich. 277; s. c. 9 West. Rep. 699; 33 N. W. Rep. 395 (but in this case the injury was not due to the intemperate habits of the foreman, but to the negligence of plaintiff in doing his work in an

was intoxicated at the time of the happening of an accident whereby a fellow servant was injured, is a circumstance to be considered on the question of whether the master was in fault for employing an incompetent servant, as it tends legitimately to prove the incompetency of the servant to perform the duties with which he was charged; and hence an exception to the admission of such evidence was not well taken which failed to raise the question whether such proof was sufficient to establish the allegation, or whether additional evidence was required to charge the defendant with knowledge of the fact.²¹ But such habit of the servant must have been the proximate cause of the injury:²² if the injury proceeded from some other source, if the fellow servant was sober at the time, and was performing his work without negligence, there can of course be no recovery.²³

§ 4892. Notice to Master of Incompetency or Unfitness of Servant.

—It has already been pointed out that knowledge on the part of, or notice to, a servant of whatever grade, whose duty it is to act upon such knowledge, is notice to the vice-principal of the master, and hence is notice to the master.²⁴ This rule applies in the relation under consideration; so that notice to a servant having the power to employ and discharge, of the incompetency or unfitness of a fellow servant, will charge the master with knowledge. It has been so held with respect to an officer of a railway company who has power to suspend employes temporarily for incompetency or inebriety. Such an officer has power to receive notice for the company of the incompetency, inebriety, or other unfitness of an employé, so that notice to such officer of the habitual incompetency, drunkenness, or other unfitness of the employé will be notice to the company, which will become liable for an injury caused by the unfit employé where he is negligently retained in the service by such officer after receiving such notice.²⁵ Notice of the incompetency of a servant employed by a corporation, given to the officers of the corporation, they being proper officers to receive such notice, will charge the corporation with constructive notice of the fact, although at the time of the injury produced by the incompetency of such servant the officers to whom the notice was given are dead or out of the employ of the corporation.²⁶

obviously dangerous manner). As to the liability of a master for employing a drunkard, see editorial note in 40 L. R. A. 146.

²¹ *Probst v. Delamater*, 100 N. Y. 266; s. c. 3 N. E. Rep. 184; *aff'd* s. c. 17 Wkly. Dig. (N. Y.) 355.

²² *Ante*, § 4889.

²³ *East St. Louis & C. R. Co. v. Shannon*, 52 Ill. App. 420.

²⁴ *Ante*, § 3797.

²⁵ *Baltimore & C. R. Co. v. Henthorne*, 73 Fed. Rep. 634; s. c. 19 C. C. A. 623; 43 U. S. App. 113.

²⁶ *Baird v. New York & C. R. Co.*, 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734.

§ 4893. Constructive Notice of the Master of Unfitness of Servant.—Here, as in other cases, the master is under the affirmative duty of finding out and knowing the character of the servants whom he employs or retains in his service; in other words, he is held, in law, to know what he ought to have known; and this is sometimes called constructive notice.²⁷ His negligent ignorance is the equivalent in law of actual knowledge.²⁸

§ 4894. Knowledge of Master of Habitual Negligence of his Vice-Principal Immaterial.—Where the circumstances surrounding the injury are such that it is imputable to a superior servant of the master, who stands toward his other servants, not in the relation of fellow servant, but in that of vice-principal, then the question whether the master knew or ought to have known that he was negligent in the performance of his duties becomes immaterial; since the master is answerable for his negligence in any event the same as though the master had been guilty of the negligent act or omission in person.²⁹

§ 4895. Contributory Negligence of Servant in Not Discovering Unfitness of Fellow Servant.—It has been reasoned that a servant is bound to exercise reasonable care and diligence in ascertaining the fitness of a fellow servant.³⁰ Where this view is taken no recovery can be had for the death or injury of a servant resulting from the negligence of a fellow servant, where the servant killed or injured was better acquainted than any other person with the incompetency of the fellow servant.³¹ But this statement, standing alone, is liable to mislead, in that it fails to take into account the difference with respect to this matter between the situation of the master and that of the servant. The master is bound, in favor of his servants, to exercise reasonable or ordinary care to the end of selecting competent, fit and safe fellow servants with whom they are to work. This is an affirmative duty which cannot be delegated. But while the servant may be theoretically under the obligation of exercising reasonable care to the

²⁷ Knowledge of employer that an employé is in the habit of taking an occasional drink does not charge the former with knowledge of the latter's unfitness for his employment: *Culbertson v. Metropolitan St. R. Co.*, 140 Mo. 35; s. c. 36 S. W. Rep. 834.

²⁸ *Ledwidge v. Hathaway*, 170 Mass. 348; s. c. 49 N. E. Rep. 656; *Norfolk &c. R. Co. v. Hoover*, 78 Md. 253; s. c. 25 L. R. A. 710; 29 Atl. Rep. 994. That negligent ig-

norance is the equivalent in law of actual knowledge, see Vol. I, § 8, and citations.

²⁹ *Whaley v. Bartlett*, 42 S. C. 454; s. c. 20 S. E. Rep. 745.

³⁰ *Western Stone Co. v. Whalen*, 151 Ill. 472; s. c. 42 Am. St. Rep. 244; 38 N. E. Rep. 241; aff'g s. c. 51 Ill. App. 512.

³¹ *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; s. c. 38 Pac. Rep. 596.

end of discovering any incompetency, unfitness or unsafety in his fellow servant, yet he approaches the matter in a different relation from that of master: he is entitled to assume, in the absence of facts admonishing him to the contrary, that the master has done his duty in this regard.³² The meaning is that the servant is under no affirmative duty to make diligent use of his *means of knowledge* as to the incompetency of a fellow servant, but can be affected only by such knowledge as he has, including what is within his observation at the time of his injury.³³ He is not chargeable with knowledge of the incompetency of a fellow servant, nor imputable with negligence by reason of remaining in the same employment with him, until he has notice of such incompetency, either by information communicated to him by others, or by circumstances reasonably sufficient for that purpose.³⁴ On the other hand, if he does know of the incompetency of the fellow servant, and nevertheless continues to work with him without giving notice to the master, he thereby precludes himself from recovering damages for an injury growing out of such incompetency.³⁵

§ 4896. **In Continuing to Work with Fellow Servant Known to be Unfit.**—The contributory negligence of the injured servant may, and perhaps generally does, consist in the fact of his continuing to work

³² *Giordano v. Brandywine Granite Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332; *Galveston &c. R. Co. v. Sherwood* (Tex. Civ. App.), 67 S. W. Rep. 776 (no off. rep.) (though his means of knowledge of the incompetency of the fellow servant were equal to the master's, as he had a right to presume that the fellow servant was competent); *International &c. R. Co. v. Cook*, 16 Tex. Civ. App. 386; s. c. 41 S. W. Rep. 665; *Texas &c. R. Co. v. Johnson*, 89 Tex. 519; s. c. 35 S. W. Rep. 1042; 4 Am. & Eng. R. Cas. (N. S.) 441; *Louisville &c. R. Co. v. Kelly*, 63 Fed. Rep. 407; s. c. 11 C. C. A. 260; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710; s. c. 31 L. ed. 296; *Olsen v. North Pac. Lumber Co.*, 40 C. C. A. 427; s. c. 100 Fed. Rep. 384. Further as to the assumption of risk by continuing in the employment with knowledge of the incompetency or unfitness of his fellow servants,—see *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; s. c. 38 Pac. Rep. 596; *Webster Man. Co. v. Schmidt*, 77 Ill. App. 49; *Fletcher v. Railroad Co.*, 102 Tenn.

1; s. c. 49 S. W. Rep. 739; *Gulf &c. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706; *ante*, §§ 3765, 4716.

³³ *Louisville &c. R. Co. v. Kelly*, 63 Fed. Rep. 407; s. c. 11 C. C. A. 260.

³⁴ *Giordano v. Brandywine Granite Co.*, 3 Pen. (Del.) 423; s. c. 52 Atl. Rep. 332.

³⁵ *St. Louis Press Brick Co. v. Kenyon*, 57 Ill. App. 640; *B. Lantry Sons v. Lowrie* (Tex. Civ. App.), 58 S. W. Rep. 837 (no off. rep.). It has been held that an employé having supervision of another employé, and knowing that the latter is an incompetent and careless workman, who trusts himself under a ladder constructed by the latter, without examining it, cannot recover from the master, although the latter failed to keep his promise to discharge the incompetent employé, the failure to keep the promise not being the proximate cause of the accident: *Bolton v. Georgia &c. R. Co.*, 83 Ga. 659; s. c. 10 S. E. Rep. 352.

with a servant known to be incompetent or unfit for the discharge of the duties with which he is entrusted. By so continuing in the service the injured servant, as a general rule, accepts the risk of injury from the incompetent or unfit fellow servant.³⁶ This is especially true where he continues so to work with knowledge of the incompetency or unfitness of the fellow servant, and *without making any complaint* to the master or his representative. Where an employé continued without complaint to work in the master's quarry with a fellow servant with whom he had been acquainted for several years before the accident, and of whose incompetency he knew, the master, as a matter of law, was not liable for an injury caused by the incompetency of such fellow servant.³⁷

§ 4897. Complaint of Incompetency or Unfitness of Fellow Servant and Promise to Discharge Him.—Where the servant complains to his master, or to his master's representative, of the incompetency or unfitness of a fellow servant, and receives a promise to discharge him, he may, in reliance upon such promise, remain in the service a reasonable time in expectation of its fulfillment, without being imputable with an assumption of the risk, or with contributory negligence; and if he is injured before the lapse of such reasonable time in consequence of the incompetency or unfitness of the fellow servant, the master will be liable.³⁸ The rule is the same where the servant who has made the complaint continues to work on the promise of the master, or of his representative, that the fellow servant shall no longer be permitted to attempt to perform the acts for which he is incompetent.³⁹ Leaving out of view the question of the acceptance of the risk by the servant making the complaint, or of his contributory negligence in remaining in the service thereafter, it is plain that such a complaint puts the master or his representative upon inquiry with respect to the competency or fitness of the fellow servant who is the subject of

³⁶ *Ante*, §§ 4657, *et seq.*, 4714; *post*, § 4896.

³⁷ *Johnson v. Portland Stone Co.*, 40 Or. 436; s. c. 67 Pac. Rep. 1013; rehearing denied, *sub nom. Johnson v. Portland Granite & Co.*, 68 Pac. Rep. 425. But a fireman of a railroad company, ordered to make a certain trip with an engineer for whom he had never fired before, but who, presumably with the company's knowledge, habitually violated its rules in regard to having his train under control on approaching stations and switches, was not estopped to complain of

the engineer's negligence on the return trip, or from suing for resulting injuries, merely because on the trip down he had ascertained this habit of the engineer: *Missouri & C. R. Co. & C. v. Williams*, 28 Tex. Civ. App. 615; s. c. 68 S. W. Rep. 805.

³⁸ *Brown v. Levy*, 108 Ky. 163; s. c. 21 Ky. L. Rep. 1724; 55 S. W. Rep. 1079; *ante*, § 4715.

³⁹ *Lyttle v. Chicago & C. R. Co.*, 84 Mich. 289; s. c. 47 N. W. Rep. 571; *Carlson v. Wilkeson Coal & C. Co.*, 19 Wash. 473; s. c. 53 Pac. Rep. 725.

the complaint; so that if an injury to the servant making the complaint proceeds from the incompetency or unfitness of such fellow servant, the master, in the absence of these qualifications, will be liable therefor.⁴⁰

§ 4898. Unfitness in Consequence of Disease, such as Epilepsy.—Where the incompetency of a brakeman arose, not from the fact that he was habitually inattentive to his duties, but because his physical condition was such, from liability to epileptic fits, that he was likely at any moment to become unable to perform his duties, the fact that he had never been guilty of *carelessness* did not prevent the jury from finding that he was an improper person to entrust with important duties, when his failure might produce just such results as happened at the time of the accident in controversy.⁴¹

§ 4899. Liability under Statutes for Employing Incompetent or Unfit Fellow Servants.—In California an employer who *retains* an unfit employé in his service, after knowing of his unfitness, is liable for an injury to a coemployé growing out of such unfitness, under a statute⁴² providing that an employer must in all cases indemnify an employé for losses caused by the employer's want of ordinary care; although under another statute⁴³ the employer is not liable to his employé unless he neglected to use ordinary care in the *selection* of the negligent employé.⁴⁴

§ 4900. Instructions to Juries on this Subject.—It has been held not error, under an appropriate state of facts, to instruct the jury that a railway company owes its employés operating its trains the duty of providing "efficient" men for its service; since "efficient" in the relation in which it was used, was the equivalent of "competent," and

⁴⁰ *Loe v. Chicago &c. R. Co.*, 57 Mo. App. 350. An engineer in the service of a railway company had once been discharged by the company for incompetency. On applying for reemployment, the trainmaster called the attention of the company's officers to his unfitness, and protested against his reemployment, which protest was disregarded. It was held that the trainmaster need not repeat his protest, nor report any further instances of unfitness, in order to charge the company with knowledge thereof; that if the retention of the engineer was due to the trainmaster's negligence

in failing further to report him, and they were fellow servants, still the company was liable, as it knew of the engineer's unfitness as well as the trainmaster: *Mexican &c. R. Co. v. Mussette*, 7 Tex. Civ. App. 169; s. c. 24 S. W. Rep. 520; s. c. aff'd, 86 Tex. 708; 24 L. R. A. 642; 26 S. W. Rep. 1075.

⁴¹ *Baird v. New York &c. R. Co.*, 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734.

⁴² Cal. Civ. Code, § 1971.

⁴³ Cal. Civ. Code, § 1970.

⁴⁴ *Gier v. Los Angeles &c. R. Co.*, 108 Cal. 129; s. c. 41 Pac. Rep. 22.

expressed no more than the duty which the law imposes on the master;⁴⁵ nor to instruct them that, if plaintiff knew that a fellow servant was of a low order of intellect, he assumed the risk which might result from engaging in the same work with him, in so far as such injury might result from that condition.⁴⁶ An instruction which nakedly informed the jury that "an employer is bound to furnish competent employ  s, and that if he fails to do so he is liable for injuries caused by their incompetency, unless the coemploy   assumes the risk,"—has been condemned as erroneous; since the failure of an employer to furnish competent employ  s does not render the employer liable for an injury to a fellow servant, unless such failure is the result of a want of ordinary care.⁴⁷

   4901. **Whether Existence of Grounds on which Master is Chargeable is Question of Law or Fact.**—In an action against a master for injuries sustained by one servant through the negligence of a fellow

⁴⁵Norfolk &c. R. Co. v. Ampey, 93 Va. 108; s. c. 2 Va. Law Reg. 284; 25 S. E. Rep. 226.

⁴⁶B. Lantry Sons v. Lowrie (Tex. Civ. App.), 58 S. W. Rep. 837 (no off. rep.).

⁴⁷Maitland v. Gilbert Paper Co., 97 Wis. 476; s. c. 72 N. W. Rep. 1124. In an action for injuries received through the negligence of a co-laborer, an *instruction* that plaintiff would be put on inquiry to ascertain, before engaging in work with such laborer, whether he was a man of ordinary intellect, and understood the English language, was condemned as erroneous; since, in the absence of actual knowledge of such want of capacity, plaintiff could assume that the master had exercised reasonable discretion in selecting the servant: B. Lantry Sons v. Lowrie (Tex. Civ. App.), 58 S. W. Rep. 837 (no off. rep.). A complaint alleged that decedent was knocked off a freight-train by a waterspout improperly allowed to project over the track. Only one witness testified to seeing the spout out of position, and this was after the accident, while quite a number of witnesses testified to the contrary. No one saw the decedent fall. Defendant's theory was that decedent fell by reason of the roof of the car being icy. If the spout was projecting over the track, it might have been due to the negli-

gence of fellow servants. An *instruction* that decedent had a right to assume that defendant had exercised reasonable care in the selection of its employ  s; that he was not bound to investigate whether it had done so or not, and that until such time as notice to the contrary was brought home to him, he had a right to act on such assumption,—was incorrect; since if the decedent was killed through the negligence of a fellow servant in the same line of employment, then the master would not be liable unless it had failed to exercise due care in the employment of such fellow servants, *and on this point there was not a particle of proof*,—the practical effect of the instruction being to take the entire question of the probable negligence of a fellow servant from the jury, and to cut out any defense based upon that theory: Chicago &c. R. Co. v. Libey, 68 Ill. App. 144. An instruction to the effect that an employer is not liable for an injury to an employ   merely because the injury was caused by the act of an incompetent fellow servant, where an experienced person, in the exercise of ordinary care, would have performed the act in the same manner, is correct: Galveston &c. R. Co. v. Parrish (Tex. Civ. App.), 40 S. W. Rep. 191 (no off. rep.).

servant, the questions as to whether the servant was incompetent or careless, and whether the master knew of such incompetency or carelessness, or whether he might have known of it by reasonable diligence,—are *questions of fact for the jury*.⁴⁸

ARTICLE II. QUESTIONS OF PROCEDURE IN ACTIONS FOUNDED ON SUCH LIABILITY.

SECTION

4905. Pleadings in actions to enforce such liability.
 4906. Presumptions and burden of proof with respect to the employment of unfit fellow servants.
 4907. Evidence of the negligence, incompetency, drunkenness, or other unfitness of a servant from whom the injury proceeds.
 4908. Whether evidence of unfitness at the time of the employment makes out a *prima facie* case of negligence against the master.
 4909. General reputation of a servant as evidence of his fitness or unfitness.

SECTION

4910. Evidence of specific acts of negligence as tending to show incompetency and unfitness of the fellow servant.
 4911. Various evidentiary facts tending to prove incompetency or unfitness.
 4912. Evidence from which incompetency or unfitness of fellow servant cannot be inferred.
 4913. Evidence of unfitness as tending to show that the particular servant did the mischief.
 4914. Effect of certificate of competency given by public examiners.

§ 4905. **Pleadings in Actions to Enforce such Liability.**¹—To justify a recovery of damages for an injury caused by the negligence of a fellow servant, it is necessary for the plaintiff to aver and prove that the fellow servant was incompetent or unfit, and that the master was negligent in employing him, or in retaining him in his service after discovering his incompetency or unfitness, and that the injury complained of was caused by such incompetency or unfitness.^{1a} The particularity of averment required in pleading such facts will be different in different jurisdictions. One court has held that under an allegation that the fellow servant whose negligence produced the injury was

⁴⁸ Calumet &c. St. R. Co. v. Peters, 88 Ill. App. 112.

¹ See *ante*, § 4877.

^{1a} Elwell v. Hacker, 86 Me. 416; s. c. 30 Atl. Rep. 64; Jordan v. Wells, 3 Woods (U. S.) 527. See also, Bell v. Globe Lumber Co., 107 La. 723; s. c. 31 South. Rep. 994

(a general allegation that the damage was caused by an employé of the defendant is not sufficient notice to the defendant that a recovery will be sought on the ground that the defendant knew of the incompetency of the employé).

incompetent, the plaintiff could show that he was incompetent by reason of his intemperate habits.² Where the rule obtains, as it formerly did in Indiana,³ that the plaintiff must, in his complaint, negative the conclusion of his own contributory negligence, a complaint grounded on the negligence of the employer in selecting or retaining an incompetent or unfit fellow servant, by whose negligence the injury was produced, is fatally defective where it fails to allege, either directly or indirectly, that the plaintiff was ignorant of the incompetency or unfitness of the fellow servant.⁴ It has been held that where the complaint alleges that the injury was received by reason of the negligence of the master in retaining in his employ a servant who he knew was incompetent, it need not be alleged that the plaintiff and the employé by whose negligence he was injured were not fellow servants.⁵ But here, as elsewhere, the plaintiff must recover, if at all, upon the case which he has made in his pleading. If, therefore, he predicates his action upon injuries sustained by him by reason of the negligence of another servant *acting as his superior*, he cannot recover upon proof of the negligence of the same servant *acting as his fellow servant*, on the theory that he was incompetent and that the master had been negligent in selecting or retaining him in his service.⁶ A complaint which alleges that the plaintiff was injured by reason of the negligence and incompetency of a fellow servant; that the incompetency of such fellow servant was well known when he was employed; that the master could have learned of such fact by the use of reasonable diligence; and that the servant was retained in the employment of the master after his incompetency was discovered,—has been held sufficient to support an action against the master by the injured servant.⁷ When a complaint alleges that an injury was caused by the

² Lyons v. New York &c. R. Co., 39 Hun (N. Y.) 385.

³ Vol. I, § 365.

⁴ Peterson v. New Pittsburg Coal &c. Co., 149 Ind. 260; s. c. 63 Am. St. Rep. 298; 49 N. E. Rep. 8. A petition in an action for personal injuries by an employé, relying solely on the occurrence of the injury through the negligence of a fellow servant of plaintiff, *cannot be amended* so as to allege that the injury was due to a defective appliance furnished by defendant, as the original petition did not state a cause of action: Davis v. Muscogee Man. Co., 106 Ga. 126; s. c. 32 S. E. Rep. 30. In West Virginia it is not necessary to allege that the negligence of the master in failing to employ proper servants produced

the injury, where the action is grounded upon the negligence of an incompetent fellow servant: Unfried v. Baltimore &c. R. Co., 34 W. Va. 260; s. c. 12 S. E. Rep. 512. But in Louisiana it is held that a complaint which alleges merely that the injuries were caused by the incompetency or negligence of a fellow servant, imputes no fault to the master, and hence discloses no cause of action against him: Bell v. Globe Lumber Co., 107 La. 725; s. c. 31 South. Rep. 994.

⁵ East St. Louis &c. R. Co. v. Shannon, 52 Ill. App. 420.

⁶ East Tennessee &c. R. Co. v. Collins, 85 Tenn. 227; s. c. 1 S. W. Rep. 883.

⁷ Hall v. Bedford Quarries Co., 156 Ind. 460; s. c. 60 N. E. Rep. 149.

negligence of the master in employing or retaining in his employ an incompetent servant, it must be averred that the latter was guilty of some act of negligence directly contributing to the injury.⁸

§ 4906. **Presumptions and Burden of Proof with Respect to the Employment of Unfit Fellow Servants.**—In actions for injuries sustained by reason of incompetent fellow servants, the presumption is that the fellow servant was not incompetent, and that the master was not negligent in employing him or retaining him in his employment. Therefore, in such actions, the *onus probandi* is upon the plaintiff to negative these presumptions, in order to make out a *prima facie* case.⁹ To establish negligence in cases of this kind, the plaintiff must prove either that the master had undertaken personally to superintend and direct the works, or that the persons employed by him were not proper and competent persons, or that the materials were inadequate, or the means and resources unsuitable to accomplish the work. The *onus* is upon him; and failing to do so, he fails to establish negligence.¹⁰ This principle is clearly pointed out by Lord Cranworth, in the leading Scotch case in the House of Lords, which has constantly been quoted as expounding the law of England equally with that of Scotland: "Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible."¹¹ "It is not enough," said Mr. Justice Willes, "for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks com-

⁸ Norfolk &c. R. Co. v. Phillips, 100 Va. 362; s. c. 41 S. E. Rep. 726.

⁹ Davis v. Detroit &c. R. Co., 20 Mich. 105; Wright v. New York &c. R. Co., 25 N. Y. 562; Kansas &c. R. Co. v. Salmon, 11 Kan. 83; s. c. 14 Kan. 512; Central R. &c. Co. v. Sears, 59 Ga. 436; s. c. 5 Rep. 494; Central R. &c. Co. v. Kelly, 58 Ga. 107; Central R. &c. Co. v. Kenney, 58 Ga. 485; Nolan v. Shickle, 3 Mo. App. 300; Wonder v. Baltimore &c. R. Co., 32 Md. 411; Duffy v. Upton, 113 Mass. 544; Murphy v. St. Louis &c. R. Co., 4 Mo. App. 565; Colorado &c. R. Co. v. Ogden, 3 Colo. 499; Summerhays v. Kansas &c. R.

Co., 2 Colo. 484; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Way v. Illinois &c. R. Co., 40 Ill. 341; Columbus &c. R. Co. v. Troesch, 68 Ill. 545; s. c. 57 Ill. 155; Beaulieu v. Portland Co., 48 Me. 291; Atlanta &c. R. Co. v. Campbell, 56 Ga. 586. In Greenleaf v. Illinois &c. R. Co., 29 Iowa 14, it is held that the employé is not bound to do more than raise a reasonable presumption of negligence on the part of the employer.

¹⁰ Huddleston, B., in Allen v. New Gas Co., 1 Exch. Div. 254.

¹¹ Bartonshill Coal Co. v. Reid, 4 Jur. (N. S.) 767.

pensation."¹² It is then clear that, where an action by a servant against his master proceeds upon the ground that a master has been negligent in employing or in retaining another servant, through whose incompetency or unfitness the plaintiff has been injured, the burden of proof is on the plaintiff in the first instance.¹³ This necessarily follows from the premise that, in the absence of evidence tending to show the contrary, the presumption is that the master has done his duty and has exercised due care in the employment of competent servants.¹⁴

§ 4907. Evidence of the Negligence, Incompetency, Drunkenness, or Other Unfitness of a Servant from whom the Injury Proceeds.—

This brings us to the question of the methods of proof which may be resorted to in order to prove on the one hand, or to disprove on the other, the negligence, incompetency, drunkenness, or other unfitness of the servant from whom the injury proceeds, and the knowledge of the master of such dangerous habits. A case is made out for the plaintiff upon evidence that the servant from whom the injury proceeds had *frequently shown recklessness* and unfitness, and that, notwithstanding complaint against him, he had been retained by the master until the time of the accident.¹⁵ On the other hand, where the action proceeds upon the incompetency of a fireman in temporary charge of his locomotive, the plaintiff must prove that the fireman was so inexperienced in the management of an engine that the placing him in charge of it was not an exercise of ordinary care; that he was guilty of mismanagement of the engine by reason of his inexperience and unskillfulness; and that such mismanagement was the proximate cause of the injuries which the plaintiff sustained.¹⁶ Evidence that one acting as *engineer* on a train to which a switchman was coupling

¹² Lovegrove v. London &c. R. Co., 16 C. B. (N. S.) 692; s. c. 33 L. J. (C. P.) 329. To the same effect, see Cotton v. Wood, 8 C. B. (N. S.) 568; s. c. 1 Thomp. Neg. (1st ed.), p. 364; Feltham v. England, L. R. 2 Q. B. 33.

¹³ St. Louis &c. R. Co. v. Corgan, 49 Ill. App. 229 (burden of proving that defendant knowingly retained an incompetent or habitually negligent servant); Chicago &c. R. Co. v. Thompson, 99 Ill. App. 277; Haley v. Western Transit Co., 76 Wis. 344; s. c. 45 N. W. Rep. 16 (holding that burden of proving competency of fellow servant and that employer furnished necessary appliances to

light the place was on the defendant); Mentzer v. Armour, 18 Fed. Rep. 373; s. c. 5 McCrary (U. S.) 617. Evidence held not sufficient to show that a carpenter handling a derrick by which another employé was injured, was incompetent for that service, or, if he was, that the master should have known of his incompetency: Gunn v. Willingham, 111 Ga. 427; s. c. 36 S. E. Rep. 804.

¹⁴ Chicago &c. R. Co. v. Myers, 83 Ill. App. 469.

¹⁵ Northern &c. R. Co. v. Mares, 123 U. S. 710; s. c. 31 L. ed. 296.

¹⁶ Core v. Ohio River R. Co., 38 W. Va. 456; s. c. 18 S. E. Rep. 596.

freight-cars in a switch-yard was a *fireman*, and not regularly engaged as an engineer, is not sufficient to show his incompetency as an engineer, where he is shown to have served as a fireman for a long time and to have run an engine in the switch-yard on several occasions.¹⁷ Evidence that it was generally known in the community that the servant from whose negligence or misconduct the injury proceeded had been guilty of *specific acts of negligence*, showing him to be unfit for the performance of his particular duties, has been held admissible for the purpose of showing that the employer knew or ought to have known of the acts of negligence after they had been done, and ought not to have retained him in his service.¹⁸ Evidence that the "pit boss" who had charge of the operation of the mine in which the plaintiff was injured had ample time and opportunity to learn of the incompetency of the miner from whose negligence the injury was alleged to have proceeded, was admissible as tending to show that the defendant company had knowledge of the incompetency of such employé.¹⁹ The uncontradicted testimony of the foreman in charge of the construction of a telegraph-line, that the erection of the telegraph-poles required special skill, and that an employé from whose unskillfulness the injury was alleged to have proceeded was incompetent, has been held sufficient to establish such incompetency.²⁰ It is scarcely

¹⁷ *Ohio &c. R. Co. v. Dunn*, 138 Ind. 18; s. c. 36 N. E. Rep. 702; 37 N. E. Rep. 546.

¹⁸ *Lambrecht v. Pfizer*, 49 App. Div. (N. Y.) 82; s. c. 63 N. Y. Supp. 591.

¹⁹ *Cherokee &c. Coal &c. Co. v. Dickson*, 10 Kan. App. 391; s. c. 61 Pac. Rep. 450.

²⁰ *Postal Tel. Cable Co. v. Coote* (Tex. Civ. App.), 57 S. W. Rep. 912 (no off. rep.). On the other hand, where it becomes necessary for the defendant to prove that the plaintiff had the same means of knowledge as the defendant had, of the incompetency of the fellow servant from whom the injury proceeded, the fact of such knowledge may be proved by circumstances, as in other cases; and it will be sufficient to prove the stated facts giving rise to the inference or presumption that he knew; but in considering whether evidence of such incompetency has come under the observation of the plaintiff, reference must be had to the fact that plaintiff's attention must to a certain extent have been engaged

in the discharge of his duties: *Daly v. Sang*, 91 Wis. 336; s. c. 64 N. W. Rep. 997. Under a declaration alleging that, by reason of defendant's negligence in permitting the walls, roof, and supports of its mine to remain defective, and in knowingly placing an incompetent and unskilled foreman in charge thereof, and that, in consequence of his lack of ordinary competency and skill, plaintiff's intestate was killed,—plaintiff was entitled to introduce evidence to prove the foreman's incompetency: *Dingee v. Unrue*, 98 Va. 247; s. c. 35 S. E. Rep. 794. Evidence sufficient to establish the competency of miners to inspect the roof of a mine to determine its safety and to remove loose earth or rock therefrom: *Fisher v. Central Lead Co.*, 156 Mo. 479; s. c. 56 S. W. Rep. 1107 (evidence showed proper inspection, and verdict for plaintiff was set aside). Under allegations that injury proceeded from the fact of an engine being put in charge of a new and incompetent engineer, to the knowledge of the defendant,—evidence on

necessary to add that the *burden of proof* that proper care was not used by the defendant in the selection of a co-servant from whose lack of skill the injury proceeded, rests, as in other cases, upon the plaintiff.²¹ Incompetency to perform a particular service,—*e. g.*, operate a hand-car,—is sufficiently proved by showing that it requires a certain degree of training to perform that service, and that the servant in question did not have such training.²²

§ 4908. **Whether Evidence of Unfitness at the Time of the Employment Makes Out a Prima Facie Case of Negligence Against the Master.**—But the question as to the kind or *quantum* of evidence which will sustain this burden of proof and make it a *prima facie* case is a different question. One court has held, in conformity with the maxim *res ipsa loquitur*, that the plaintiff sustains this burden of proof by showing that the servant from whom the injury proceeded was unfit at the time of the employment for the duties devolved upon him.²³ But other courts hold that the mere fact of the incompetency of the servant does not of itself prove that the master has been wanting in ordinary care in employing him;²⁴ and certainly this is the correct rule where nothing would indicate to the master, proceeding in the exercise of reasonable care, that the servant was not in all respects competent to fill the position to which he was assigned. It is also perfectly obvious that a master might be entrapped into employing a grossly incompetent servant, by the representations of such

which the plaintiff was properly nonsuited,—see *Barton v. Jones* (Pa.), 8 Atl. Rep. 850 (no off. rep.).

²¹ *Southern Cotton Oil Co. v. De Vond* (Tex. Civ. App.), 25 S. W. Rep. 43 (no off. rep.); *ante*, §§ 4885–4887. Circumstances under which, the evidence being in conflict as to whether the injured servant had knowledge of the incompetency of the fellow servant, or of the custom of the master to employ incompetent servants, a verdict in favor of the plaintiff was sustained: *Postal Tel. Cable Co. v. Coote* (Tex. Civ. App.), 57 S. W. Rep. 912 (no off. rep.). Not error for the court to make a distinction between incompetency and negligence, and to submit to the jury only the question of negligence, where the evidence was entirely directed to the manner in which the co-employé performed his work, and to the knowledge of the plaintiff and the defendant with respect thereto: *Olson v. North Pa-*

cific Lumber Co., 40 C. C. A. 427; s. c. 100 Fed. Rep. 384. State of pleadings and evidence under which it was not error for the court to modify a requested instruction purporting to define defendant's duties towards deceased, so as to include its duty with respect to the selection of a proper foreman: *Dingee v. Unrue*, 98 Va. 247; s. c. 35 S. E. Rep. 794.

²² *International &c. R. Co. v. Martinez* (Tex. Civ. App.), 57 S. W. Rep. 689 (no off. rep.).

²³ *Crandall v. McIlrath*, 24 Minn. 127; *Lee v. Michigan &c. R. Co.*, 87 Mich. 574; s. c. 49 N. W. Rep. 909; 48 Am. & Eng. R. Cas. 356 (servant shown to have been incompetent when employed two or three weeks before the accident—in the absence of evidence of care in his selection, no proof of master's knowledge of his incompetency necessary).

²⁴ *Thomas v. Herrall*, 18 Or. 546; s. c. 23 Pac. Rep. 497.

servant or of others that he was competent,—a thing which, no doubt, frequently happens. It has been held, in this line of thought, that, before a servant can recover in an action predicated upon this theory, he is bound to prove, not only that the fellow servant by whose negligence he was injured had previously been negligent in the discharge of his duties, but that the defendant knew of his negligence, or was negligent in not ascertaining it.²⁵ In dealing with this question it is necessary to keep in mind a governing principle, which is, that it is the *duty* of the master, in employing a servant, to exercise reasonable care, and to make a reasonable inquiry and investigation to the end of finding out whether he is fit or unfit; so that the master will be liable for an injury to a servant brought about by the negligence of a fellow servant hired by the master in entire ignorance of his qualifications, and without any inquiry in reference thereto.²⁶

§ 4909. **General Reputation of a Servant as Evidence of his Fitness or Unfitness.**—As men, in judging of the character and qualifications of other men, are often compelled to form their judgment upon the reputation which such other men have established in the community where they live, or among those with whom they have acted, and keeping in view the master's duty of finding out and knowing,—it seems reasonably to follow that the fact that the reputation of a person seeking employment from the master, among other men engaged in the same or similar employment, with respect to his competency and fitness, was bad, will be evidence to charge the master.²⁷ But with respect to the question of the acceptance of the risk or the contributory negligence of the servant who is killed or injured, the fact that the master has done his duty.²⁸ General reputation that a fellow servant is reckless is not sufficient to impute contributory negligence or acceptance of the risk to the injured servant unless such reputation is known to him.²⁹ On the other hand, the view has been taken that

²⁵ Wall v. Delaware &c. R. Co., 54 Hun (N. Y.) 454; s. c. 28 N. Y. St. Rep. 132; 7 N. Y. Supp. 709; s. c. aff'd, 125 N. Y. 727 (*mem.*); 26 N. E. Rep. 157; 35 N. Y. St. Rep. 995.

²⁶ Indiana Man. Co. v. Millican, 87 Ind. 87.

²⁷ Texas &c. R. Co. v. Johnson, 89 Tex. 519; s. c. 4 Am. & Eng. R. Cas. (N. S.) 441; 35 S. W. Rep. 1042; Calumet &c. St. R. Co. v. Peters, 88 Ill. App. 112 (bad reputation for carelessness and sobriety, in connection with evidence of specific

acts of recklessness, sufficient to take the question to the jury).

²⁸ Texas &c. R. Co. v. Johnson, 89 Tex. 519; s. c. 4 Am. & Eng. R. Cas. (N. S.) 441; 35 S. W. Rep. 1042; Calumet &c. St. R. Co. v. Peters, 88 Ill. App. 112.

²⁹ Texas &c. R. Co. v. Johnson, 90 Tex. 304; s. c. 38 S. W. Rep. 520; denying writ of error from Court of Civil Appeals, 37 S. W. Rep. 974; which decision was directed by the Supreme Court, 89 Tex. 519; 35 S. W. Rep. 1042; rev'g s. c. (Tex. Civ. App.), 34 S. W. Rep. 186.

the injured servant cannot charge his master with liability merely by showing the general reputation for incompetency or unfitness of the fellow servant whose negligence caused the injury, without showing that the master *knew or ought to have known* that the servant was incompetent and unfit to perform his particular duties; that the plaintiff must establish specific acts showing incompetency or unfitness for the particular duties; that a general knowledge in the community of specific acts is evidence tending to show the master's knowledge or opportunity for knowledge; but that evidence of the general reputation of the servant is not.⁸⁰

§ 4910. Evidence of Specific Acts of Negligence as Tending to Show Incompetency and Unfitness of the Fellow Servant.—Some of the cases cited in the preceding paragraph justify the conclusion that evidence of specific acts of negligence on the part of the servant committing the injury is admissible as tending to prove his incompetency or unfitness; and such is the conclusion of some of the courts.⁸¹ Other courts, pursuing the analogy which obtains with respect to impeach-

⁸⁰ *Lambrecht v. Pfizer*, 49 App. Div. (N. Y.) 82; s. c. 63 N. Y. Supp. 591; 97 N. Y. St. Rep. 591. This decision is believed to be untenable. Evidence of a bad reputation for recklessness in blasting held sufficient to affirm a judgment for damages recovered by the parents of a son killed through the negligence of such servant in failing to notify the deceased that a blast was about to be fired: *Stasch v. Cornwall Ore Bank Co.*, 19 Pa. Super. Ct. 113.

⁸¹ *Gier v. Los Angeles & C. R. Co.*, 108 Cal. 129; s. c. 41 Pac. Rep. 22 (specific acts to establish *fact* of unfitness, which must be shown in addition to *reputation* for unfitness); *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; s. c. 53 N. E. Rep. 733; aff'g s. c. 79 Ill. App. 456 (specific act inadmissible; but evidence tending to show that a servant *habitually performs* his work in a manner dangerous to safety of other servants is admissible); *Pittsburgh & C. R. Co. v. Ruby*, 38 Ind. 294; s. c. 10 Am. Rep. 111 (specific acts which were known or should have been known to the employer); *Couch v. Watson Coal Co.*, 46 Iowa 17 (same holding); *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330; s. c. 4 L. R. A. 776; 11 S. W. Rep. 736 (specific acts, with evidence of knowledge

thereof by master); *Baulec v. New York & C. R. Co.*, 59 N. Y. 356; s. c. 17 Am. St. Rep. 325 (specific act, from the manner of its performance or from the circumstances, may prove unfitness); *Wood v. New York & C. R. Co.*, 32 App. Div. (N. Y.) 606; s. c. 53 N. Y. Supp. 162; 87 N. Y. St. Rep. 162 (evidence was sufficient to establish a switchman's *frequent neglect* of duty, and that the defendant knew or ought to have known of the fact); *Baird v. New York & C. R. Co.*, 64 App. Div. (N. Y.) 14; s. c. 71 N. Y. Supp. 734 (railroad brakeman guilty of repeated negligence, etc.); *Wabash & C. R. Co. v. Brown*, 31 U. S. App. 192; s. c. 65 Fed. Rep. 941; 13 C. C. A. 222 (switch misplaced by drunken switchman, who had made same mistake a few weeks before, while in same condition, to company's knowledge); *Baltimore & C. R. Co. v. Camp*, 31 U. S. App. 213; s. c. 65 Fed. Rep. 952; 13 C. C. A. 233 (evidence admissible that operator, a few months before, had gone to sleep while on duty and stopped a train, for which he had been suspended); *Thomas v. Cincinnati & C. R. Co.*, 97 Fed. Rep. 245 (recklessness in handling a switch-engine in a particular instance does not prove incompetency).

ment or support of character in criminal cases, hold that evidence of specific negligence is not admissible.³² For stronger reasons, the courts which take this view hold that a single act of negligence on the part of a servant does not necessarily charge the master with notice of the servant's incompetency so as to disable the master from defending an action brought by another servant for an injury visited upon him by the negligence of the former servant; nor does a single exceptional act of negligence on the part of a servant prove him to be negligent or incapable; but, to have this effect, the negligence must be habitual and not occasional.³³ Under any theory of this question, proof of a single previous similar act of negligence on the part of the servant doing the injury will not render the master liable, in the absence of evidence that the master had notice of the previous accident,³⁴ or was culpably ignorant of it.³⁵

³² *Kennedy v. Spring*, 160 Mass. 203; s. c. 35 N. E. Rep. 779 (specific acts of negligence not admissible); *Olsen v. Andrews*, 168 Mass. 261; s. c. 47 N. E. Rep. 90 (specific acts inadmissible; but when conduct tending to show servant's qualifications, or his mental or physical fitness or unfitness for his work, is properly before the jury on one of the issues, they may consider it on the question of his competency; not competent on subject of employer's negligence in hiring him, however, without independent proof that employer ought to have discovered his incompetency); *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; s. c. 80 Am. Dec. 468 ("character for care, skill and truth of witnesses, parties or others, must all alike be proved by evidence of *general reputation*, and not of special acts"); *Galveston &c. R. Co. v. Davis*, 92 Tex. 372; s. c. 48 S. W. Rep. 570; *Spring Valley Coal Co. v. Patting*, 86 Fed. Rep. 433; s. c. 58 U. S. App. 575; 30 C. C. A. 168 (proof of the single act of negligence causing the accident is insufficient to take the case to the jury on the question of the competency of an employé). According to one of the earlier cases the reason is, that special acts very often exhibit frailties or vices that are contrary to the character which actually exists; since the very frailties proven against a man may have been subsequently regarded by him in so serious a light as to have produced

an amendment of his character in the given particular; besides, ordinary care does not exclude occasional acts of carelessness, such as all men are liable to commit: *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104, 110.

³³ *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Ohio &c. R. Co. v. Dunn*, 138 Ind. 18; s. c. 36 N. E. Rep. 702; 37 N. E. Rep. 546 (one act of negligence on his part would not raise presumption of incompetency as against the presumption that the company had exercised due care in hiring him).

³⁴ *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270; s. c. 28 Atl. Rep. 1087.

³⁵ *Huffman v. Chicago &c. R. Co.*, 78 Mo. 50 (must be shown that master knew of specific acts of carelessness testified to, or was culpably ignorant thereof). It has been held that the mere fact that an employé held a stick of frozen du-alin over a fire to thaw it will not support an action at common law by a fellow employé against the master for personal injuries resulting from an explosion, upon the theory that the act itself showed that the employé was an unsuitable person for the master to have in his employment, where he was employed merely as a common laborer, and not to handle or use explosives, and was acting at the same time in pursuance of a direction for which the master was not responsible, given by a work-

§ 4911. **Various Evidentiary Facts Tending to Prove Incompetency or Unfitness.**—In one case the plaintiff was injured by an elevator operated by a fellow servant, who was forty-one years old, of no previous acquaintance with elevators and machinery, and who had been operating the elevators in the building where the accident occurred about twelve days, after practicing for two evenings before he was employed. His experience had been in the evening, when the travel was light. He had never operated the elevator in question until the evening of the accident. It was heavier and quicker in motion than the others, and more difficult to control. There was evidence that a man fairly well qualified to run the others might be incompetent when placed in charge of this. The employer was advised by the engineer that the man would be qualified for the work with a little instruction and practice, but he made no inquiries as to how well he was instructed before allowing him to commence operating the elevator. It was held that the question of care on the part of the master in the selection of the fellow servant, and consequent liability for his negligence was for the jury.³⁶ In another case, which was an action to recover damages for injuries sustained by a brakeman on an engine engaged in drawing coal from a mine, where the engine crashed into a door which was not opened at the customary signal by reason of the alleged incompetency of the doorkeeper, who was a boy of fourteen and a half years of age, it was held that the jury might consider, as going to his competency and the care exercised by the company, the boy's size, age, previous experience, strength, and intelligence, and the fact that he was kept at his post thirteen hours a day, although the statute permits the employment of boys of such age in mines, and

man who was merely acting as foreman in the absence of the superintendent,—both the workman who gave the order and the workman who executed it being fellow servants with plaintiff: *McManus v. Staples*, 171 Mass. 150; s. c. 50 N. E. Rep. 537. Proof that five years before the accident under investigation, a person had been injured through the negligence of the servant whose negligence was alleged to have caused the injury, and that on three other occasions during the five years, persons working with him had come near being injured, was held insufficient to impute a knowledge of his negligent character to his employer: *Olsen v. North Pacific Lumber Co.*, 106 Fed. Rep. 298. It was not sufficient evi-

dence of notice of the incompetency of an employé to those having authority to hire and discharge the servants of a railroad corporation, that a freight-conductor whose negligence caused the injury in question, on a previous occasion, had by mistake carried a passenger by his stopping place, and had for that reason spoken disparagingly of himself to his employer, where it appeared that, with this exception, he had maintained a good standing during eight months' service as a conductor, and a longer period previously as brakeman: *Michigan &c. R. Co. v. Dolan*, 32 Mich. 510.

³⁶*Nutzmann v. Germania Life Ins. Co.*, 78 Minn. 504; s. c. 81 N. W. Rep. 518; s. c. on second appeal, 82 Minn. 116; 84 N. W. Rep. 730.

the difficulty of opening the door, owing to a heavy pressure of air against it, which was increased whenever a train approached.³⁷

§ 4912. **Evidence from which Incompetency or Unfitness of Fellow Servant Cannot be Inferred.**—It has been held that the fact of incompetency or unfitness of a fellow servant cannot be inferred from the mere statement that the fellow servant was incompetent, where no facts are stated showing his incompetency;³⁸ nor, in case of an injury by an inmate of an insane asylum detailed by the superintendent to assist in tearing down some brick walls, by his causing one of the walls to fall, injuring another inmate, from the mere fact of insanity,—there being no evidence that the superintendent was negligent in selecting the subordinate officer who detailed the inmates to assist at the work, nor that the inmates who worked with the plaintiff were dangerous or unwilling, nor that they were unskillfully selected, nor that the accident happened through any incompetency of the officer or of the inmates;³⁹ nor where an engineer of a mining company has been employed by such company for more than twelve years, much of the time as an engineer, during all of which period no one has been injured by his negligence, although he once failed to reverse the lever of his engine while employed at another kind of hoist than that at which he is at present employed, and during all the time he has answered signal-bells constantly, without making any other mistakes, until the time of the present accident, and is sober and industrious;⁴⁰ nor, from the mere fact that a railroad engineer is nearsighted, that he is an improper person for the duty; because if, by the use of proper glasses, he can see sufficiently well to enable him to discharge all the duties devolving upon an engineer in operating an engine, and he in fact uses such glasses, the company would not be considered negligent on that account by retaining him in its service;⁴¹ nor, where the issue was whether a railway company was negligent in retaining in its employ a brakeman who was careless, from evidence that he was slow and lazy, and that the company knew this;⁴² nor from evidence that the yardmaster of one railroad company, who was short a man, employed

³⁷ *Carlson v. Wilkeson Coal & Co.*, 19 Wash. 473; s. c. 53 Pac. Rep. 725. See also, *Houston & C. R. Co. v. Patton* (Tex.), 9 S. W. Rep. 175 (no off. rep.) (evidence to charge railway company with notice of the incompetency of a locomotive-engineer).

³⁸ *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228; s. c. 37 W. N. C. (Pa.) 544; 33 Atl. Rep. 1104; 27 Pitts. L. J. (N. S.) 37.

³⁹ *Atkinson v. Clark*, 132 Cal. 476; s. c. 64 Pac. Rep. 769.

⁴⁰ *McKeever v. Homestake Min. Co.*, 10 S. D. 599; s. c. 74 N. W. Rep. 1053.

⁴¹ *Texas & C. R. Co. v. Harrington*, 62 Tex. 597.

⁴² *Corson v. Maine Cent. R. Co.*, 76 Me. 244 (the same witness that testified he was slow and lazy, also testified that "he was always careful about his work").

a switchman on the statement of the yardmaster of another company that he had one that he was done with and whom the former yardmaster could have, about an hour before an accident to a fellow servant occasioned in part by the negligence of such switchman.⁴⁸

§ 4913. Evidence of Unfitness as Tending to Show that the Particular Servant did the Mischief.—It has been held that, to entitle a servant to recover from the master for an injury on the ground that it resulted from the negligence of an incompetent fellow servant, for whose employment or retention in the service the defendant was chargeable with negligence, it must be definitely shown that it was in fact the negligence of such person which caused the injury; and proof which goes no further than to show his known incompetency, or that the act of negligence was committed either by him or by another fellow servant, does not warrant an inference that the negligence was his, and is insufficient to fix liability on the defendant.⁴⁴

§ 4914. Effect of Certificate of Competency Given by Public Examiners.—A certificate of competency given to an engineer by the State board of mine examiners is not conclusive as to his competency, as between his employer and another employé, notwithstanding the law prohibits a mine-owner from employing a hoisting-engineer not having such a certificate.⁴⁵

⁴⁴ *Ohio &c. R. Co. v. Dunn*, 138 Ind. 18; s. c. 36 N. E. Rep. 702; 37 N. E. Rep. 546. In an action by an administrator to recover damages from a railroad company for the killing of H., a fireman, through B's misplacing a switch, B. being alleged to be an incompetent switchman, evidence that B. had for three months preceding the accident performed the duties without fault or neglect, and was of ordinary intelligence, was held to warrant a finding that he was competent; and his neglect to close the switch being through inattention while conversing, and not through inability to perform his duties, plaintiff could not recover for results of the co-servant's negligence; and this, though at the time of transferring B. to this duty, the company had left only three employés, including B., to perform the work previously assigned to six, having discharged the others,—this fact not contributing to the accident: *Harvey v. New York &c. R. Co.*, 88 N. Y. 481; rev'g s. c. 25 Hun (N. Y.) 62. A finding in an action for personal injuries to an employé that

a fellow servant was incompetent, that he was retained by defendant after notice of such incompetency an unreasonable length of time, and that the accident was caused by his suddenly opening a surface blow-off valve of the boilers under plaintiff's supervision,—is not a sufficient finding that defendant's retention of the incompetent employé was the proximate cause of the injury; because that might all be true, and yet the bursting of the glass from such a cause might be such an extraordinary occurrence that it would not follow that, under the circumstances, it reasonably should have been foreseen. The fact of proximate cause was not found by the jury; and the court erred in not submitting a question calling for this essential finding: *Maitland v. Gilbert Paper Co.*, 97 Wis. 476; s. c. 72 N. W. Rep. 1124.

⁴⁵ *Brady v. Western Union Tel. Co.*, 113 Fed. Rep. 909; s. c. 51 C. C. A. 539.

⁴⁶ *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; s. c. 53 N. E. Rep. 733; aff'g s. c. 79 Ill. App. 456.

CHAPTER CXXV.

WHO ARE AND WHO ARE NOT FELLOW SERVANTS WITHIN THIS DOCTRINE.

ART. I. General Theories and Suggestions, §§ 4917-4921.

ART. II. Servants Appointed to Perform the Absolute and Unassignable Duties of the Master, §§ 4923-4935.

ART. III. Superior and Inferior Servants, §§ 4938-4966.

ARTICLE I. GENERAL THEORIES AND SUGGESTIONS.

SECTION

4917. The general rule stated.

4918. Theory of "dual relationship."

4919. Servants engaged in different grades of employment under a common master.

4920. Notice to or knowledge of one servant not imputable to a fellow servant.

SECTION

4921. When master responsible for acts of authority exercised by one servant over another, in directing or controlling him.

§ 4917. **The General Rule Stated.**—The rule quoted by the greatest number of adjudged cases is that all who serve a common master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who, under the rule under consideration, are deemed to take the risk of each other's negligence.¹ It is said that subjection to control and direction by the same general master in the same common object, and not the fact that employes are *paid* by the same general master, is the test of fellow service.²

¹ *Wonder v. Baltimore &c. R. Co.*, 32 Md. 411, 417; s. c. 3 Am. Rep. 143; *Farwell v. Boston &c. R. Co.*, 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924; *Foster v. Minnesota &c. R. Co.*, 14 Minn. 360; *Jackson v. Norfolk &c. R. Co.*, 43 W. Va. 380; s. c. 2 Chic. L. J. Wkly. 300; 27 S. E. Rep. 278; 6 Am. & Eng. R. Cas. (N. S.) 455; *post*, §§ 4919, 4938, *et seq.*

² *Ingram v. Hilton &c. Lumber Co.*, 108 Ga. 194; s. c. 33 S. E. Rep. 961.

§ 4918. **Theory of "Dual Relationship."**—What has been sometimes called the "theory of dual relationship" with respect to the fellow-servant doctrine, is that whether the servant through whose negligence injury is inflicted upon another servant, is to be regarded as a fellow servant of the injured servant or as a vice-principal of the master, depends not upon the rank or grade of the servant inflicting the injury, nor on the relative rank or grade of the two servants with respect to each other, but upon the *character of the act* which the servant inflicting the injury was doing at the time. If it was an *act of service*, then, in jurisdictions where the fellow-servant doctrine prevails, the master is not liable, although the servant inflicting the injury may be, for general purposes, a representative of the master and his *alter ego* or vice-principal; but if it was an *act of vice-principals*, an act done in the discharge of some duty which the law devolves primarily upon the master, and which is unalienable, then the master will be liable, although the servant inflicting the injury may be of the lowest grade in his service. Out of these considerations springs what is called the "doctrine of dual relationship" of a servant. The meaning is that the same servant may be, with respect to acts of a certain kind, a fellow servant of the others, and with respect to acts of another kind, a vice-principal of the master. Thus, the negligence of one occupying generally the position of vice-principal to servants employed under him, in failing to provide safe and proper appliances, is chargeable to the master, although, in handling such appliances, he may be a fellow servant.³ So, although a *foreman of work* is, so far as mere acts of service are concerned, generally deemed a fellow servant of those working under him, yet so far as concerns the master's duty of providing safe appliances, he is the vice-principal of the master, and not a fellow servant of another servant working under him.⁴ So, an employé, while running an engine, is a fellow servant of another employé engaged in putting belts upon pulleys on a shafting operated by the engine, especially where the latter gives the signal to the engineer when to start and when to stop, although the engineer is also foreman and has charge of the latter, and in some respects, *e. g.*, the maintenance of the signal-appli-

³ Gann v. Railroad Co., 101 Tenn. 380; *s. c. sub nom.* Nashville & C. R. Co. v. Gann, 47 S. W. Rep. 493.

⁴ The failure of a company's foreman to secure a pump, which he knew was out of repair, so as to prevent injury to an infant apprentice who was wrongfully directed

to work the pump, was the failure of the company, for which it was responsible: Stimper v. Fuchs & Co. Man. Co., 26 App. Div. (N. Y.) 333; *s. c.* 83 N. Y. St. Rep. 785; 49 N. Y. Supp. 785; *s. c. aff'd*, 161 N. Y. 636 (*mem.*); 57 N. E. Rep. 1125.

ance in a proper condition for the belt-adjuster's safety, is a vice-principal of the latter.⁵

§ 4919. Servants Engaged in Different Grades of Employment under a Common Master.—The fact that the negligent servant, in his grade of employment, is superior to the servant injured, does not, in the opinion of most of the courts, take the case out of the rule; they are equally fellow servants, and the master is not liable.⁶

§ 4920. Notice to or Knowledge of one Servant Not Imputable to a Fellow Servant.—From this it follows that, although one servant may be compelled to suffer without redress for the negligence of a fellow servant, yet notice of a fact communicated to one servant, or knowledge of a fact possessed by one servant, is not imputable to a fellow servant in theory of law. Thus, where one servant is injured in consequence of a defect in an appliance which the master ought to have discovered and remedied, the fact that a fellow servant knew of the defect does not affect the rights of the injured servant, he not being aware of it.⁷ It is a part of this doctrine that the failure of a servant having knowledge of a dangerous defect to report the fact to the master, is not the kind of negligence of a fellow servant which is imputable to the servant injured.⁸

⁵ *National Fertilizer Co. v. Travis*, 102 Tenn. 16; s. c. 49 S. W. Rep. 832.

⁶ *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255; *Columbus & C. R. Co. v. Arnold*, 31 Ind. 174; s. c. 99 Am. Dec. 615; *Thayer v. St. Louis & C. R. Co.*, 22 Ind. 26; s. c. 85 Am. Dec. 409, per Perkins, J.; *Lawler v. Androscoggin R. Co.*, 62 Me. 463; s. c. 16 Am. Rep. 492; *O'Connell v. Baltimore & C. R. Co.*, 20 Md. 212; s. c. 83 Am. Dec. 549; *Cumberland Coal & C. Co. v. Scally*, 27 Md. 589; *Shauck v. Northern & C. R. Co.*, 25 Md. 462; *O'Connor v. Roberts*, 120 Mass. 227; *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *McGowan v. St. Louis & C. R. Co.*, 61 Mo. 528; *Daubert v. Pickel*, 4 Mo. App. 590; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Conway v. Belfast & C. R. Co.*, 1 R. 9 C. L. 498; *Murphy v. Smith*, 19 C. B. (N. S.) 361; s. c. 12 L. T. (N. S.) 605; *Allen v. New Gas Co.*, 1 Exch. Div. 251; *Howells v. Landore Siemens Steel*

Co., L. R. 10 Q. B. 62; s. c. 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Week. Rep. 335; 31 L. T. (N. S.) 433; *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Feltham v. England*, L. R. 2 Q. B. 33; rev'g s. c. 4 Fost. & Fin. 460; *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 326. See also cases cited *ith explanations, post*, § 4938, *et seq. Contra*: *Louisville & C. R. Co. v. Collins*, 2 Duv. (Ky.) 114; s. c. 87 Am. Dec. 486, where it was ruled that a railway-engineer and a common laborer were not fellow servants within the rule.

⁷ *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611. See also, *Richardson v. Cooper*, 88 Ill. 270 (notice of a defect given to a fellow servant, superintendent of another branch of the work, not imputable to the injured servant); *Illinois & C. R. Co. v. Pirtle*, 47 Ill. App. 498 (brakeman not chargeable with knowledge of the defective condition of the wheels of the tender because the engineer, who is a fellow servant, has notice of it).

⁸ *Monmouth Min. & C. Co. v. Er-*

§ 4921. When Master Responsible for Acts of Authority Exercised by One Servant over Another in Directing or Controlling Him.—In some jurisdictions acts of authority exercised by the authorization of the master by one servant over another are deemed the acts of the master, and not those of a fellow servant;⁹ but the conclusion is different where they are engaged in a common employment.¹⁰ But it seems that the authorized power of one servant to control the actions of the others will not render the common master liable for his negligence whereby one of the others is injured, unless the negligence arises out of and is the direct result of the exercise of such authority: if it is a mere act of fellow service, the master will not be liable.¹¹

ARTICLE II. SERVANTS APPOINTED TO PERFORM THE ABSOLUTE AND UNASSIGNABLE DUTIES OF THE MASTER.

SECTION

4923. Grade or rank of servant not the controlling test, but the test is the character of the act.

4924. Servant charged with the primary or absolute duties of the master is a vice-principal and not a fellow servant.

4925. Provided the injury results from the negligent discharge of those duties, and not from a mere act of fellow service.

4926. Of this nature is the duty of inspection and repair.

4927. Duty of inspection a positive and non-assignable duty.

SECTION

4928. Master cannot devolve this duty upon others, so as to exonerate himself.

4929. Fellow servant charged with this duty becomes a vice-principal of the master.

4930. Master not exonerated from the performance of such duties by the employment of competent servants or agents to perform them.

4931. Negligence of independent contractor with respect to such duties is negligence of master.

ling, 148 Ill. 521; s. c. 39 Am. St. Rep. 187; 36 N. E. Rep. 117; aff'g s. c. 45 Ill. App. 411. But see Atchison &c. R. Co. v. Martin, 7 N. M. 158; s. c. 34 Pac. Rep. 536 (knowledge possessed by the foreman of section-men of the existence of a rule of the company, the violation of which caused the injury, imputable to the injured man, although he was ignorant of it). Compare Covey v. Hannibal &c. R. Co., 27 Mo. App. 170 (where a contrary conclusion was reached).

⁹Consolidated Coal Co. v. Wombacher, 134 Ill. 57; s. c. 24 N. E. Rep. 627 (negligent exercise of au-

thority by "pit-boss" in coal mine, causing injury to a laborer in the mine).

¹⁰Klochinski v. Shores Lumber Co., 93 Wis. 417; s. c. 67 N. W. Rep. 934.

¹¹Chicago &c. R. Co. v. Touhy, 26 Ill. App. 99 (switchman injured through negligence of engineer in carrying out alleged negligent order of foreman of switching-gang, the order being given as that of a fellow servant, and not as that of a representative of the master, and the engineer being under no duty to obey such order implicitly).

SECTION

4932. Negligence of master in failing to perform a non-assignable duty commingling with negligence of fellow servant—Master liable.

4933. Various applications of the foregoing doctrine.

SECTION

4934. Decisions which exonerate the employer, where he employs suitable agents to perform such duties.

4935. Liability of employer for negligence of servant employed to warn and instruct other servants.

§ 4923. **Grade or Rank of Servant Not the Controlling Test, but the Test is the Character of the Act.**—It must be carefully borne in mind that the comparative grade or rank of the servant inflicting the injury and of the servant receiving the injury is not the controlling test by which to determine whether or not the master is liable, but it is the *character of the negligent act or omission*; so that when a servant of whatever grade or rank in the service, even the lowest, is charged by the master with the performance of duties in favor of his other servants which the law requires the master to perform, to the end of promoting their safety, and such servant, while in the performance of those duties, inflicts a negligent injury upon another servant, the master will be answerable in damages for it on the ground that the servant inflicting the injury is his vice-principal, and not a fellow servant with the one receiving the injury.¹

¹ Davis v. Southern Pac. Co., 98 Cal. 19; s. c. 35 Am. St. Rep. 133; 32 Pac. Rep. 708 (under a statute which was held to prescribe the same test); McElligott v. Randolph, 61 Conn. 157; s. c. 29 Am. St. Rep. 181 (master liable for negligence of a foreman over unskilled men in leaving them to do work alone that required supervision, whereby a workman was injured through selecting an insufficient appliance); Robertson v. Chicago & C. R. Co., 146 Ind. 486; s. c. 45 N. E. Rep. 655; 6 Am. & Eng. R. Cas. (N. S.) 611 (test is not the difference of rank or even the power to control or to employ and discharge); Kerney v. Baltimore & C. R. Co., 149 Ind. 21; s. c. 9 Am. & Eng. R. Cas. (N. S.) 328; 48 N. E. Rep. 364; New Pittsburg Coal & C. Co. v. Peterson, 136 Ind. 398; s. c. 35 N. E. Rep. 7; 43 Am. St. Rep. 327; Peirce v. Oliver, 18 Ind. App. 87; s. c. 47 N. E. Rep. 485; Stucke v. Orleans R. Co., 50 La. An. 172; s. c. 23 South. Rep. 342 (negligent failure of foreman to perform duty owing by the

master is not imputable to a servant injured by reason thereof); Small v. Allington & C. Man. Co., 94 Me. 551; s. c. 48 Atl. Rep. 177 (holding that the master's liability to one servant for the negligence of another in no way depends upon the superior rank of the negligent servant); Dube v. Lewiston, 83 Me. 211; Harrison v. Detroit & C. R. Co., 79 Mich. 409; s. c. 7 L. R. A. 623; 19 Am. St. Rep. 180 (but the case was decided against the employer on the ground that the negligent servant had full control and authority over a distinct department or division of the business); Carlson v. Northwestern Teleph. & C. Co., 63 Minn. 428; s. c. 2 Am. & Eng. Corp. Cas. (N. S.) 675; 65 N. W. Rep. 914; Lindvall v. Woods, 41 Minn. 212; s. c. 4 L. R. A. 793; 42 N. W. Rep. 1020; Kelley v. Cable Co., 7 Mont. 70; s. c. 14 Pac. Rep. 633; Loughlin v. State, 105 N. Y. 159; s. c. 11 N. E. Rep. 271 (character of act determines the relation); Kain v. Smith, 25 Hun (N. Y.) 146; Tendrup v. John Stephen-

§ 4924. **Servant Charged with the Primary or Absolute Duties of the Master is a Vice-Principal and Not a Fellow Servant.**—The meaning is that there are certain primary or absolute duties which the law casts upon the master to the end of protecting his servants, and that the servant, of whatever grade, to whom the master delegates the performance of those duties is his vice-principal, and not a fellow servant with the servant who may be injured through his negligence in their performance. Another way of stating the same proposition is to say that duties of this nature cannot be delegated by the master to a servant so as to escape responsibility to other servants for their careful performance.² It is also a part of this doctrine that a

son Co., 51 Hun (N. Y.) 462; s. c. aff'd, 121 N. Y. 681 (*mem.*); *Hankins v. New York & C. R. Co.*, 142 N. Y. 416; s. c. 25 L. R. A. 396; 40 Am. St. Rep. 616; *Crispin v. Bab-bitt*, 81 N. Y. 516; s. c. 37 Am. Rep. 521; *Slater v. Jewett*, 85 N. Y. 61; s. c. 39 Am. Rep. 627; *Hussey v. Coger*, 112 N. Y. 614; s. c. 3 L. R. A. 559; 8 Am. St. Rep. 787; *Ell v. Northern Pac. R. Co.*, 1 N. D. 336; s. c. 12 L. R. A. 97; 43 Alb. L. J. 414; 48 N. W. Rep. 222; 26 Am. St. Rep. 621; *Anderson v. Bennett*, 16 Or. 515; s. c. 8 Am. St. Rep. 311; 19 Pac. Rep. 765 (duty to avoid exposing the servant to a serious danger not contemplated by the contract of service—servant to whom this duty is delegated is a vice-principal, no matter by what name called); *Mast v. Kern*, 34 Or. 247; s. c. 5 Am. Neg. Rep. 88; 54 Pac. Rep. 950; 75 Am. St. Rep. 580; *Jenkins v. Richmond & C. R. Co.*, 39 S. C. 507; s. c. 18 S. E. Rep. 182; 39 Am. St. Rep. 750; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711; s. c. 18 S. W. Rep. 387; *Allen v. Goodwin*, 92 Tenn. 385; *Galveston & C. R. Co. v. Smith*, 76 Tex. 611; s. c. 13 S. W. Rep. 562; 18 Am. St. Rep. 78; *Norfolk & C. R. Co. v. Donnelly*, 88 Va. 853; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; s. c. 3 Am. St. Rep. 92; *Core v. Ohio River R. Co.*, 38 W. Va. 456; s. c. 18 S. E. Rep. 596; *Jackson v. Norfolk & C. R. Co.*, 43 W. Va. 380; s. c. 2 Chic. L. J. Wkly. 300; 27 S. E. Rep. 278; 6 Am. & Eng. R. Cas. (N. S.) 455; *Stockmeyer v. Reed*, 55 Fed. Rep. 259; s. c. 47 Alb. L. J. 488 (holding that if the negligence of a *foreman* took place in

the performance of work which properly pertained to the duties of a servant rather than to those of a master, they were fellow servants); *Harley v. Louisville & C. R. Co.*, 57 Fed. Rep. 144 (to be vice-principal he must stand for and represent the corporation as the superintending and commanding head of one of the separate and distinct departments of its service).

² *Kansas City & C. R. Co. v. Becker*, 67 Ark. 1; s. c. 53 S. W. Rep. 406; 77 Am. St. Rep. 78; 46 L. R. A. 814 (duty to inspect, discover and repair defective step on the side of the cab of a locomotive); *Fones v. Phillips*, 39 Ark. 17; 43 Am. Rep. 264 (negligence of a foreman as such does not necessarily render the master liable); *Trask v. California & C. R. Co.*, 63 Cal. 96 (duty of railroad company with respect to the construction of its road); *Beeson v. Green Mt. Gold Min. Co.*, 57 Cal. 20 (superintendent, when not a fellow employé under Cal. Civ. Code, § 1970); *Mullin v. California Horseshoe Co.*, 105 Cal. 77; s. c. 38 Pac. Rep. 535 (duty of furnishing reasonably safe and suitable place to work in and reasonably safe and suitable appliances to work with); *Elledge v. National City & C. R. Co.*, 100 Cal. 282; s. c. 34 Pac. Rep. 720; 38 Am. St. Rep. 290; rehearing denied, 34 Pac. Rep. 852 (knowledge of servant to whom such duty is delegated is the knowledge of the master); *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417; s. c. 49 Pac. Rep. 559 (master cannot delegate the duty to provide his servants with suitable appliances and a safe place to work

master cannot exonerate himself from the performance of a duty

and to use due care in the selection of fit and competent employes, so as to avoid liability for the negligent performance thereof); *Matthews v. Bull* (Cal.), 47 Pac. Rep. 773 (no off. rep.) (selection and retention of competent servants—duty of master); *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363; s. c. 48 Pac. Rep. 503 (duty of furnishing reasonably safe machinery and of keeping the same in reasonable repair); *Murphy v. Hughes*, 1 Pen. (Del.) 250; s. c. 40 Atl. Rep. 187 (duty of furnishing competent and trustworthy fellow servants); *Baltimore & C. R. Co. v. Elliott*, 9 App. (D. C.) 341; s. c. 24 Wash. L. Rep. 760 (duty of inspection); *McCauley v. Southern R. Co.*, 10 App. (D. C.) 560; s. c. 25 Wash. L. Rep. 331 (duty of furnishing reasonably safe appliances and keeping them in proper repair); *Camp v. Hall*, 39 Fla. 535; s. c. 22 South. Rep. 792 (duty of furnishing reasonably safe machinery and appliances, reasonably safe place to work, and of warning and instructing against special dangers, especially where servant is young and inexperienced); *Chicago & C. R. Co. v. Kneirim*, 152 Ill. 458; s. c. 39 N. E. Rep. 324; 43 Am. St. Rep. 259 (master's duty of supervision and inspection of appliances cannot be delegated); *Goldie v. Werner*, 50 Ill. App. 297; s. c. aff'd, 151 Ill. 551; 38 N. E. Rep. 95 (duty to use reasonable care in the selection of materials to be used in erecting a scaffold); *McBeath v. Rawle*, 93 Ill. App. 212 (duty of providing safe scaffolding is a personal duty of the master—compare *ante*, § 3947, *et seq.*); *Leonard v. Kinnare*, 174 Ill. 532; s. c. 51 N. E. Rep. 688; aff'g s. c. 75 Ill. App. 145 (duty to exercise reasonable care to provide safe instrumentalities with which to work is a positive obligation which cannot be delegated so as to escape responsibility for its non-performance); *Edward Hines Lumber Co. v. Ligas*, 68 Ill. App. 523; s. c. 2 Chic. L. J. Wkly. 160 (duty of exercising reasonable care that the machinery, appliances, and place to work supplied to the servant are reasonably safe); *Kewanee Boiler Co. v. Erickson*, 78 Ill. App. 35; *Kirk v. Senzig*, 79 Ill. App. 251 (negligence of foreman in failing to warn elevator-man of the presence of a workman in an elevator-shaft); *LaSalle v. Kostka*, 190 Ill. 130; s. c. 60 N. E. Rep. 72; aff'g s. c. 92 Ill. App. 91; *Libby v. Scherman*, 50 Ill. App. 123; s. c. aff'd, 146 Ill. 540; 34 N. E. Rep. 801; 37 Am. St. Rep. 191; *Lauter v. Duckworth*, 19 Ind. App. 535; s. c. 48 N. E. Rep. 864 (duty of furnishing a reasonably safe place for the servant to work); *Indiana Iron Co. v. Cray*, 19 Ind. App. 565; s. c. 43 N. E. Rep. 803 (duty of maintaining reasonably safe place for servant to work); *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; s. c. 9 West. Rep. 825; 12 N. E. Rep. 380; *Cole v. Wood*, 11 Ind. App. 37; s. c. 36 N. E. Rep. 1074 (employer cannot free himself from liability for the performance of his duties by dividing them among various subordinates); *Indiana & C. R. Co. v. Snyder*, 140 Ind. 647; s. c. 39 N. E. Rep. 912 (notice to a servant employed as an inspector to examine lumber out of which handles for hand-cars are made is the knowledge of the railway company; duty of placing suitable materials in the handles of hand-cars not discharged by employing an inspector to examine the lumber out of which handles are made; carpenter employed by a railway company to make and place handles on its hand-cars is a vice-principal as to one employed on the hand-car; and notice to the former of the unsuitable condition of timber put in a handle is notice to the company); *Taylor v. Evansville & C. R. Co.*, 121 Ind. 124; s. c. 22 N. E. Rep. 876; 6 L. R. A. 584; 7 Rail. & Corp. L. J. 125; 41 Alb. L. J. 173; 41 Am. & Eng. R. Cas. 437; 16 Am. St. Rep. 372; *Louisville & C. R. Co. v. Miller*, 140 Ind. 685; s. c. 40 N. E. Rep. 116 (duty of railway company to furnish safe cars and safe track not cast off by delegating it to a fellow servant); *Blondin v. Oolitic Quarry Co.*, 11 Ind. App. 395; s. c. 37 N. E. Rep. 812 (duty to an employé engaged in dressing stone to place the stone on a solid and steady surface, not discharged by delegating it to another employé); *Kerney v. Balti-*

of this nature in favor of his employés by employing an *independent contractor* to perform the duty.³

more &c. R. Co., 149 Ind. 21; s. c. 9 Am. & Eng. R. Cas. (N. S.) 328; 48 N. E. Rep. 364; Krueger v. Louisville &c. R. Co., 111 Ind. 51; s. c. 9 West. Rep. 249; 11 N. E. Rep. 957, and authorities cited (duty of supplying safe machinery); Cherokee &c. Coal &c. Co. v. Britton, 3 Kan. App. 292; s. c. 45 Pac. Rep. 100; Kansas City &c. R. Co. v. Kier, 41 Kan. 671; s. c. 21 Pac. Rep. 770 (duty of a railway company to keep its road in reasonable repair); Atchison &c. R. Co. v. McKee, 37 Kan. 592; s. c. 15 Pac. Rep. 484 (servant employed to inspect, repair and provide machinery for other servants to op-

erate is the representative of the master, and not a fellow servant); Atchison &c. R. Co. v. Moore, 29 Kan. 632; Stucke v. Orleans R. Co., 50 La. An. 188; s. c. 23 South. Rep. 342 (duty of furnishing reasonably safe place for servant to work and reasonably safe and suitable tools with which to work); Ferris v. Hershheim, 51 La. An. 178; s. c. 24 South. Rep. 771 (duty of maintaining a safe stairway in a factory); Hall v. Emerson-Stevens Man. Co., 94 Me. 445; s. c. 47 Atl. Rep. 924 (duty of adjusting a grindstone which exploded was a duty of the master, for the negli-

³ Post, § 4931; Herdler v. Buck's Stove &c. Co., 136 Mo. 3; s. c. 37 S. W. Rep. 115; Sackewitz v. American Biscuit &c. Co., 78 Mo. App. 144; s. c. 2 Mo. App. Repr. 192. One authoritative court has held that the common-law duty resting upon an employer of maintaining ways and appliances reasonably safe for the employés' use may be delegated by its commission to competent agents; and, consequently, that a *complaint* which avers negligence in respect to such maintenance to have been that of a person in the same common service, who is entrusted by the employer with the duty of maintenance, does not show a breach of such common-law duty, when there is no averment of negligence in the selection of such person: Woodward Iron Co. v. Cook, 124 Ala. 349; s. c. 27 South. Rep. 455. But this seems quite opposed to the doctrine of the foregoing cases, and, consequently, unsound. Another court, according to its official syllabus, has held that a coal mine, being a place in which conditions are constantly changing, is not a *place* furnished by the master for the employés, within the spirit of those decisions which deny the right of the master to delegate to a servant the duty of providing a safe place for his employés: Coal &c. Co. v. Clay, 51 Ohio St. 542; s. c. *sub nom.* Consolidated Coal &c. Co. v. Floyd, 25 L. R. A. 848; 32 Ohio L. J. 355; 2 Ohio Leg. N. 75; 38 N. E. Rep. 610. This decision seems to be equally

untenable. There does not seem to be anything in the nature of a coal mine to take it out of the general rule in this respect. The decision of another court that where a railroad company employed competent inspectors to see that foreign cars coming upon its roads were in a reasonably safe condition, it was exonerated on the principle that the inspector was a fellow servant of a brakeman injured through his negligence (Smith v. Potter, 46 Mich. 258; s. c. 41 Am. Rep. 161), is equally unsound, since the duty was an unalienable duty of the railway company. Still another decision is to the effect that a railway *trainman* is a fellow servant of a conductor with respect to the duty of furnishing a brakeman his links to be used in coupling cars, so that the railway company is not liable for his negligence in furnishing a defective link, there being plenty of good links available: Young v. Boston &c. R. Co., 168 Mass. 219; s. c. 46 N. E. Rep. 624. Another decision is to the effect that a master who employs a servant to keep tools in repair and to replace them with others when necessary, is not liable to another servant in consequence of his using a tool after it has become dull on account of the neglect of the former servant to replace it with another: Webber v. Piper, 109 N. Y. 496; s. c. 17 N. E. Rep. 216,—a decision which seems untenable.

§ 4925. Provided the Injury Results from the Negligent Discharge of those Duties, and Not from a Mere Act of Fellow Service.—But it

gent performance of which he was liable); *Frye v. Bath Gas &c. Co.*, 94 Me. 17; s. c. 46 Atl. Rep. 804 (duty of furnishing safe place—leaving a hole uncovered in front of a steam-boiler); *Donnelly v. Booth Bros. &c. Granite Co.*, 90 Me. 110; s. c. 37 Atl. Rep. 874 (duty of owner of quarry to furnish a safe rope to suspend a platform to be used in loading a vessel—liable although the rope which broke was selected by a co-employé); *Small v. Allington &c. Man. Co.*, 94 Me. 551; s. c. 48 Atl. Rep. 177; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c. 37 Am. Rep. 343 (railroad company liable for injury to a brakeman from the falling of a derrick erected by its other servants by the side of the track, and negligently allowed to remain there for an unreasonable length of time); *Moynihan v. Hills Co.*, 146 Mass. 586; s. c. 4 Am. St. Rep. 348; *Kelley v. Norcross*, 121 Mass. 508 (but where master has furnished suitable and safe materials, he is not liable for their negligent use); *Ford v. Fitchburg R. Co.*, 110 Mass. 240; s. c. 14 Am. Rep. 598; *Sadowski v. Michigan Car Co.*, 84 Mich. 100; s. c. 47 N. W. Rep. 598 (negligence of a person employed to lay a water-pipe in a ditch through a lumber-yard which it was the duty of the master to keep in a reasonably safe condition, in leaving such yard in a dangerous condition, is the negligence of the master); *Roux v. Blodgett &c. Lumber Co.*, 94 Mich. 607; s. c. 54 N. W. Rep. 492 (duty of looking after the safety of the place where other servants work); *Ashman v. Flint &c. R. Co.*, 90 Mich. 567; s. c. 51 N. W. Rep. 645 (notice to a yardmaster of a defective frog is notice to the company); *Harrison v. Detroit &c. R. Co.*, 79 Mich. 409; s. c. 44 N. W. Rep. 1034; 7 L. R. A. 623; 19 Am. St. Rep. 180; 41 Am. & Eng. R. Cas. 398; *Balhoff v. Michigan &c. R. Co.*, 106 Mich. 606; s. c. 2 Det. Leg. N. 723; 28 Chic. Leg. N. 166; 65 N. W. Rep. 592 (duty of railway company to provide a safe track—immaterial that reparation was entrusted to a competent fellow servant); *Thomas v.*

Ann Arbor R. Co., 114 Mich. 59; s. c. 4 Det. Leg. N. 485; 72 N. W. Rep. 40 (an employer who delegates a foreman to select rope from an abundance of suitable material, and take it away to a distance for use by the employés, is liable for his negligence in selecting defective rope) [*distinguishing Prescott v. Ball Engine Co.*, 176 Pa. St. 459; s. c. 53 Am. St. Rep. 683]; *Carlson v. Northwestern Teleph. &c. Co.*, 63 Minn. 428; s. c. 2 Am. & Eng. Corp. Cas. (N. S.) 675; 65 N. W. Rep. 914; *Kelly v. Erie Tel. &c. Co.*, 34 Minn. 321 (duty of furnishing safe machinery); *Lindvall v. Woods*, 41 Minn. 212; s. c. 4 L. R. A. 793; 42 N. W. Rep. 1020; *Brown v. Winona &c. R. Co.*, 27 Minn. 162; s. c. 38 Am. Rep. 285; *Sackewitz v. American Biscuit &c. Co.*, 78 Mo. App. 144; s. c. 2 Mo. App. Rep. 192 (master cannot relieve himself from responsibility by delegating duty to an independent contractor); *Donahoe v. Kansas City*, 136 Mo. 657; s. c. 38 S. W. Rep. 571 (immaterial that directions with respect to bracing the sides of the trench were given to a fellow servant of the person injured, the duty being that of the master); *Herdler v. Buck's Stove &c. Co.*, 136 Mo. 3; s. c. 37 S. W. Rep. 115 (master cannot relieve himself of the duty of exercising ordinary care to provide reasonably safe appliances for his servants, by the employment of superintendents or independent contractors to provide such appliances); *Rodney v. St. Louis &c. R. Co.*, 127 Mo. 676; s. c. 28 S. W. Rep. 887; s. c. aff'd, 30 S. W. Rep. 150 (duty of taking measures to prevent injury to employés through a car discovered to be defective); *Coontz v. Missouri Pac. R. Co.*, 121 Mo. 652; s. c. 26 S. W. Rep. 661 (railway company cannot delegate to an engineer its duty to inspect the wheels of its engine so as to relieve it from liability for injuries to a conductor caused by the engine being thrown down an embankment by the breaking of a defective wheel); *Bowen v. Chicago &c. R. Co.*, 95 Mo. 268; s. c. 14 West. Rep. 744; 8 S. W. Rep. 230 (duty of keeping

must be understood that the doctrine of the preceding section applies only in cases where the injury visited by the negligence of the su-

bridge in repair); *Dutzi v. Geisel*, 23 Mo. App. 676; *Maher v. Thropp*, 59 N. J. L. 186; s. c. 35 Atl. Rep. 1057 (duty of furnishing suitable implements); *Hustis v. James A. Banister Co.*, 63 N. J. L. 465; s. c. 43 Atl. Rep. 651; s. c. 6 Am. Neg. Rep. 318 (master cannot delegate duty of exercising reasonable care to the end of supporting overhead shaftings by delegating its performance to an engineer placed in charge of the machinery); *Addicks v. Christoph*, 62 N. J. L. 786; s. c. 72 Am. St. Rep. 685; 6 Am. Neg. Rep. 117; 43 Atl. Rep. 196 (duty to warn and instruct); *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647; s. c. 44 Atl. Rep. 762 (duty of furnishing a safe ladder); *Cole v. Warren Man. Co.*, 63 N. J. L. 626; s. c. 44 Atl. Rep. 647 (duty of furnishing safe appliances); *Strauss v. Harberman Man. Co.*, 23 App. Div. (N. Y.) 1; s. c. 48 N. Y. Supp. 425 (the act of a foreman in repairing or altering a machine is that of a vice-principal, and not that of a fellow servant); *Kranz v. Long Island R. Co.*, 123 N. Y. 1; s. c. 20 Am. St. Rep. 716; 33 N. Y. St. Rep. 46; 25 N. E. Rep. 206 (duty of making safe a trench in which a servant is to work); *Egan v. Dry Dock & C. R. Co.*, 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188 (duty of inspecting a steam-boiler); *Sciolina v. Erie Preserving Co.*, 7 App. Div. (N. Y.) 417; s. c. 39 N. Y. Supp. 916; appeal denied, 151 N. Y. 50; s. c. 45 Alb. L. J. 377; 45 N. E. Rep. 371 (duty of furnishing suitable and safe machinery); *McNamara v. Brooklyn City R. Co.*, 11 Misc. (N. Y.) 667; s. c. 66 N. Y. St. Rep. 361; 32 N. Y. Supp. 913 (failure to furnish adequate brakes for street-cars and to keep them in repair—company cannot escape liability by directing its servants or agents to perform the duty); *Bernard v. New York & C. R. Co.*, 78 Hun (N. Y.) 454; s. c. 60 N. Y. St. Rep. 789; 29 N. Y. Supp. 230 (failure to provide proper cars for transporting dynamite); *Simmons v. Peters*, 20 App. Div. (N. Y.) 251; s. c. 46 N. Y. Supp. 800 (duty of lighting a

gas-jet near an elevator-well so as to furnish employes with a reasonably safe means of access to the elevator); *Hankins v. New York & C. R. Co.*, 142 N. Y. 416; s. c. 25 L. R. A. 396; 40 Am. St. Rep. 616; 59 N. Y. St. Rep. 802; 37 N. E. Rep. 66; *Ballard v. Hitchcock Man. Co.*, 71 Hun (N. Y.) 582; s. c. 55 N. Y. St. Rep. 110; 24 N. Y. Supp. 1101; s. c. aff'd, 145 N. Y. 619 (duty of keeping a steam-boiler in repair); *Hoes v. Ocean S. S. Co.*, 67 N. Y. Supp. 782; s. c. 56 App. Div. (N. Y.) 259 (duty of inspecting the engines of a vessel); *Cavanagh v. O'Neill*, 161 N. Y. 657; s. c. 57 N. E. Rep. 1106; aff'g s. c. 50 N. Y. Supp. 207; 27 App. Div. (N. Y.) 48 (duty of furnishing safe place for servant to work in); *Stewart v. Ferguson*, 60 N. Y. Supp. 429; s. c. 44 App. Div. (N. Y.) 58 (under New York statute requiring employer to furnish safe scaffolding—further as to which, see *ante*, § 3959); *McKnight v. Brooklyn Heights R. Co.*, 51 N. Y. Supp. 738; s. c. 23 Misc. (N. Y.) 527 (duty of inspection so as to discover defects arising from wear and tear delegated to employes—must have time and opportunity to make proper inspection in order to excuse master); *Probst v. Delamater*, 100 N. Y. 267; *Rooney v. Compagnie Generale Transatlantique*, 10 Daly (N. Y.) 241; *Crispin v. Babbitt*, 81 N. Y. 516; s. c. 37 Am. Rep. 521; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; rev'g s. c. 21 Hun (N. Y.) 500 (but negligence in this case was not in the performance of any duty owing personally by the master); *Tendrup v. John Stephenson Co.*, 51 Hun (N. Y.) 462; s. c. aff'd, 121 N. Y. 681 (*mem.*); *O'Donnell v. East River Gas Co.*, 91 Hun (N. Y.) 184; s. c. 36 N. Y. Supp. 288; 71 N. Y. St. Rep. 124 (explosion of naphtha negligently left by a fellow servant in a pipe to which the hose used in cleaning out a boiler was attached); *Eastland v. Clarke*, 165 N. Y. 420; s. c. 59 N. E. Rep. 202; rev'g s. c. 51 N. Y. Supp. 1140 (duty of warning and instructing); *O'Connor v. Barker*, 25 App. Div. (N. Y.) 121; s. c. 49 N. Y.

perior upon the inferior servant arises from the negligent failure to perform, or from negligence in the mode of performing, one of

Supp. 211 (duty of warning a new and inexperienced employé placed at work on a dangerous machine); *Troxler v. Southern R. Co.*, 124 N. C. 189; s. c. 44 L. R. A. 313; 70 Am. St. Rep. 580; 32 S. E. Rep. 550 (duty of furnishing safe appliances); *Ell v. Northern Pac. R. Co.*, 1 N. D. 336; s. c. 12 L. R. A. 97; 26 Am. St. Rep. 621; *Anderson v. Bennett*, 16 Or. 515; s. c. 8 Am. St. Rep. 311; 19 Pac. Rep. 765; *Smith v. Hillside Coal & Co.*, 186 Pa. St. 28; s. c. 40 Atl. Rep. 287 (duty to warn and instruct other servants); *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Laporte v. Cook*, 21 R. I. 158; s. c. 5 Am. Neg. Rep. 724; 42 Atl. Rep. 519 (failure to furnish proper appliances with which to shore a trench in process of excavation renders master liable, though the mere failure to use such material after it had been furnished would not); *Wilson v. Charleston & C. R. Co.*, 51 S. C. 79; s. c. 28 S. E. Rep. 91; *Houston & C. R. Co. v. Marcelles*, 59 Tex. 334 (duty of keeping machinery in a safe condition); *Texas & C. R. Co. v. Bingle*, 16 Tex. Civ. App. 653; s. c. 41 S. W. Rep. 90; writ. of error denied, 91 Tex. 287; s. c. 42 S. W. Rep. 971 (notice to engineer in charge of switching-engine of absence of step is notice to company); *Galveston & C. R. Co. v. Pitts* (Tex. Civ. App.), 42 S. W. Rep. 255 (no off. rep.) (duty of a railway company with respect to the safety of its track); *San Antonio & C. R. Co. v. Adams*, 6 Tex. Civ. App. 102; s. c. 24 S. W. Rep. 839 (railroad company cannot escape liability for injuries to an employé caused by a defective bridge, on the ground that the injuries resulted from the negligence of other employés of the company); *Sabine & C. R. Co. v. Ewing*, 1 Tex. Civ. App. 521; s. c. 21 S. W. Rep. 700 (duty of railway company to inspect coupling-apparatus of engine, and liability for failure of engineer to make such inspection, resulting in injury to the fireman); *Terrell Compress Co. v. Arrington* (Tex. Civ. App.), 48 S. W. Rep. 59 (no off. rep.) (negligence of a foreman in using greasy timber in erecting machinery is negligence of the master); *Galveston & C. R. Co. v. Smith*, 76 Tex. 611; s. c. 18 Am. St. Rep. 78; 13 S. W. Rep. 562; *Chapman v. Southern Pac. Co.*, 12 Utah 30; s. c. 41 Pac. Rep. 551 (employé charged with the direction of work in the absence of the foreman, and with the duty of repairing the machinery when needed, not a fellow servant of another so far as his duty to make repairs was concerned, but was a vice-principal); *Houston v. Brush*, 66 Vt. 331; s. c. 29 Atl. Rep. 380 (foreman failed to keep tackle in repair); *Baltimore & C. R. Co. v. McKenzie*, 81 Va. 71; *Allend v. Spokane Falls & C. Co.*, 21 Wash. 324; s. c. 58 Pac. Rep. 244 (liable for negligence of servant to whom he entrusted the duty of providing safe place for other servants to work in, though he conferred upon him no authority to employ or discharge); *Ogle v. Jones*, 16 Wash. 319; s. c. 47 Pac. Rep. 747 (duty of furnishing reasonably safe appliances); *Boelter v. Ross Lumber Co.*, 103 Wis. 324; s. c. 79 N. W. Rep. 243 (duty of seeing to the safety of a wheel in a wagon, notwithstanding a custom that the teamsters should look after their own wagons); *Chicago & C. R. Co. v. Healy*, 86 Fed. Rep. 245; s. c. 57 U. S. App. 513; 30 C. C. A. 11 (duty of railroad company to trainmen to see that a bridge is kept in a reasonably safe state of repair); *Port Blakeley Mill Co. v. Garrett*, 97 Fed. Rep. 537; s. c. 38 C. C. A. 342 (injury from breaking of stakes on a flat-car which were defective and insufficient in number); *Kerr & C. Man. Co. v. Hess*, 98 Fed. Rep. 56; s. c. 38 C. C. A. 547 (duty of providing lumber for a scaffolding is a personal duty of the master—compare *ante*, § 3947, *et seq.*); *Lafayette Bridge Co. v. Olsen*, 108 Fed. Rep. 335; s. c. 47 C. C. A. 367; 54 L. R. A. 33 (if master delegates his absolute duty to another, he is responsible for its proper performance by that other, although the latter may be, as to other matters, a fellow servant, for whose negligence the master is not responsible); *Western Union*

the primary or absolute duties of the master, and not merely from an act of fellow service in the common employment done by the superior servant.⁴ It is a part of this doctrine that where the master delegates to one of his servants a positive duty resting upon the master to the end of promoting the safety of his other servants, the master will be liable for any injury springing from the negligent failure to perform such duty, or from the negligent manner of performing it, although *as to other matters* the servant inflicting the injury and the servant receiving it are fellow servants within the rule under consideration.⁵

Tel. Co. v. Burgess, 108 Fed. Rep. 26; s. c. 47 C. C. A. 168 (although as to other matters the servant inflicting and the servant receiving the injury are fellow servants); New York &c. R. Co. v. O'Leary, 93 Fed. Rep. 737; s. c. 35 C. C. A. 562; 14 Am. & Eng. R. Cas. (N. S.) 718 (duty of taking measures against injury from a guy which a third person had stretched across a railway-track); Texas &c. R. Co. v. Barrett, 67 Fed. Rep. 214 (duty with respect to the safe condition of machinery and apparatus); Western Coal &c. Co. v. Ingraham, 70 Fed. Rep. 219; s. c. 36 U. S. App. 1; 2 Am. & Eng. Corp. Cas. (N. S.) 689; 17 C. C. A. 71 (duty of making timely inspections of the timbers, walls and roofs of a mine); Lund v. Hersey Lumber Co., 41 Fed. Rep. 202 (superintendent and foreman of a mill not fellow servants with a common workman, with respect to the safety of a rope in a tackling, employed for hauling a barge out of the water); Pike v. Chicago &c. R. Co., 41 Fed. Rep. 95; Great Northern R. Co. v. McLaughlin, 70 Fed. Rep. 669; s. c. 44 U. S. App. 189; 17 C. C. A. 330 (injury from unsafe skids selected by a foreman to whom the duty of selection is delegated); Mase v. Northern Pac. R. Co., 57 Fed. Rep. 283 (duty of guarding an opened railway-switch—doubtful decision); Baltimore &c. R. Co. v. Henthorne, 73 Fed. Rep. 634; s. c. 43 U. S. App. 113; 19 C. C. A. 623 (duty of selecting fit and competent servants); Ellis v. Northern Pac. R. Co., 103 Fed. Rep. 416 (duty of furnishing reasonably safe place to work); Lindvall v. Woods, 44 Fed. Rep. 855 (duty of selecting competent workmen and providing a safe structure on which to work); St.

Louis &c. R. Co. v. Needham, 63 Fed. Rep. 107; s. c. 27 U. S. App. 227; 25 L. R. A. 833; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368, 387; s. c. 37 L. ed. 781; Northern Pac. R. Co. v. Herbert, 116 U. S. 642; s. c. 29 L. ed. 755; Telander v. Sunlin, 44 Fed. Rep. 564; Swift & Co. v. Short, 92 Fed. Rep. 567; s. c. 34 C. C. A. 545 (the act of fellow servants of a person injured by the flying of a shoe forming part of a clutch from a rapidly-revolving wheel, in wiring the shoe to make it safe after it is cracked, is the act of the master, and will not defeat recovery, although it is negligently done); Lehigh Valley Coal Co. v. Wavrek, 84 Fed. Rep. 866; s. c. 55 U. S. App. 437; 28 C. C. A. 540 (duty of furnishing safe tools).

⁴ Milhench v. E. Jenckes Man. Co., 24 R. I. 131; s. c. 52 Atl. Rep. 687 (act of a foreman in a mill, in directing an assistant to aid him in placing copper rolls on the top of a machine, was that of a fellow servant). If the proposition of the text is sound, of which the author has no doubt, then the case next below cited was not well decided, because the act out of which the injury proceeded was an act of fellow service and not the act of a vice-principal. A superintendent entrusted with the responsibility of looking after the machinery in a mill and keeping it in repair, was held to occupy the position of a vice-principal as regarded an employé engaged in oiling a machine, so as to render the mill-owner liable for his negligence in starting the machine by replacing a broken belt while such employé was so engaged: Hughlett v. Ozark Lumber Co., 53 Mo. App. 87.

⁵ Brick v. Rochester &c. R. Co., 98 N. Y. 211; Lafayette Bridge Co.

§ 4926. Of this Nature is the Duty of Inspection and Repair.—

Of this nature is the duty of inspecting and keeping in suitable repair the premises, machinery, tools, and appliances which the master furnishes to his servants wherein or with which to work;⁶ and,

- v. Olsen, 108 Fed. Rep. 335; s. c. 47 C. C. A. 367; 54 L. R. A. 33; Western Union Tel. Co. v. Burgess, 108 Fed. Rep. 26; s. c. 47 C. C. A. 168; Consolidated Coal Co. v. Gruber, 188 Ill. 584; s. c. 59 N. E. Rep. 254; aff'g s. c. 91 Ill. App. 15 (*semble*); Strauss v. Harberman Man. Co., 23 App. Div. (N. Y.) 1; s. c. 48 N. Y. Supp. 425; Egan v. Dry Dock & C. R. Co., 12 App. Div. (N. Y.) 556; s. c. 42 N. Y. Supp. 188.
- ⁶Kansas City & C. R. Co. v. Becker, 67 Ark. 1; s. c. 53 S. W. Rep. 506; 77 Am. St. Rep. 78; 46 L. R. A. 814 (injury from defect due to the negligence of *two* other employés charged with duty of inspection—no defense that one of them was a fellow servant); Chicago & C. R. Co. v. Cullen, 187 Ill. 523; s. c. 58 N. E. Rep. 455 (trainmen charged with the duty, upon discovering the defective condition of a car, to report it to the master for repair, and to discontinue the use of it until it is restored to a reasonably safe condition, are not fellow servants of a section-foreman killed in consequence of their neglect); North Chicago St. R. Co. v. Dudgeon, 83 Ill. App. 528; s. c. aff'd, 184 Ill. 474; 56 N. E. Rep. 796 (street-railway conductor injured in consequence of a pile of stones having been negligently left near the track, commingled with negligence of the gripman in starting the car too soon); Cincinnati & C. R. Co. v. McMullen, 117 Ind. 439; s. c. 10 Am. St. Rep. 67; 20 N. E. Rep. 287 (car-inspector not a fellow servant of a brakeman or conductor); Atchison & C. R. Co. v. Lannigan, 56 Kan. 109; s. c. 42 Pac. Rep. 343; Hogue v. Sligo Furnace Co., 62 Mo. App. 491 (failure of master to furnish reasonably safe machinery, commingled with negligence of fellow servant); Jennings v. New York & C. R. Co., 155 N. Y. 672; aff'g s. c. 12 Misc. (N. Y.) 408; 67 N. Y. St. Rep. 408; 33 N. Y. Supp. 585; Eaton v. New York & C. R. Co., 163 N. Y. 391; s. c. 57 N. E. Rep. 609; rev'g s. c. 43 N. Y. Supp. 666; 14 App. Div. (N. Y.) 20 (car-inspector is not a fellow servant of a brakeman who is injured by reason of a defective brake-shaft, though a rule requires brakemen to inspect brakes at all stoppings of the train); Shields v. Robins, 3 App. Div. (N. Y.) 582; s. c. 38 N. Y. Supp. 214; 73 N. Y. St. Rep. 708 (negligence of master in failing to furnish proper place to work, commingled with negligence of fellow servant); Chesson v. John L. Roper Lumber Co., 118 N. C. 59; s. c. 23 S. E. Rep. 925 (carpenters employed to inspect and make any needed repairs in a platform are not fellow servants with servants required to work thereon, but are vice-principals); Cameron v. Great Northern R. Co., 8 N. D. 124; s. c. 5 Am. Neg. Rep. 454; 12 Am. & Eng. R. Cas. (N. S.) 520; 77 N. W. Rep. 1016 (conductor on a passenger-train is not a fellow servant with other employés whose duty it is to provide and inspect cars furnished for the use of conductors, who furnish a car from which the steps have been removed); Michigan & C. R. Co. v. Waterworth, 21 Ohio C. C. 498; s. c. 11 Ohio C. D. 621; Jones v. Pipe Co., 15 Ohio C. C. 26; s. c. 8 Ohio C. D. 168 (where servant charged with duty of inspection and repair is not competent, and *not supposed to be so* by his employer, and has never examined the particular machine); Missouri & C. R. Co. v. Ferch, 18 Tex. Civ. App. 46; s. c. 44 S. W. Rep. 317 (engineer to whom alone the duty of inspecting the engine is entrusted); Galveston & C. R. Co. v. Templeton, 87 Tex. 42; s. c. 26 S. W. Rep. 1066 (failure of master to inspect, commingled with negligence of fellow trainman); Gowen v. Bush, 76 Fed. Rep. 349; s. c. 40 U. S. App. 349; 22 C. C. A. 196 (employés charged with the duty of going through a mine and inspecting it to see whether it is free from explosive gas); Terre Haute & C. R. Co. v. Mansberger, 65 Fed. Rep. 196; s. c. 12 C. C. A. 574; rehearing de-

on principle at least, the duty of watching the conduct of his servants generally to the end that they do not lapse into habits which render them dangerous to their fellow servants.⁷ But there is a doctrine that the office of inspection and repair, when it is merely incident to the use by a servant of the premises, machinery, tools, or appliances, is not the duty of the master but that of the servant;⁸ but this exception has been held not to apply to that inspection and repair which may be necessary to the safe support and maintenance of an overhead shafting in a factory.⁹

nied, 67 Fed. Rep. 67 (neglect of a car-inspector whereby a brakeman was injured—company liable); *Atchison & C. R. Co. v. Mulligan*, 67 Fed. Rep. 569 (railroad-engineer, in respect to the duty of inspection of the engine represents the company, and is not the fellow servant of a hostler's helper); *Anderson v. The Ashbrooke*, 44 Fed. Rep. 124 (defective appliances, commingled with negligence of fellow servant, resulting in injury to the servant of a stevedore). Several decisions have been found which are opposed to the doctrine of the text. One holds directly that an employé, *supposed to be competent and careful*, who is engaged to superintend repairs and to inspect machinery, is a fellow servant of one engaged about the machinery: *McCafferty v. Dock Co.*, 11 Ohio C. C. 457; s. c. 1 Ohio C. D. 262. Certainly he is not with respect to an injury of the latter proceeding from the negligence of the inspector in performing his duty. Another court holds that the negligence of a station-agent, whose duty it is to inspect loaded cars, in permitting a car to go into a train improperly loaded, in consequence of which an employé of the company is injured, does not give to the latter any right of action against the company, as the negligence is that of a fellow servant: *Byrnes v. New York & C. R. Co.*, 113 N. Y. 251; s. c. 22 N. Y. St. Rep. 936; 21 N. E. Rep. 50. This decision is equally untenable. Another case holds that where a railroad company provided a competent inspector to determine if car-loads of lumber received from other roads were properly loaded, and the inspector either failed to make an inspection of a car which was not securely loaded, or made a faulty one, and some of the lum-

ber fell off and killed one of its switchmen, the company was not liable, as the accident was due to the negligence of a fellow servant: *Lellis v. Michigan Cent. R. Co.*, 124 Mich. 37; s. c. 82 N. W. Rep. 828. The conclusion of the court in this case is equally subject to criticism. Another court holds that the fact that the superintendent of a quarry has assumed to inspect exploders used by the employés will not make the owner liable to an employé for an injury caused by a defective exploder, where it was no part of the owner's business to have an inspection made, unless he knew and consented to the superintendent's performing the work as a part of that which he was employed to do: *Shea v. Wellington*, 163 Mass. 364; s. c. 40 N. E. Rep. 173.

⁷ *Ante*, § 3790.

⁸ Thus, where the water-gauge on a steamboat-boiler became cracked, and the engineer, on discovering it, directed the fireman to turn the valves of the gauge and shut off the water so that the engineer could put in a new glass, and while doing so the fireman was injured by the explosion of the gauge, of the danger of which the engineer had failed to warn him,—it was held that the duty of making such repairs, the defect not being of a permanent character, and not requiring the help of skilled machinists to repair it, was one of the ordinary duties of the engineer *as a servant*, and that, consequently, his negligence in failing to warn the fireman of the danger was that of a fellow servant, for which the master was not responsible: *Manning v. Genesee River & C. Steamboat Co.*, 66 App. Div. (N. Y.) 314; s. c. 72 N. Y. Supp. 677.

⁹ *Hustis v. James A. Banister*

§ 4927. **Duty of Inspection a Positive and Non-Assignable Duty.**—

Many decisions emphasize the conclusion that the duty of an employer of labor to subject his premises, machinery, and appliances, to reasonable and skillful inspections, at reasonably frequent intervals, is a positive and non-assignable duty in the sense that the master remains liable for the negligence of any person or persons to whom he commits the performance of it, and in the sense that he will not be exonerated from liability for damages arising from dangers or defects which might have been discovered by a reasonably competent and skillful inspection, by the mere fact that he has employed a competent inspector or a sufficient number of competent inspectors, unless in fact a careful and competent inspection has been made.¹⁰

§ 4928. **Master Cannot Devolve this Duty upon Others so as to Exonerate Himself.**—On a principle already considered,¹¹ the duty which the law imposes upon a master of exercising reasonable care to the end that the *machinery, appliances, premises*, etc., committed by him to his servant, shall not subject the servant to greater dangers than those which necessarily flow from the nature of the employment, is an *absolute duty*,—not in the sense that the master is an *insurer* of its performance, but in the sense that the master cannot delegate its performance to others so as to exonerate himself from responsibility for its non-performance. No matter by whose hand or brain he neglects to perform this duty,—whether by that of the ven-

Co., 63 N. J. L. 465; s. c. 43 Atl. Rep. 651; 6 Am. Neg. Rep. 318. See *ante*, § 4851.

¹⁰ Sanborn v. Madera Flume & Co., 70 Cal. 261; s. c. 11 Pac. Rep. 710; Baltimore & C. R. Co. v. Amos, 20 Ind. App. 378; s. c. 49 N. E. Rep. 854; Purcell Mill & C. Co. v. Kirkland, 2 Ind. Terr. 169; s. c. 47 S. W. Rep. 311 (master can escape responsibility only on the ground that a proper inspection would not have disclosed defects); Atchison & C. R. Co. v. Kingscott, 65 Kan. 131; s. c. 69 Pac. Rep. 184; Rogers v. Ludlow Man. Co., 144 Mass. 198; Walkowski v. Penokee & C. Consol. Mines, 115 Mich. 629; s. c. 41 L. R. A. 33, 109; 73 N. W. Rep. 895; Carroll v. Tidewater Oil Co., 67 N. J. L. 679; s. c. 52 Atl. Rep. 275; Hoes v. Ocean S. S. Co., 170 N. Y. 581 (*mem.*); s. c. 63 N. E. Rep. 1118; aff'g s. c. 56 App. Div. (N. Y.) 259; 67 N. Y. Supp. 782 (negligence of fellow servant in

making inspection held to be negligence of master); Newton v. Vulcan Iron Works, 199 Pa. St. 646; s. c. 49 Atl. Rep. 339; Texas & C. R. Co. v. O'Feil, 78 Tex. 486; s. c. 15 S. W. Rep. 33; Fordyce v. Culver, 2 Tex. Civ. App. 569; s. c. 22 S. W. Rep. 237; Galveston & C. R. Co. v. Buch (Tex. Civ. App.), 65 S. W. Rep. 681 (no off. rep.) (inspection committed to a servant—company liable for his negligence); Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503; s. c. 66 S. W. Rep. 477 (cars made up in a train without being properly equipped). To the *contrary*, that a railroad company is not ordinarily liable, for the negligent inspection of its cars by its car-inspectors, to a fellow servant, unless its superior officers have 119 Pa. St. 301; s. c. 13 Atl. Rep. knowledge of such negligence,—see Philadelphia & C. R. Co. v. Hughes, 286; 21 W. N. C. (Pa.) 166.

¹¹ *Ante*, §§ 3874, 3986, 3988.

dor of the machinery which he purchases in the market, or by that of an independent contractor, or by that of his own superior servant, or by that of an inferior servant, for whose negligence, but for this rule, he would not be responsible on the ground of his being a fellow servant of the servant receiving the injury,—he is bound in a primary sense for its performance. In other words, if it is necessary here to invoke the doctrine of *respondeat superior* so as to charge him, that doctrine so applies as to make him responsible for the negligence of the maker of the machinery, and of the servant or agent, of whatever grade, to whom he commits the duty of inspecting it and keeping it in repair, and the negligence of such manufacturer or of such servant is his own negligence,¹²—although the fact that such

- ¹² *Denver &c. R. Co. v. Sipes*, 26 Colo. 17; *North Chicago St. R. Co. v. Dudgeon*, 83 Ill. App. 528; s. c. *aff'd*, 184 Ill. 477 (conductor of street car injured by rocks, etc., piled too near the track by an independent contractor—company liable); *Frost Man. Co. v. Smith*, 98 Ill. App. 308; s. c. *aff'd*, 197 Ill. 253; 64 N. E. Rep. 305; *Pullman's Palace Car Co. v. Laack*, 143 Ill. 242; s. c. 32 N. E. Rep. 285; 18 L. R. A. 215; *Norton v. Volzke*, 158 Ill. 402; s. c. 41 N. E. Rep. 1085; *aff'g* s. c. 54 Ill. App. 545; *Hess v. Rosenthal*, 160 Ill. 621; s. c. 43 N. E. Rep. 743; *aff'g* s. c. 55 Ill. App. 324; *Baltimore &c. R. Co. v. Amos*, 20 Ind. App. 378; s. c. 49 N. E. Rep. 854 (duty of inspection an absolute duty); *Indiana Car Co. v. Parker*, 100 Ind. 181; *Louisville &c. R. Co. v. Graham*, 124 Ind. 89; s. c. 24 N. E. Rep. 668; *Purcell Mill &c. Co. v. Kirkland*, 2 Ind. Terr. 169; s. c. 47 S. W. Rep. 311; *Fink v. Des Moines Ice Co.*, 84 Iowa 321; s. c. 51 N. W. Rep. 155; *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; s. c. 88 N. W. Rep. 817; *Kelley v. Ryus*, 48 Kan. 120; s. c. 29 Pac. Rep. 144; *Atchison &c. R. Co. v. Kingscott*, 65 Kan. 131; s. c. 69 Pac. Rep. 184 (duty of inspection an absolute duty); *Moynihah v. Hills Co.*, 146 Mass. 586; s. c. 6 N. Eng. Rep. 286; 16 N. E. Rep. 574; *Woodman v. Metropolitan R. Co.*, 149 Mass. 339; s. c. 21 N. E. Rep. 482; *Toomey v. Donovan*, 158 Mass. 232; s. c. 33 N. E. Rep. 396; *McMahon v. McHale*, 174 Mass. 320; s. c. 54 N. E. Rep. 854; *Walkowski v. Penokee &c. Consol. Mines*, 115 Mich. 629; s. c. 41 L. R. A. 33, 109; 73 N. W. Rep. 895; *Bridges v. St. Louis &c. R. Co.*, 6 Mo. App. 389; *Higgins v. Missouri Pac. R. Co.*, 43 Mo. App. 547; *Jones v. St. Louis &c. R. Co.*, 43 Mo. App. 398; *Sackewitz v. American Biscuit Man. Co.*, 78 Mo. App. 144; s. c. 2 Mo. App. Repr. 192 (cannot be delegated to an independent contractor, so as to relieve the master of responsibility for an injury to the servant resulting from the negligence of the contractor); *Taylor v. Missouri Pac. R. Co. (Mo.)*, 16 S. W. Rep. 206 (no off. rep.); *Van Steenburgh v. Thornton*, 58 N. J. L. 160; s. c. 33 Atl. Rep. 380; *Cole v. Warren Man. Co.*, 63 N. J. L. 626; s. c. 44 Atl. Rep. 647; *Smith v. Erie R. Co.*, 67 N. J. L. 636; s. c. 52 Atl. Rep. 634; *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647; *Hustis v. James A. Banister Co.*, 63 N. J. L. 465; *Wannamaker v. Rochester*, 63 Hun (N. Y.) 625; s. c. 44 N. Y. St. Rep. 45; 17 N. Y. Supp. 321; s. c. *aff'd*, 137 N. Y. 529; 33 N. E. Rep. 336; *Schulz v. Rohe*, 24 N. Y. Supp. 118; s. c. 4 Misc. (N. Y.) 384; 53 N. Y. St. Rep. 576; s. c. *rev'd* (on ground of contributory negligence), 149 N. Y. 132; 43 N. E. Rep. 420; *Johnston v. Phenix Bridge Co.*, 60 N. Y. Supp. 947; s. c. 44 App. Div. (N. Y.) 581; *Stewart v. Ferguson*, 60 N. Y. Supp. 429; s. c. 44 App. Div. (N. Y.) 58; *Tomaselli v. John Griffiths Cycle Corp.*, 9 App. Div. (N. Y.) 127; s. c. 41 N. Y. Supp. 51; 75 N. Y. St. Rep. 509; *Scandell v. Columbia Const. Co.*, 50 App. Div. (N. Y.) 512; s. c. 64 N. Y. Supp. 232; *Hoes v. Ocean S. S. Co.*, 170 N. Y. 581 (*mem.*); s. c. 63 N. E. Rep.

manufacturer, agent or servant was skillful, careful and reputable in his line of work or service, will be an important evidentiary fact in favor of the master, on the question whether he has exercised due care in discharging the duty which the law puts upon him.^{12a}

§ 4929. Fellow Servant Charged with this Duty Becomes a Vice-Principal of the Master.—If, in any such case, the master commits the performance of this duty to a fellow servant of the servant receiving the injury, the negligence of such fellow servant in performing it, will be the negligence of the master.¹³ It is not enough that the

1118; aff'g s. c. 56 App. Div. (N. Y.) 259; 67 N. Y. Supp. 782; Sarno v. Atlantic Stevedoring Co., 66 App. Div. (N. Y.) 611; s. c. 74 N. Y. Supp. 578; Eichholz v. Niagara Falls &c. Co., 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; Davidson v. Cornell, 31 N. Y. St. Rep. 982; s. c. 10 N. Y. Supp. 521; s. c. rev'd on other grounds, 132 N. Y. 228; 30 N. E. Rep. 573; Sellik v. Langdon, 37 N. Y. St. Rep. 511; s. c. 13 N. Y. Supp. 858; s. c. aff'd, 133 N. Y. 535; 30 N. E. Rep. 1148; Freeman v. Glens Falls &c. Co., 39 N. Y. St. Rep. 621; s. c. 15 N. Y. Supp. 657; Wellston Coal Co. v. Smith, 65 Ohio St. 70; s. c. 61 N. E. Rep. 143; 55 L. R. A. 99; Hough v. Grants Pass Power Co., 41 Or. 531; s. c. 69 Pac. Rep. 655; Trainor v. Philadelphia &c. R. Co., 137 Pa. St. 148; s. c. 26 W. N. C. (Pa.) 441; 48 Phila. Leg. Int. 47; 20 Atl. Rep. 632; Newton v. Vulcan Iron Works, 199 Pa. St. 646; s. c. 49 Atl. Rep. 339; Mulvey v. Rhode Island Locomotive Works, 14 R. I. 204; Moran v. Corliss Steam-Engine Co., 21 R. I. (pt. 2) 386; s. c. 43 Atl. Rep. 874; 45 L. R. A. 267; Carter v. Oliver Oil Co., 34 S. C. 211; s. c. 13 S. E. Rep. 419; Gulf &c. R. Co. v. Shearer, 1 Tex. Civ. App. 343; s. c. 21 S. W. Rep. 133; Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503; s. c. 66 S. W. Rep. 477; Galveston &c. R. Co. v. Buch (Tex. Civ. App.), 65 S. W. Rep. 681 (no off. rep.); St. Louis &c. R. Co. v. Kelton, 28 Tex. Civ. App. 137; s. c. 66 S. W. Rep. 887; Trihay v. Brooklyn Lead Min. Co., 4 Utah 468; s. c. 11 Pac. Rep. 612; Mackey v. Baltimore &c. R. Co., 19 D. C. 282; s. c. 18 Wash. L. Rep. 767; Allend v. Spokane Falls &c. R. Co., 21 Wash. 324; s. c. 58 Pac. Rep. 244;

Wilber v. Follansbee, 97 Wis. 577; s. c. 72 N. W. Rep. 741; rehearing denied, 73 N. W. Rep. 559 (landlord cannot delegate his primary duties to a *contractor* to the injury of his tenants); Water Co. v. Ware, 16 Wall. (U. S.) 566; Toledo Brewing &c. Co. v. Bosch, 41 C. C. A. 482; s. c. 101 Fed. Rep. 530; Weeks v. Scharer, 49 C. C. A. 372; s. c. 111 Fed. Rep. 330; Sommer v. Carbon Hill Coal Co., 89 Fed. Rep. 54; s. c. 59 U. S. App. 519; Beattie v. Edge Moor Bridge Works, 109 Fed. Rep. 233; Martel v. Ross, Rap. Jud. Que. 16 C. S. 118.

^{12a} *Ante*, § 3990.

¹³ Denver &c. R. Co. v. Sipes, 26 Colo. 17; Hess v. Rosenthal, 160 Ill. 621; s. c. 43 N. E. Rep. 743; aff'g s. c. 55 Ill. App. 324; Cushman v. Carbondale Fuel Co., 116 Iowa 618; s. c. 88 N. W. Rep. 817 (duty of propping or timbering a mine); Cole v. Warren Man. Co., 63 N. J. L. 626; Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647; Hustis v. James A. Banister Co., 63 N. J. L. 465; Ryan v. Miller, 12 Daly (N. Y.) 77; s. c. aff'd, 99 N. Y. 665; Stewart v. Ferguson, 60 N. Y. Supp. 429; s. c. 44 App. Div. (N. Y.) 58; Tomaselli v. John Griffiths Cycle Corp., 9 App. Div. (N. Y.) 127; s. c. 41 N. Y. Supp. 51; 75 N. Y. St. Rep. 509; Scandell v. Columbia Const. Co., 50 App. Div. (N. Y.) 512; s. c. 64 N. Y. Supp. 232; Hoes v. Ocean S. S. Co., 170 N. Y. 581 (*mem.*); s. c. 63 N. E. Rep. 1118; aff'g s. c. 56 App. Div. (N. Y.) 259; 67 N. Y. Supp. 782; Eichholz v. Niagara Falls &c. Co., 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842; Wellston Coal Co. v. Smith, 65 Ohio St. 70; s. c. 61 N. E. Rep. 143; 55 L. R. A. 99; Hough v. Grants

master, in the discharge of this duty, gives the necessary order to one of his servants, but he must see that the order is executed.¹⁴

§ 4930. Master Not Exonerated from the Performance of Such Duties by the Employment of Competent Servants or Agents to Perform Them.—It is only a different way of stating the foregoing propositions, to say that the master is not discharged from responsibility for the performance of these primary and unalienable duties to his servants, by employing competent servants or agents to perform them; but he is responsible for the negligence of such servants or agents in their performance.¹⁵

§ 4931. Negligence of Independent Contractor with Respect to Such Duties is Negligence of Master.—If a master delegates the performance of a primary and non-assignable duty which the master owes to his own servant, to an independent contractor, the rule which exonerates a proprietor from responsibility for the negligence of an independent contractor ceases to obtain, but the contractor becomes, with respect to the performance of such duties, the vice-principal and representative of the master, and the master is liable to his servant for the negligence of the contractor in failing to perform them, or in the manner of performing them.¹⁶

§ 4932. Negligence of Master in Failing to Perform a Non-Assignable Duty Commingling with Negligence of Fellow Servant—Master Liable.—It follows that the master may become liable for a failure to

Pass Power Co., 41 Or. 531; s. c. 69 Pac. Rep. 655; Galveston & C. R. Co. v. Buch, 27 Tex. Civ. App. 283; s. c. 65 S. W. Rep. 681; St. Louis & C. R. Co. v. Kelton, 28 Tex. Civ. App. 137; s. c. 66 S. W. Rep. 887; Norfolk & C. R. Co. v. Phillips, 100 Va. 362; s. c. 41 S. E. Rep. 726; Allend v. Spokane Falls & C. R. Co., 21 Wash. 324; s. c. 58 Pac. Rep. 244 (although such servant has no power to employ or discharge); Beattie v. Edge Moor Bridge Works, 109 Fed. Rep. 233.

¹⁴ Martel v. Ross, Rap. Jud. Que. 16 C. S. 118.

¹⁵ Van Dusen v. Letteller, 78 Mich. 492; s. c. 44 N. W. Rep. 572; Bridges v. St. Louis & C. R. Co., 6 Mo. App. 389; Smith v. Erie R. Co., 67 N. J. L. 636; s. c. 52 Atl. Rep. 634; Van Steenburgh v. Thornton, 58 N. J. L. 160; s. c. 33 Atl. Rep. 380; Smith v.

Erie R. Co., 67 N. J. L. 636; s. c. 52 Atl. Rep. 634; Sarno v. Atlantic Stevedoring Co., 66 App. Div. (N. Y.) 611; s. c. 74 N. Y. Supp. 578; Martel v. Ross, Rap. Jud. Que. 16 C. S. 118.

¹⁶ North Chicago St. R. Co. v. Dudgeon, 83 Ill. App. 528; s. c. aff'd, 184 Ill. 477; 56 N. E. Rep. 596; Woodman v. Metropolitan R. Co., 149 Mass. 339; s. c. 21 N. E. Rep. 482; Sackewitz v. American Biscuit Man. Co., 78 Mo. App. 144; s. c. 2 Mo. App. Repr. 192; Johnston v. Phoenix Bridge Co., 60 N. Y. Supp. 947; s. c. 44 App. Div. (N. Y.) 581; Moran v. Corliss Steam-Engine Co., 21 R. I. (pt. 2) 386; s. c. 43 Atl. Rep. 874; 45 L. R. A. 267; Water Co. v. Ware, 16 Wall. (U. S.) 566; Toledo Brewing & C. Co. v. Bosch, 41 C. C. A. 482; s. c. 101 Fed. Rep. 530.

perform this duty, although the negligence of a fellow servant contributed to the accident.¹⁷

§ 4933. **Various Applications of the Foregoing Doctrine.**—The foregoing doctrine makes the employer liable for the negligence of others under the following conditions:—Where a railway company employs an independent contractor to repair its tracks;¹⁸ where a rock falls from the roof of a mine by reason of not being suitably propped or timbered, the duty of propping and timbering being confided to a fellow servant;¹⁹ where a derrick fell by reason of the displacement of a key which was in plain sight;²⁰ where a boss or supervisor appointed by the master, failed to take adequate measures for the safety of workmen employed in a sewer trench;²¹ where, in consequence of the negligence of a railway sectionman, charged with the duty of inspecting and repairing the road-bed and tracks, a trainman travelling on the road was injured;²² where an employer directed another to perform a statutory duty of such employer, of erecting a safe scaffolding whereon his employes were to work;²³ where a street was obstructed by an independent contractor, in the performance of a contract with a proprietor;²⁴ where the duty had been delegated to a servant of selecting the pieces of iron to be used in doing a certain work, and he failed to select pieces which were reasonably safe and suitable for the purpose, in consequence of which another servant was injured;²⁵ where the engines of a vessel had been repaired, but there was no inspection, after the completion of the repairs, by the engineers of the vessel, and in starting the engine, some portions of it blew out, fatally injuring a servant;²⁶ where an employer committed to its foreman the sole right and duty of selecting a suitable guy and of determining when it should be replaced, and,

¹⁷ *Southern Pac. R. Co. v. Lasch*, 2 Tex. Civ. App. 68; s. c. 21 S. W. Rep. 563; *Boyce v. Fitzpatrick*, 80 Ind. 526; *ante*, § 4856, *et seq.*

¹⁸ *North Chicago St. R. Co. v. Dudgeon*, 83 Ill. App. 528; s. c. *aff'd*, 184 Ill. 477. See *ante*, § 4931.

¹⁹ *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; s. c. 88 N. W. Rep. 817.

²⁰ *McMahon v. McHale*, 174 Mass. 320; s. c. 54 N. E. Rep. 854.

²¹ *Van Steenburgh v. Thornton*, 58 N. J. L. 160; s. c. 33 Atl. Rep. 380.

²² *Smith v. Erie R. Co.*, 67 N. J. L. 636; s. c. 52 Atl. Rep. 634.

²³ *Stewart v. Ferguson*, 60 N. Y. Supp. 429; s. c. 44 App. Div. (N. Y.)

58. See *ante*, § 3959, where the statute under which this case was decided is more fully considered.

²⁴ *Woodman v. Metropolitan R. Co.*, 149 Mass. 339; s. c. 21 N. E. Rep. 482; *Johnston v. Phoenix Bridge Co.*, 60 N. Y. Supp. 947; s. c. 44 App. Div. (N. Y.) 581; *Water Co. v. Ware*, 16 Wall. (U. S.) 566.

²⁵ *Tomaselli v. John Griffiths Cycle Corp.*, 9 App. Div. (N. Y.) 127; s. c. 41 N. Y. Supp. 51; 75 N. Y. St. Rep. 509.

²⁶ *Hoes v. Ocean S. S. Co.*, 170 N. Y. 581 (*mem.*); s. c. 63 N. E. Rep. 1118; *aff'g* s. c. 56 App. Div. (N. Y.) 259; 67 N. Y. Supp. 782.

in consequence of his failure to replace the guy with a new one after it had been subjected to undue strain, an accident occurred to another servant;²⁷ where a mine boss having control of a mine, and with power to employ and discharge, instead of performing his duties in and about the mine himself, delegates them to a miner, through whose negligence another is injured,—such miner not being deemed a fellow servant of the other miners in the discharge of such duties;²⁸ where an employé of an electric lighting company, just before the time to start the dynamos in the evening, was directed by the manager to ride past the power house on his bicycle and notify the employés on duty there, not to start the current until further notice, but such employé failed to reach the power house in time, and the current was started to the injury of a lineman, the duty directed to be performed being regarded as the personal duty of the master;²⁹ where a master delegated to an independent contractor, the duty of keeping a crane operated by electricity in a safe condition for the use of his employés and he negligently failed to perform it, in consequence of which one of the employés was injured;³⁰ where a brakeman negligently left open a switch which it was his duty to operate, in consequence of which an engineer was injured,—the brakeman being deemed the representative of the company, and not a fellow servant of the engineer;³¹ where a mine-owner delegated to a subordinate the duty of providing ventilation for the mine, and he negligently failed to perform it, to the injury of miners at work therein;³² where, in consequence of structural defects, the false-work of a bridge gave way when an appliance called a traveller was run over it, in consequence of which a servant working underneath it was killed,—the conclusion being that the work of putting in unbraced bents for use in carrying the traveller, was a matter for which the master was responsible, and that the fellow-servant doctrine did not apply;³³ where a railway company undertook to discharge its duty toward a brakeman to furnish a sufficient number of sound and suitable stakes to hold a load of ties on a platform-car, and furnished suitable lumber and entrusted the *preparation* of the stakes to efficient men,—the con-

²⁷ *Sarno v. Atlantic Stevedoring Co.*, 66 App. Div. (N. Y.) 611; s. c. 74 N. Y. Supp. 578.

²⁸ *Wellston Coal Co. v. Smith*, 65 Ohio St. 70; s. c. 61 N. E. Rep. 143; 55 L. R. A. 99.

²⁹ *Hough v. Grants Pass Power Co.*, 41 Or. 531; s. c. 69 Pac. Rep. 655.

³⁰ *Moran v. Corliss Steam-Engine*

Co., 21 R. I. (pt. 2) 386; s. c. 43 Atl. Rep. 874; 45 L. R. A. 267.

³¹ *St. Louis & C. R. Co. v. Kelton*, 28 Tex. Civ. App. 137; s. c. 66 S. W. Rep. 887.

³² *Sommer v. Carbon Hill Coal Co.*, 89 Fed. Rep. 54; s. c. 59 U. S. App. 519.

³³ *Beattie v. Edge Moor Bridge Works*, 109 Fed. Rep. 233.

clusion being that this did not discharge its duty toward the brakeman.³⁴

§ 4934. **Decisions which Exonerate the Employer, where he Employs Suitable Agents to Perform Such Duties.**—Decisions are sometimes met with which proceed upon the *contrary* principle, that an employer who charges a competent employé with the special duty to keep machinery and appliances in good condition, thereby discharges his whole duty to other employés, although he knows that a particular appliance is not in good condition;³⁵ and on this principle an employer has been exonerated from liability to pay damages for the death of its servant from the fall of a bridge, on the ground that it employed an experienced builder to construct the bridge and to superintend and control the building of it, and that the defendant had no knowledge of the defect which caused the accident.³⁶ These decisions are out of line with the great mass of judicial authority, and are believed, by the writer, to be contrary to reason and justice. But, of course, it does not follow from anything that has preceded, that if the negligence of the servant who is hurt contributes to produce the injury, he will be allowed to recover damages,—as where he himself assists in selecting and putting in place the defective appliance by which he is injured.³⁷

§ 4935. **Liability of Employer for Negligence of Servant Employed to Warn and Instruct Other Servants.**—The duty of an employer to warn and instruct his servants of dangers with which they are unacquainted, under conditions already pointed out,³⁸ being a primary absolute and unalienable duty of the master, he is responsible for negligence in performing it on the part of any servant of

³⁴ McIntyre v. Boston &c. R. Co., 163 Mass. 189; s. c. 39 N. E. Rep. 1012; Pennsylvania R. Co. v. La Rue, 81 Fed. Rep. 148; s. c. 55 U. S. App. 20; 27 C. C. A. 363 (citing Bushby v. New York &c. R. Co., 107 N. Y. 374; s. c. 14 N. E. Rep. 407).

³⁵ Bemisch v. Roberts, 143 Pa. St. 1; s. c. 28 W. N. C. (Pa.) 169; 22 Pitts. L. J. (N. S.) 1; 48 Phila. Leg. Int. 305; 21 Atl. Rep. 998.

³⁶ Mansfield Coal &c. Co. v. McEnery, 91 Pa. St. 185. See, as to a scaffold, Fraser v. Red River Lumber Co., 45 Minn. 235; s. c. 47 N. W. Rep. 785; Devlin v. Smith, 25 Hun (N. Y.) 206; s. c. aff'd, 89 N. Y. 476. In a Canadian case it is ruled that an employer who does

not personally superintend the work of repairing his mill machinery, must select proper and competent persons so to do, and furnish them with all adequate materials and resources necessary for that purpose; and that, after he has done this, he is not liable for their want of skill and diligence in the performance of the work: Baird v. Dunn, 33 N. B. 156.

³⁷ Griffiths v. New Jersey &c. R. Co., 5 Misc. (N. Y.) 320; s. c. 25 N. Y. Supp. 812; s. c. aff'd, 8 Misc. (N. Y.) 3; 59 N. Y. St. Rep. 303; 28 N. Y. Supp. 75; s. c. aff'd, 149 N. Y. 595; 44 N. E. Rep. 1124.

³⁸ Ante, § 4055, *et seq.*

whatever grade to whom he may delegate the duty. Such servant occupies, *pro hac vice*, the position of vice-principal, and not that of a fellow servant of another servant injured by his non-performance or negligent performance of the duty.³⁹ The master is responsible for the proper qualification of any person to whom he delegates this duty, and for his negligence in failing to continue the instruction until it is completed.⁴⁰ This refers to the *general duty* which the law imposes upon the master of warning and instructing his inexperienced or infant servants concerning the danger of the service. It does not necessarily refer to the duty of giving warnings of dangers which arise from time to time in the mere work of service,—such warnings, for example, as it may be the duty of a mere foreman of work to give. For example, the negligent failure of a foreman of work to warn a laborer when a load of earth and stone was about to be dumped into a trench where he was working, was not such negligence of the employer as would make him liable for an injury to the laborer from the failure to give such warning, in the absence of evidence that the failure was chargeable to his negligence in hiring incompetent or insufficient servants, or in placing the duty of warning on a servant incompetent to perform it, by reason of other duties, or to a failure to make proper rules for the conduct of the work.⁴¹ So, where a quarry-owner's superintendent employed a foreman to direct laborers engaged in blasting, and such foreman negligently failed to give warning that a blast was about to be fired, by reason of which the plaintiff, one of such laborers, was injured,—it was held that such foreman was, as matter of law, a fellow servant with the plaintiff, as the master was under no personal duty to give such warning.⁴² So, the failure of a machinist having direction of other machinists as to the character of the work they shall perform from day to day, to suggest to an inexperienced machinist working with him the danger of performing a task in a certain manner, is that of a fellow servant,

³⁹ *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517; s. c. 47 Pac. Rep. 364, 778 (negligence of a superintendent in placing an inexperienced employé at work on a dangerous machine without proper instruction); *Brennan v. Gordon*, 13 Daly (N. Y.) 208; s. c. on second trial, 118 N. Y. 489; 29 N. Y. St. Rep. 829; 23 N. E. Rep. 810; rev'g s. c. 14 Daly (N. Y.) 47; 3 N. Y. St. Rep. 604; *Lebbering v. Struthers*, 157 Pa. St. 312; s. c. 33 W. N. C. (Pa.) 99; 27 Atl. Rep. 720; *Wallace v. Standard Oil Co.*, 66 Fed.

Rep. 260 (agent of master failed to instruct inexperienced boy as to the danger of going near a red-hot stove with oil and gas-soaked clothes; on the contrary told him it was safe); *Louisville & C. R. Co. v. Miller*, 43 C. C. A. 436; s. c. 104 Fed. Rep. 124.

⁴⁰ *Louisville & C. R. Co. v. Miller*, 43 C. C. A. 436; s. c. 104 Fed. Rep. 124.

⁴¹ *McLaine v. Head & Co.*, 71 N. H. 294; s. c. 52 Atl. Rep. 545.

⁴² *Donovan v. Ferris*, 128 Cal. 48; s. c. 60 Pac. Rep. 519.

and not of a vice-principal.⁴³ Other courts have held that the negligence of a competent and properly instructed employé entrusted with the duty of *warning* other employés of the starting of machinery, in failing to do so, is not attributable to the employer, so as to render the latter liable for personal injuries to an employé resulting therefrom.⁴⁴ But a servant employed to repeat the warnings which were necessary in raising and lowering timbers used in erecting a stage, through whose negligence a ship-carpenter was killed, was deemed not to be a fellow servant of the deceased, but a vice-principal; so that the common master was liable for his mistake, if any, in repeating the signals.⁴⁵

ARTICLE III. SUPERIOR AND INFERIOR SERVANTS.

SECTION

4938. Superiority in rank not a controlling test, but superior and inferior servants may be fellow servants.
4939. Foreman of work and the workmen under him deemed fellow servants.
4940. Jurisdictions in which a superior servant is deemed a vice-principal and not a fellow servant of the servant working under him.
4941. Further of the status of superior and inferior servants under this doctrine.
4942. Illustration in the case of a superintendent of a machine-shop and an errand-boy employed therein.

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4943. Engineer in manufacturing establishment and his fireman.
4944. Locomotive-engineer and his fireman.
4945. Servant authorized to employ and discharge other servants acts as vice-principal in so doing.
4946. Servant vested with exclusive supervision, direction and control of the work or of any department thereof is a vice-principal and not a fellow servant.
4947. Illustrations of this doctrine.
4948. Application of this doctrine in case of corporations.

⁴³ *Kerner v. Baltimore &c. R. Co.*, 149 Ind. 21; s. c. 9 Am. & Eng. R. Cas. (N. S.) 328; 48 N. E. Rep. 364 (no recovery for death of third machinist who was helping).

⁴⁴ *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574; s. c. 77 N. W. Rep. 875 (no provision for warning employés—master liable) [limiting *Promer v. Milwaukee &c. R. Co.*, 90 Wis. 215; and citing *Hartvig v. Northern Pac. Lumber Co.*, 19 Or. 522; s. c. 25 Pac. Rep. 358]. State of facts under which it was held that even if an employé who was sent up a chimney to put out a

fire failed to give another servant warning of the danger from planks being thrown down, it did not necessarily show the negligence of a fellow servant, since the jury might have found that the fellow servant did all that he could have done, and that it was the duty of the superintendent to give warning to the servant who was killed, and that the evidence warranted a verdict for the plaintiff: *Cote v. Lawrence Man. Co.*, 178 Mass. 295; s. c. 59 N. E. Rep. 656.

⁴⁵ *Sroufe v. Moran Bros. Co.*, 28 Wash. 381; s. c. 68 Pac. Rep. 896.

SECTION

4949. Who deemed vice-principal where there is no division of the business into distinct departments.
4950. Servant whose duty is exclusively supervision, direction and control deemed a vice-principal, and not a fellow servant.
4951. General superintendent is a vice-principal and not a fellow servant.
4952. Distinction between superintendent or general manager of the work and foreman in charge of some branch or detail.
4953. When superintendent deemed a fellow servant.
4954. Power to employ or discharge as a test of relation of fellow servant or vice-principal.
4955. Servant vested with general superintendence and with authority to employ or discharge workmen, deemed a vice-principal.
4956. Workman discharging the duties of superintendent in his absence.

SECTION

4957. Assistant superintendent.
4958. When foreman not deemed a fellow servant with those working under him.
4959. Foreman vested with entire management.
4960. Assistant foreman, when deemed a vice-principal.
4961. When knowledge of foreman or vice-principal is the knowledge of the master.
4962. Effect of foreman or superintendent sending servant to a dangerous place or putting him at dangerous work.
4963. Servant injured by superintendent or other superior while performing work of servant.
4964. Contrary doctrine that even the acts of service of a vice-principal are imputable to the master.
4965. Presumptions as between negligence of vice-principals and negligence of fellow servants.
4966. Greater age or experience does not make a servant a vice-principal.

§ 4938. **Superiority in Rank Not a Controlling Test, but Superior and Inferior Servants may be Fellow Servants.**—Superiority in rank of the servant inflicting the injury, over the servant receiving the injury, is not a controlling test; but two persons who are subject to the control and direction of the same general master, and who are working to accomplish the same common object, are fellow servants within the meaning of the rule under consideration; so that if one of them is injured by the negligence of the other, the master is not liable, in the absence of statute, though the negligent servant is higher in rank than the servant receiving the injury, and though he has the right to direct and control the work of the other.¹ In such cases, the

¹Postal Tel. Cable Co. v. Hulsey, 115 Ala. 193; s. c. 22 South. Rep. 854; Hamby v. Union Paper Mills Co., 110 Ga. 1; s. c. 35 S. E. Rep. 297 [citing McDonald v. Eagle Man. Co., 68 Ga. 839; McGovern v. Columbus Man. Co., 80 Ga. 227; s. c. 5 S. E. Rep. 492; Ellington v.

subordinates assume the risks of the negligence of their superiors in their work of supervision, to the same extent as that of those who work by their sides.² Within the meaning of this rule, the following persons have been held to be fellow servants, notwithstanding the superiority in rank of one over the other:—The leader, or boss, of a gang of hands, himself under the control and direction of a foreman, and doing such work as the latter directs to be done, and the other members of the gang, although the latter are under his orders;³ a *shift-boss* in charge of a gang of men, whose duty it is to direct the men when, where, and how to work, to supervise them and their labor, and to see that they properly perform it, but who has no authority to hire or discharge them,—and the men of his shift;⁴ three servants working together, two of them subject to the orders of the other, by whose negligence in directing the placing of a stone one of the others was injured.⁵ The distinction upon which these cases rest is that between an act of vice-principalship and a mere act of service. The meaning is, that where a superior servant is performing a positive and unassignable duty of the master, his negligence is the negligence of the master, no matter what his grade or rank in the service may be; but where he is performing a mere detail of work, his negligence is that of a fellow servant, although he may be in command over the servant who is injured, and although his negligence may consist in giving an erroneous command or direction.⁶

Beaver Dam Lumber Co., 93 Ga. 53; s. c. 19 S. E. Rep. 21; Stubbs v. Atlanta &c. Mills, 92 Ga. 495; s. c. 17 S. E. Rep. 746; Hoyle v. Excelsior Lumber Co., 95 Ga. 34; s. c. 21 S. E. Rep. 1001; Willingham v. Rockdale Fertilizer Co., 101 Ga. 713; s. c. 29 S. E. 301; Peterson v. White Breast Coal &c. Co., 50 Iowa 673; s. c. 32 Am. Rep. 143; Newbury v. Getchell &c. Lumber &c. Co., 100 Iowa 441; s. c. 69 N. W. Rep. 743; Flynn v. Salem, 134 Mass. 351 (one employed by a city to superintend the digging of a trench, and one employed as a laborer to dig the trench by the same master, are *prima facie* fellow servants); Louisville &c. R. Co. v. Lahr, 86 Tenn. 335; s. c. 6 S. W. Rep. 663; Knutter v. New York &c. Tel. Co., 67 N. J. L. 646; s. c. 52 Atl. Rep. 565; Hawk v. McLeod Lumber Co., 166 Mo. 121; s. c. 65 S. W. Rep. 1022; Richmond &c. Works v. Ford, 94 Va. 627; s. c. 27 S. E. Rep. 509 (where the negligence of a servant is in the per-

formance or non-performance of some duty that is merely incidental to the general employment); Weeks v. Scharer, 111 Fed. Rep. 330; s. c. 49 C. C. A. 372; *ante*, § 4919.

² Weeks v. Scharer, 111 Fed. Rep. 330; s. c. 49 C. C. A. 372.

³ Richmond &c. Works v. Ford, 94 Va. 627; s. c. 27 S. E. Rep. 509.

⁴ Weeks v. Scharer, 111 Fed. Rep. 330; s. c. 49 C. C. A. 372.

⁵ Smallwood v. Bedford Quarries Co., 28 Ind. App. 692; s. c. 63 N. E. Rep. 869.

⁶ Lapan v. Hall, 128 Mich. 523; s. c. *sub nom.* Lipan v. Hall, 87 N. W. Rep. 619; 8 Det. Leg. N. 750. See also, Knutter v. New York &c. Tel. Co., 67 N. J. L. 646; s. c. 52 Atl. Rep. 565. A good illustration of this principle may be found in a case which held that where an inexperienced servant was injured by the negligence of an experienced servant in charge of a dangerous work, the fact that the master's superintendent was present, and ob-

§ 4939. **Foreman of Work and the Workmen Under Him Deemed Fellow Servants.**—Within the meaning of this rule, a mere *foreman* of work is generally regarded as a fellow servant with those under his control, while performing acts of service, as distinguished from those acts which it is the master's primary duty to perform.⁷ The

served such experienced servant doing the work in such negligent manner, and failed to object, did not render the master liable for the injuries, where the negligence was with respect to a mere detail of work, as to which such superintendent, as well as the experienced servant, was a fellow servant with the servant injured: *O'Brien v. Buffalo Furnace Co.*, 68 App. Div. (N. Y.) 451; s. c. 73 N. Y. Supp. 830 (men were removing hardened refuse material from the base of a blast furnace stack; superintendent allowed dynamite to be tamped with an iron rod instead of a wooden one; injured servant knew that dynamite was being used, but was inexperienced in its use, and was not warned of the danger attending its use). For a badly decided case, where a servant was injured in consequence of there being no bumpers at the end of a trestle, which trestle had been built by a contractor under control of the superintendent, who had control of the whole work, with power to employ or discharge hands,—in which it was held that the injured servant had no ground of recovery because the superintendent was his fellow servant,—see *Maryland Clay Co. v. Goodnow*, 95 Md. 330; s. c. 5 Atl. Rep. 298 (Pearce, J., dissenting). This case should have been decided the other way, on the ground that the superintendent, in erecting the trestle, was performing an absolute duty of the master,—namely, the duty of seeing that the ways, works and machinery, with which its servants were required to work, were reasonably safe for the purpose intended. The negligence of so constructing its track was gross, palpable and inexcusable. The track, as it ran down the trestle, descended at a gradient of six feet in three hundred, and at the lower end of the track the distance to the ground was thirteen feet. The necessity of

having bumpers at the end of the track was perfectly obvious, and it had been emphasized by the fact that the contractor warned the superintendent of the danger of not having bumpers there. The decision is unaccountable.

⁷ *St. Louis & C. R. Co. v. Torrey*, 58 Ark. 217; s. c. 24 S. W. Rep. 244 (foreman performing an act of labor in common with the injured employé); *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255; *Noyes v. Wood*, 102 Cal. 389; s. c. 36 Pac. Rep. 766 (foreman of a contractor of the job of painting a building, in erecting a scaffold, is a fellow servant with a journeyman painter, and the contractor is not liable for the erection of an insecure scaffold through the negligence of the foreman); *White v. Kennon*, 83 Ga. 343; s. c. 9 S. E. Rep. 1082; 39 Am. & Eng. R. Cas. 330 (one employed by the owner of a steam sawmill to take charge of hands and keep in proper repair a tramroad over which logs are hauled, is a fellow servant with the engineer on the road); *McGovern v. Columbus & C. Co.*, 80 Ga. 227; s. c. 5 S. E. Rep. 492 (watchman employed in the picker-room of a cotton factory with two other persons and having direction of the work therein, deemed a fellow servant of such persons); *Gates v. Itner*, 104 Ga. 679; s. c. 30 S. E. Rep. 884; *McDonald v. Eagle & C. Man. Co.*, 67 Ga. 761; s. c. 68 Ga. 839 (workman engaged by defendant in constructing a dye-house together with two or three workmen, and having the direction of the work); *Chicago & C. R. Co. v. Simmons*, 11 Ill. App. 147; *Fitzgerald v. Honkomp*, 44 Ill. App. 365 (negligence of a foreman in his duties as a co-laborer with an inferior employé is the negligence of a fellow servant); *Gall v. Beckstein*, 173 Ill. 187; s. c. 50 N. E. Rep. 711; aff'g s. c. *sub nom.* *Beckstein v. Gall*, 69 Ill. App. 616 (negligence of a foreman by which

doctrine is frequently stated thus: A master is not responsible to an

an employé assisting him in lifting a barrel from the track to the ground was injured, was that of a fellow servant and not of a vice-principal, even if in the discharge of certain duties he acted as a vice-principal); *Salem Stone &c. Co. v. Chastain*, 9 Ind. App. 453; s. c. 36 N. E. Rep. 910; *Louisville &c. R. Co. v. Isom*, 10 Ind. App. 691; s. c. 38 N. E. Rep. 423 (where both are engaged in throwing rails upon a car); *New Pittsburg Coal &c. Co. v. Peterson*, 14 Ind. App. 634; s. c. 43 N. E. Rep. 270; *American Teleph. &c. Co. v. Bower*, 20 Ind. App. 32; s. c. 49 N. E. Rep. 182 (holding that the negligence of one having the direction of the actual work of removing a telephone and telegraph line, with authority to hire, pay, and discharge employés, in climbing a pole and loosening the wires after the soil has been removed from the bottom of the pole, causing an injury to another employé, is that of a fellow servant, and not of a vice-principal); *Hodges v. Standard Wheel Co.*, 152 Ind. 680; s. c. 1 Repr. (Ind.) 476; 52 N. E. Rep. 391 (workman injured, during temporary absence of foreman, in releasing his hold upon a pile of rims which he was supporting while another workman under whose direction he was working, was removing lumber; nor was defendant liable under Employers' Liability Act, § 1, subdiv. 2 (*Burns' R. S.* 1901, § 7083), as the negligence did not result from the negligence of a person to whose order or direction the injured servant at the time of the injury was bound to conform,—the foreman having no authority, express or implied, to delegate his powers); *Barnicle v. Connor*, 110 Iowa 238; s. c. 81 N. W. Rep. 452 (holding that as to the particular act, the foreman was a fellow servant); *Conley v. Portland*, 78 Me. 217 (laborer employed in constructing a sewer, and one having the oversight and direction of the work); *Dube v. Lewiston*, 83 Me. 211; s. c. 22 Atl. Rep. 112; *Doughty v. Penobscot &c. Co.*, 76 Me. 143; *Cowan v. Umbagog Pump Co.*, 91 Me. 26; s. c. 39 Atl. Rep. 340; *Cumberland Coal &c. Co. v. Scally*, 27 Md. 589; *Yates v. McCullough Iron Co.*, 69 Md. 370; s. c. 19 Md. L. J. 837; 16 Atl. Rep. 280 (chief manager of charcoal-works, who works at charging the retorts, etc., with no direct charge over the machinery, but with the right to repair it and with the duty to see whether it is out of repair, but with no authority to buy, alter, or change machinery, where the works and machinery are inspected once or twice a week by different officers of the company); *O'Connor v. Roberts*, 120 Mass. 227; *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75; *Summersell v. Fish*, 117 Mass. 312; *Zeigler v. Day*, 123 Mass. 152; *McDermott v. Boston*, 133 Mass. 349; *O'Brien v. Rideout*, 161 Mass. 170; s. c. 36 N. E. Rep. 792; *Howard v. Hood*, 155 Mass. 391; s. c. 29 N. E. Rep. 630 (co-servant having some control over the injured fellow servant); *Dewey v. Parke*, 76 Mich. 631; s. c. 43 N. W. Rep. 644 (foreman of carpenter-department and the carpenters working under him); *Morch v. Toledo &c. R. Co.*, 113 Mich. 154; s. c. 4 Det. Leg. N. 236; 71 N. W. Rep. 464 (section-foreman with authority to hire or discharge only the men employed on his section, temporarily taking place of roadmaster and superintending unloading of ties, subject to orders of roadmaster); *Wellihan v. National Wheel Co.*, 128 Mich. 1; s. c. 8 Det. Leg. N. 487; 87 N. W. Rep. 75; *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59; s. c. 4 Det. Leg. N. 485; 72 N. W. Rep. 40; *Andre v. Winslow Bros. Elevator Co.*, 117 Mich. 560; s. c. 5 Det. Leg. N. 359; 76 N. W. Rep. 86; 11 Am. & Eng. Corp. Cas. (N. S.) 316 (foreman superior only in the sense that he directs servant how the work assigned to both shall be done, where both work at the same work and with the like tools); *Schroeder v. Flint &c. R. Co.*, 103 Mich. 213; s. c. 29 L. R. A. 321; 50 Am. St. Rep. 354; 61 N. W. Rep. 663 (boss or foreman of a gang of men unloading and leveling dirt on a railroad); *Mikolajczak v. North American Chemical Co.*, 129 Mich. 80; s. c. 88 N. W. Rep. 75; 8 Det. Leg. N. 870 (workman injured while assisting in breaking down salt in plant through failure

employé for the negligent act of a competent and proper foreman

of a yard foreman to give warning that a mass was about to be pried off); *Findlay v. Russell Wheel &c. Co.*, 108 Mich. 286; s. c. 2 Det. Leg. N. 843; 66 N. W. Rep. 50 (foreman of department in factory, who joins with the employés in the performance of labor therein, is a fellow servant of such employés in the performance of acts which it is not the duty of the master to perform); *Gonsior v. Minneapolis &c. R. Co.*, 36 Minn. 385; s. c. 31 N. W. Rep. 515; *Bell v. Lang*, 83 Minn. 228; s. c. 86 N. W. Rep. 95 (where a foreman, in selecting a tree to use as a tackle-post in loading a pile-driver hammer on a wagon, was not acting as vice-principal but as fellow servant); *Holtz v. Great Northern R. Co.*, 69 Minn. 524; s. c. 72 N. W. Rep. 805 (while assisting in the work of repairing a car by driving a bolt through the floor thereof); *Friedrich v. St. Paul*, 68 Minn. 402; s. c. 71 N. W. Rep. 387 (when the negligence of a foreman engaged in excavating a trench is that of a fellow servant of one who is injured thereby); *Saxton v. Northwestern Tel. Exch. Co.*, 81 Minn. 314; s. c. 84 N. W. Rep. 109 (failure of foreman to inform linemen, engaged in taking down old and decayed telegraph-poles, that a particular pole was defective; no recovery by lineman injured by breaking of such pole, the injury proceeding from defects he was employed to repair); *Marshall v. Schricker*, 63 Mo. 308; *Daubert v. Pickel*, 4 Mo. App. 590; *Hamilton v. Iron Mountain R. Co.*, 4 Mo. App. 564, 565; *Graesel v. Weber*, 76 Mo. App. 677; s. c. 2 Mo. App. Repr. 29 (where servant acted in disobedience to orders from the foreman, causing injury to a fellow servant, and no negligence on part of foreman was shown, a nonsuit was proper); *Hawk v. McLeod Lumber Co.*, 166 Mo. 121; s. c. 65 S. W. Rep. 1022 (deck-hand and sawyer are fellow servants); *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557; s. c. 38 Atl. Rep. 677; *Olsen v. Nixon*, 61 N. J. L. 671; s. c. 4 Am. Neg. Rep. 515; 40 Atl. Rep. 694 (where he does not represent the master as his servant or middleman ex-

clusively, but is at work with the others in the common employment of the master); *O'Brien v. American Dredging Co.*, 53 N. J. L. 291; s. c. 14 N. J. L. J. 82; 21 Atl. Rep. 324 (foreman employed in a common operation with the injured servant, though in a superior capacity); *Malone v. Hathaway*, 64 N. Y. 5; s. c. 21 Am. Rep. 573; *Brown v. Maxwell*, 6 Hill (N. Y.) 592; s. c. 41 Am. Dec. 771; *Sherman v. Rochester &c. R. Co.*, 17 N. Y. 153; aff'g s. c. 15 Barb. (N. Y.) 574; *Hofnagle v. New York &c. R. Co.*, 55 N. Y. 608; *Vitto v. Farley*, 15 Misc. (N. Y.) 153; s. c. 36 N. Y. Supp. 1105; 72 N. Y. St. Rep. 254 (foreman failed to warn miner to draw an unexploded charge); *Ludlow v. Groton Bridge Co.*, 16 Misc. (N. Y.) 222; s. c. 37 N. Y. Supp. 595; aff'g s. c. 73 N. Y. St. Rep. 510; 36 N. Y. Supp. 452 (foreman failed properly to secure a heavy iron to a truck, in consequence of which it fell over, injuring a workman under him); *Murray v. Crimmins*, 14 Misc. (N. Y.) 466; s. c. 35 N. Y. Supp. 1023; 70 N. Y. St. Rep. 727 (assistant foreman is a fellow servant of workman under him); *Bagley v. Consolidated Gas Co.*, 5 App. Div. (N. Y.) 432; s. c. 39 N. Y. Supp. 302 (negligence of foreman in the use of a proper appliance provided by the master, injuring a servant under him); *Scott v. Sweeny*, 34 Hun (N. Y.) 292 (foreman in charge of a derrick, and laborer engaged in moving stone on a truck, both employed by the same master); *Loughlin v. State*, 105 N. Y. 159 (an employé of the State, injured while digging clay, and the captain of a boat belonging to the State, under whose direction he was acting); *White v. Eidlitz*, 19 App. Div. (N. Y.) 256; s. c. 46 N. Y. Supp. 184 (contractors for erection of building not liable for the death of a bricklayer, caused by the negligence of the foreman of the bricklayers in directing him to ride to the top of the building in a defective elevator which the contractors had not authorized the men to use); *Connolly v. Maurer*, 6 Misc. (N. Y.) 98; s. c. 56 N. Y. St. Rep. 838; 26 N. Y. Supp. 18; *Daley v. Brown*, 60

to whom there has been no delegation of power and control of the

N. Y. Supp. 840; s. c. 45 App. Div. (N. Y.) 428; Oellerich v. Hayes, 8 Misc. (N. Y.) 211; s. c. 59 N. Y. St. Rep. 221; 28 N. Y. Supp. 579; Warzawski v. McWilliams, 64 App. Div. (N. Y.) 63; s. c. 71 N. Y. Supp. 680; Maltbie v. Belden, 167 N. Y. 307; s. c. 60 N. E. Rep. 645; 54 L. R. A. 52; rev'g s. c. *sub nom.* Maltby v. Belden, 60 N. Y. Supp. 824; Quigley v. Levering, 167 N. Y. 58; s. c. 60 N. E. Rep. 276; 54 L. R. A. 62; aff'g s. c. 63 N. Y. Supp. 1059 (accident caused by negligence of foreman whose duty it was to clean and oil machinery); Dwyer v. Hickler, 43 N. Y. St. Rep. 221; s. c. 16 N. Y. Supp. 814; Moore v. McNeill, 35 App. Div. (N. Y.) 323; s. c. 54 N. Y. Supp. 956 (negligence of a foreman in charge of the construction of a scaffolding, in choosing, from a suitable supply for the purpose, an unsuitable plank); Kiffin v. Wendt, 39 App. Div. (N. Y.) 229; s. c. 57 N. Y. Supp. 109; Cullen v. Norton, 126 N. Y. 1; s. c. 36 N. Y. St. Rep. 359; 26 N. E. Rep. 905 (foreman of a quarry examined a hole which had been drilled, saw that the charge had not exploded, but that the fuse was still attached, and yet set men to work within two feet of it, and while working there the fuse ignited and the charge exploded—no recovery); Perry v. Rogers, 157 N. Y. 251; s. c. 5 Am. Neg. Rep. 68; 51 N. E. Rep. 1021; rev'g s. c. 91 Hun (N. Y.) 243; 71 N. Y. St. Rep. 105; 36 N. Y. Supp. 208; Collins v. Crimmins, 11 Misc. (N. Y.) 24; s. c. 64 N. Y. St. Rep. 626; 31 N. Y. Supp. 860; Keenan v. New York & C. R. Co., 145 N. Y. 190; s. c. 64 N. Y. St. Rep. 576; 39 N. E. Rep. 711; 45 Am. St. Rep. 604 ("gang-boss" over forty or fifty men working in a railroad repair-yard is a fellow servant with one of the men under him); Mancuso v. Cataract Const. Co., 87 Hun (N. Y.) 519; s. c. 68 N. Y. St. Rep. 153; 34 N. Y. Supp. 273 (foreman whose authority is limited to the management of the details of the service and the distribution of the work among the workmen employed); Tully v. New York & C. S. S. Co., 10 App. Div. (N. Y.) 463; s. c. 42 N. Y. Supp. 29 (foreman of a steamship and longshoreman employed by him in loading a vessel); O'Connor v. Hall, 52 App. Div. (N. Y.) 428; s. c. 65 N. Y. Supp. 136; Vitto v. Keogan, 15 App. Div. (N. Y.) 329; s. c. 44 N. Y. Supp. 1 (foreman of excavating-work directed employé to draw an unexploded blast without telling him of dynamite in the hole—master not liable); Bagley v. Consolidated Gas Co., 13 Misc. (N. Y.) 6; s. c. 34 N. Y. Supp. 187; Simone v. Kirk, 67 N. Y. Supp. 1019; s. c. 57 App. Div. (N. Y.) 461; Griffiths v. New Jersey & C. R. Co., 5 Misc. (N. Y.) 320; s. c. 25 N. Y. Supp. 812; s. c. aff'd, 8 Misc. (N. Y.) 3; 59 N. Y. St. Rep. 303; 28 N. Y. Supp. 75; s. c. aff'd, 149 N. Y. 595 (where, although called a foreman, he is engaged in the same work and receives the same pay—carpenter and men under him, engaged in preparing materials); Koehler v. New York Steam Co., 71 App. Div. (N. Y.) 222; s. c. 75 N. Y. Supp. 597 (injury to a workman in consequence of foreman disobeying his instructions in turning on the steam in steam-pipes); Brown v. Terry, 67 App. Div. (N. Y.) 223; s. c. 73 N. Y. Supp. 733 (foreman actively engaged in assisting in the same work, deemed a fellow servant); Ell v. Northern Pac. R. Co., 1 N. D. 336; s. c. 12 L. R. A. 97; 26 Am. St. Rep. 621; 43 Alb. L. J. 414; 48 N. W. Rep. 222 (negligence of a foreman of a gang in failing to block a pile which was shoved against a servant); Willis v. Oregon R. & C. Co., 11 Or. 257 (foreman of a gang of laborers engaged in building a shed under the direction of a superior); Weger v. Pennsylvania R. Co., 55 Pa. St. 460; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; s. c. 42 Am. Rep. 543 (master not liable for an injury to his servant in consequence of the negligence of a competent *gang-boss* having no general control but acting under the direction of the superintendent); Hughes v. Leonard, 199 Pa. St. 123; s. c. 48 Atl. Rep. 862; Johnson v. Western & C. R. Co., 200 Pa. St. 314; s. c. 49 Atl. Rep. 794; Kinney v. Corbin, 132 Pa. St. 341; s. c. 19 Atl. Rep. 141; Carnagie v. Penn Bridge Co., 197 Pa. St. 441; s. c. 47 Atl. Rep. 355; Mc-

business, or a branch thereof, but who is merely charged with special

Ginley v. Levering, 152 Pa. St. 366; s. c. 31 W. N. C. (Pa.) 384; 25 Atl. Rep. 824 (workman injured by the breaking of a steel hammer in the hands of another workman acting under the orders of the assistant foreman); Durst v. Carnegie Steel Co., 173 Pa. St. 162; s. c. 33 Atl. Rep. 1102 (foreman who is instructed, in case of necessity, to call upon a vice-principal of the employer, or a carpenter employed by him to provide against danger from the caving in of the excavation, are fellow servants of employes engaged in excavating under their charge); Casey v. Pennsylvania Asphalt Pav. Co., 198 Pa. St. 348; s. c. 47 Atl. Rep. 1128 (foreman of a gang at a factory, who, while performing the duties of a common laborer, directs a workman to come into an enclosure and assist him, not a vice-principal in giving the order, though he had power to employ and discharge men); O'Dowd v. Burnham, 19 Pa. Super. Ct. 464; Larich v. Moies, 18 R. I. 513; s. c. 28 Atl. Rep. 661 (plaintiff was injured by caving in of a sand-bank and had been warned of danger); Di Marcho v. Builders' Iron Foundry, 18 R. I. 514; s. c. 28 Atl. Rep. 661 (where the servant inflicting the injury is not discharging a duty of the master); Frawley v. Sheldon, 20 R. I. 258; s. c. 3 Am. Neg. Rep. 734; 38 Atl. Rep. 370; Knox v. Southern R. Co., 101 Tenn. 375; s. c. 12 Am. & Eng. R. Cas. (N. S.) 684; 47 S. W. Rep. 491 ("boss wiper" who is the foreman of a gang of wipers employed by a railroad company to wipe its locomotives, and directs them when to work and what to do, but who has no power to employ or discharge them); Louisville & C. R. Co. v. Lahr, 86 Tenn. 335; s. c. 6 S. W. Rep. 663 (distinguishing between personal and official negligence); Allen v. Goodwin, 92 Tenn. 385; s. c. 21 S. W. Rep. 760 (must not only have been foreman in fact, but must have been such in the sense of being a vice-principal—not enough that the injured employé believed him to have been such); St. Louis & C. R. Co. v. Lemon, 83 Tex. 143; s. c. 18 S. W. Rep. 331 (temporary foreman left in charge

of the work during the absence of the regular foreman, he not having full control of the work with power to employ and discharge men); Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247; s. c. 35 S. W. Rep. 826 (foreman of a gang who has not authority to discharge the men); Allen v. Logan City, 10 Utah 279; s. c. 37 Pac. Rep. 496 (employé engaged in work at a gravel-bank is a fellow servant with another employé engaged in the same general character of work, who is left in charge by the vice-principal of the employer); Southern R. Co. v. Mauzy, 98 Va. 692; s. c. 2 Va. Sup. Ct. Rep. 575; 37 S. E. Rep. 285 (although the foreman possessed the power to hire and discharge hands, but was helping injured employé); Moore Lime Co. v. Richardson, 95 Va. 326; s. c. 64 Am. St. Rep. 785; 28 S. E. Rep. 334 (member of a gang of men engaged in quarrying lime-stone and burning lime, who does the same work as other members of the gang, and receives the same pay, is a fellow servant with them, though he acts as leader or foreman in the work of moving cars to the lime-kilns); Garrow v. Miller, 72 Vt. 284; s. c. 47 Atl. Rep. 1087; Lambert v. Missisquoi Pulp Co., 72 Vt. 278; s. c. 47 Atl. Rep. 1085; Sayward v. Carlson, 1 Wash. 29; s. c. 23 Pac. Rep. 830 (foreman of a mill is a fellow servant of a person working in the mill so far as the work of operating the mill is concerned); Hoth v. Peters, 55 Wis. 405; Johnson v. Ashland Water Co., 77 Wis. 51; s. c. 45 N. W. Rep. 807 (foreman in a water-works company, having exclusive charge of calking and laying pipes in the absence of the general superintendent, is a fellow servant of another employé injured by a pipe rolling off blocks while assisting the foreman, who called him to help in raising one of the joints to a level position); Paschel v. Chicago & C. R. Co., 62 Wis. 338 (foreman subordinate to a master carpenter, who alone has power to employ and discharge laborers, and who has charge of gangs and directs the foreman); Kliegel v. Weisel & C. Man. Co., 84 Wis. 148; s. c. 53 N. W. Rep. 1119 (foreman in a ma-

duties, performing them under the direction of the master, the latter retaining general control and supervision.⁸ A true expression of the rule seems to be, that, in order to charge the master, the superior servant must so far stand in the place of the master as to be charged with the performance of duties toward the inferior servant, which, under the law, the master owes to such servant,⁹ as has been more fully shown in the preceding sections.^{9a} But where the foreman is charged

chine-shop is a fellow servant, with respect to the manner of bracing a section of a heavy condenser, of an employé assisting him); *Stutz v. Armour*, 84 Wis. 623; s. c. 54 N. W. Rep. 1000; *Wiskie v. Montello Granite Co.*, 111 Wis. 443; s. c. 87 N. W. Rep. 461 (negligence of a foreman of a quarry in permitting powder to remain after the partial explosion of a blast, whereby a quarryman is injured, deemed the negligence of a fellow servant); *McBride v. Union Pac. R. Co.*, 3 Wyo. 247; s. c. 21 Pac. Rep. 687 (when a "gang-boss" is a fellow servant); *Halverson v. Nisen*, 3 Sawy. (U. S.) 562; *Texas & C. R. Co. v. Rogers*, 57 Fed. Rep. 378; s. c. 6 C. C. A. 403 (temporary boss of a bridge-gang, assisting in work at time employé is injured); *McDonald v. Buckley*, 109 Fed. Rep. 290; s. c. 48 C. C. A. 372 (general foreman, while directing operation of piledriver); *Gaynon v. Durkee*, 87 Fed. Rep. 302; s. c. 52 U. S. App. 587; 31 C. C. A. 306 (when general foreman of railroad-shops is a fellow servant with a workman required to enter the smoke-box of a locomotive to attend to a leak in the boiler); *Flip-pin v. Kimball*, 87 Fed. Rep. 258; s. c. 11 Am. & Eng. R. Cas. (N. S.) 256; 59 U. S. App. 1; 31 C. C. A. 282; *Minneapolis v. Lundin*, 58 Fed. Rep. 525; s. c. 7 C. C. A. 344 (foreman of a gang of men engaged in constructing a sewer under the supervision of a general superintendent, not a special vice-principal); *Reed v. Stockmeyer*, 74 Fed. Rep. 186; s. c. 20 C. C. A. 381; 34 U. S. App. 727 (foreman in a quarry, although having power to hire and discharge men, is a fellow servant with a laborer in such quarry when engaged in the performance of manual labor therein); *Central R. Co. v. Keegan*, 160 U. S. 259; s. c. 40 L. ed. 418;

16 Sup. Ct. Rep. 269 (foreman of a drill-crew in a railroad yard, who is a component part of the crew and an active co-laborer in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches); *Anderson v. Winston*, 31 Fed. Rep. 528 (foreman of a gang of laborers employed by a contractor is a fellow servant of one of the gang); *Kelly v. Jutte & Co.*, 98 Fed. Rep. 380 (foreman under the direct orders of two superiors in the work not a vice-principal); *Coulson v. Leonard*, 77 Fed. Rep. 538 (the distinction between a vice-principal and a foreman of work stated; foreman with supervision over several men in erecting the iron-work of a building, subject to the supervision of a member of the corporation employing them); *Cleveland & C. R. Co. v. Brown*, 73 Fed. Rep. 970; s. c. 20 C. C. A. 147; 34 U. S. App. 756 (though having authority to employ and discharge men, and oversee and direct them in the performance of their duties); *The Louisiana*, 74 Fed. Rep. 748; s. c. 41 U. S. App. 324; 21 C. C. A. 60 (leaving open a hatchway by a squad of laborers under control of an under foreman, or third foreman, deemed the act of a fellow servant); *Murphy v. Smith*, 19 C. B. (N. S.) 361; s. c. 12 L. T. (N. S.) 605; *Allen v. New Gas Co.*, 1 Exch. Div. 251; *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62; s. c. 44 L. J. (Q. B.) 25; 32 L. J. (N. S.) 19; 23 Week. Rep. 335; 31 L. T. (N. S.) 433; *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Fairweather v. Owen Sound Stone Quarry Co.*, 26 Ont. Rep. 604. *Contra*: *Conway v. Belfast & C. R. Co.*, I. R. 9 C. L. 498.

⁸ *Malone v. Hathaway*, 64 N. Y. 5.

⁹ *Hofnagle v. New York & C. R. Co.*, 55 N. Y. 608.

^{9a} *Ante*, § 4923, *et seq.*

with one of the primary duties of the master, as distinguished from a mere act of service, then he becomes the master's representative, and for his negligence in the performance of such duty the master will be liable,—as where an assistant foreman having charge of the machinery in a department of the work, is charged with the duty of keeping it in a safe condition;¹⁰ or where the foreman from whom an inexperienced servant had received all her orders failed to warn and instruct her, so that while sweeping the floor she was caught in a cogwheel.¹¹

§ 4940. **Jurisdictions in which a Superior Servant is Deemed a Vice-Principal and Not a Fellow Servant of the Servant Working Under Him.**—It is held in some jurisdictions that where one servant is placed by his employer in a position of subordination, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for the injury. The superior servant is deemed the vice-principal of the master.¹² In these jurisdictions the so-called "fellow-servant doc-

¹⁰ Dutzi v. Geisel, 23 Mo. App. 676; Bradley v. Chicago &c. R. Co., 138 Mo. 293; s. c. 39 S. W. Rep. 763; 8 Am. & Eng. R. Cas. (N. S.) 728 (foreman in charge of the removal of an embankment—servant injured by the fall of the overhanging top of it while he was excavating at the base of it). It has been held that where an employé, in obedience to the foreman's order, and with the foreman's assistance, is trying to loosen a stone from the side of a car, caught there as it is being raised by a derrick, and the foreman negligently fails to stop the derrick, whereby plaintiff is injured, such negligence is that of a vice-principal, for which the master is liable: *Dolese &c. Co. v. Schultz*, 101 Ill. App. 569.

¹¹ *O'Connor v. Golden Gate Woolen Man. Co.*, 135 Cal. 537; s. c. 67 Pac. Rep. 966.

¹² *Highland Ave. &c. R. Co. v. Dusenberry*, 98 Ala. 239; s. c. 13 South. Rep. 308 (foreman in charge of hand-car); *Leiter v. Kinnare*, 68 Ill. App. 558; *Libby v. Scherman*, 146 Ill. 540; s. c. 34 N. E. Rep. 801; 37 Am. St. Rep. 191; *Norton v. Nadebok*, 190 Ill. 590; s. c. 60 N. E. Rep. 843; aff'g s. c. 92 Ill. App.

541 (though they are coöperating in their work); *Lalor v. Chicago &c. R. Co.*, 52 Ill. 401; *Rock Island Sash &c. Works v. Pohlman*, 99 Ill. App. 670; *Consolidated &c. Smelting &c. Co. v. Peterson*, 8 Kan. App. 316; s. c. 55 Pac. Rep. 673; *Kansas City Car &c. Co. v. Sechrist*, 59 Kan. 778; s. c. 54 Pac. Rep. 688; *Louisville &c. R. Co. v. Collins*, 2 Duv. (Ky.) 114; s. c. 87 Am. Dec. 486; *Faren v. Sellers*, 39 La. An. 1011; s. c. 3 South. Rep. 362; 4 Am. St. Rep. 256 (direct representative of the master, invested with his own authority over inferior servants, not a fellow servant); *Chicago &c. R. Co. v. Bayfield*, 37 Mich. 205 (conductor of construction-train not a fellow servant with a boy of seventeen employed as a common laborer on the train—company liable to boy for injuries incurred while acting as brakeman, under orders of conductor); *Slette v. Great Northern R. Co.*, 53 Minn. 341; s. c. 55 N. W. Rep. 137 (negligence of section-foreman in failing to stop a hand-car and take it off the track when he knew that a train was following); *Sullivan v. Hannibal &c. R. Co.*, 107 Mo. 66; s. c. 17 S. W. Rep. 748; 28 Am. St.

trine" is qualified so as to mean substantially the following: Where different persons are employed by the same principal in a common enterprise, *and no control is given to one over the other*, no action can be sustained by them against their employer on account of any injuries sustained by one agent through the negligence of another.¹⁸

§ 4941. **Further of the Status of Superior and Inferior Servants under this Doctrine.**—Applying this doctrine to railway service, it has further been reasoned that if a railway company sees fit to invest one of its servants with control or superior authority over an-

Rep. 388; Proctor v. Missouri & C. R. Co., 42 Mo. App. 124 (boss directing a gang in loading railway-cars); Schroeder v. Chicago & C. R. Co., 108 Mo. 322; s. c. 18 S. W. Rep. 1094 (foreman not a fellow servant); Cook v. Hannibal & C. R. Co., 63 Mo. 397; Whalen v. Centenary Church, 62 Mo. 226 (architect having general charge of erection of building and workmen on the building); Turner v. Goldsboro Lumber Co., 119 N. C. 387; s. c. 2 Chic. L. J. Wkly. 32; 26 S. E. Rep. 23 (holding that an employé of a corporation who never comes in direct contact with or receives orders or instructions from one higher in power than the foreman, is justified in looking upon such foreman as the representative of the employer); Lake Shore & C. R. Co. v. Lavalley, 36 Ohio St. 221 (foreman of railway repair-gang putting a man to work under a car, failed to take proper precautions for protecting him, and company liable for his failure so to do); Little Miami R. Co. v. Stevens, 20 Ohio 415; Cleveland & C. R. Co. v. Keary, 3 Ohio St. 201; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 292; s. c. 27 Am. Rep. 510; Toledo & C. St. R. Co. v. Yunker, 9 Ohio C. C. 262 (foreman of car-barn of street-railway company and car-driver); Louisville & C. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866 (section-boss and section-hands); Nashville & C. R. Co. v. Jones, 9 Heisk. (Tenn.) 27 (where it was held proper to instruct the jury that "if they shall find that the injury was caused by the carelessness of an employé of the company, occupying a superior and commanding position to that held by the de-

ceased, then the plaintiff will be entitled to recover." We collect from opinion in this case that the person killed was a railway fireman, and that the servant occupying a "superior and commanding position to that held by the deceased" was the engineer in charge of the same engine); San Antonio & C. R. Co. v. Weigers, 22 Tex. Civ. App. 344; s. c. 54 S. W. Rep. 910 (evidence that the injured workman received and obeyed the orders of the foreman sufficient to warrant an instruction based on the hypothesis of the foreman being a vice-principal); Nix v. Texas & C. R. Co., 82 Tex. 473; s. c. 18 S. W. Rep. 571; 27 Am. St. Rep. 897 (case of an assistant foreman); Missouri & C. R. Co. v. Hamilton (Tex. Civ. App.), 30 S. W. Rep. 679 (no off. rep.); Chicago & C. R. Co. v. Ross, 112 U. S. 377; Railroad Co. v. Fort, 17 Wall. (U. S.) 553; Mason v. Edison Machine Works, 24 Blatchf. (U. S.) 93; s. c. 28 Fed Rep. 228.

¹⁸ Whaalan v. Mad River & C. R. Co., 8 Ohio St. 249, 251. The rule as quoted was pronounced as the result of the following cases: Little Miami R. Co. v. Stevens, 20 Ohio 415; Cleveland & C. R. Co. v. Keary, 3 Ohio St. 201. In one case the Supreme Court of Missouri decided that a mere superintendent of work, —an expression which cannot be distinguished from a "foreman of work,"—was a vice-principal of a railway company, and that his negligence in telling a teamster to drive into a dangerous place, in consequence of which the teamster was injured, was the negligence of the company: Cook v. Hannibal & C. R. Co., 63 Mo. 397.

other servant with respect to any part of its business, the two are not, with respect to such business, fellow servants within the meaning of the rule; but in such a case the superior represents the corporation with respect to the one over whom he has been placed.¹⁴ This rule makes the power to command and to enforce obedience one of the tests by which to determine whether the relation is that of fellow servant or vice-principal of master and servant.¹⁵ But it must be plain on reflection that mere superiority of rank cannot furnish a sound test, but that the sound test is to consider whether the act from which the injury proceeded was an act of superintendence or authority, or an act of service,—or, as it has been said, to consider whether the negligence was the personal negligence or the official negligence of the superior servant: the meaning that the master is not liable to an inferior servant from the mere fact that the injury to him resulted from the negligence of a servant superior in rank to him unless the superior servant stood in the master's place, so as to be charged in the particular matter with a duty toward the inferior servant which in law the master owed to such servant.¹⁶ We may extract from the decision of another court the doctrine that an employer is not liable for injuries resulting to an employé from the negligence of a coemployé in the same general service, although such coemployé is higher in authority than the one receiving the injury, and has a limited control over him, but has no authority to discharge other employés and is vested with no authority in the general management of the business of the employer.¹⁷

¹⁴ *Gravelle v. Minneapolis &c. R. Co.*, 3 McCrary (U. S.) 352 (laborer in railroad-yards and assistant yard-master are not fellow servants).

¹⁵ Thus, where a brakeman on a freight-train was injured through the negligence of one who was conductor and engineer of the train, whose direction the brakeman was bound to obey, it was held that he was entitled to recover damages: *Cowles v. Richmond &c. R. Co.*, 84 N. C. 309; s. c. 37 Am. St. Rep. 620. So, where it appeared that the foreman and general superintendent of a machine-shop hired a boy and told him that he must do whatever K., another employé, directed him to do; and K., being in charge of dangerous machinery, negligently told the boy to do a certain act in regard to it, whereby he was injured, it was held that K. and the boy were not fellow servants as to that act,

and the boy could recover against the principal: *Dowling v. Allen*, 74 Mo. 13; s. c. 41 Am. St. Rep. 298. There is a plainly untenable decision to the effect that the foreman in a railway-yard is the fellow servant of an engine-wiper in the yard, and not the representative of the company, in assuming to handle an engine while a coupling is being made at his direction by the wiper, who sustains injuries by the foreman's alleged negligence, where it is no part of his duty as foreman to handle engines at such time, although as such foreman he has authority to employ and discharge wipers: *Gulf &c. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; s. c. 21 S. W. Rep. 706.

¹⁶ *Allen v. Goodwin*, 92 Tenn. 385; s. c. 21 S. W. Rep. 760.

¹⁷ *Peterson v. Whitebreast Coal &c. Co.*, 50 Iowa 673.

According to a doctrine which seems to be peculiar to the State of Kentucky, there can be no recovery in actions by servants against their masters except in those cases in which the injury is caused by the *gross negligence* of a superior servant in the *same* department or field of labor with the injured employé;^{17a} or through the *ordinary* negligence of a superior servant, or the *gross* negligence of a servant of the same grade or rank as the injured servant, in *another* department or field of labor.^{17b} Where the injured servant and the servant inflicting the

^{17a} Cincinnati &c. R. Co. v. Palmer, 98 Ky. 382; s. c. 17 Ky. L. Rep. 998; 3 Am. & Eng. Corp. Cas. (N. S.) 435; 33 S. W. Rep. 199 (porter making a coupling under conductor's orders could not recover for injury caused by *ordinary* negligence of engineer in backing the engine, but only for his *gross* negligence); Louisville &c. R. Co. v. Brantley, 96 Ky. 297; s. c. 16 Ky. L. Rep. 691; 28 S. W. Rep. 477 (verdict stating that neglect of superior servant in same department was "ordinary," and awarding plaintiff damages, will be set aside); Eastern Kentucky R. Co. v. Powell, 17 Ky. L. Rep. 1051; s. c. 33 S. W. Rep. 629 (no off. rep.) (instruction that plaintiff could recover for injury caused by carelessness and negligence of defendant's servants, was improper). It was held to be gross negligence on the part of a conductor, after directing an employé to go between the cars and couple them, to permit the train to be moved, and the company was liable for the injuries thereby inflicted: Louisville &c. R. Co. v. Mitchell, 87 Ky. 327; s. c. 10 Ky. L. Rep. 211; 8 S. W. Rep. 706. So, where the plaintiff, under orders of a railroad yardmaster, was pushing against a lever with his foot, and the yardmaster gave the lever a sudden wrench or jerk, thereby injuring the plaintiff, it was held that the plaintiff might recover if such act of the yardmaster were found to be grossly negligent,—he being a superior servant, and acting in the course of his employment: Illinois Cent. R. Co. v. Coleman, 22 Ky. L. Rep. 878; s. c. 59 S. W. Rep. 13 (no off. rep.). To render a railway company liable for injuries to a brakeman caused by the negligence of other employés in the management of the train while he was attempting to make a coup-

ling, such other employés must have been superior to the brakeman in authority and control of the train, and the negligence must have been gross: Greer v. Louisville &c. R. Co., 94 Ky. 169; s. c. 14 Ky. L. Rep. 876; 21 S. W. Rep. 649 (holding that a fireman, while acting as engineer, is superior to the brakeman).

^{17b} Southern R. Co. v. Barr, 21 Ky. L. Rep. 1615; s. c. 55 S. W. Rep. 900 (no off. rep.). So, an instruction that there must be *gross* negligence on the part of the servants in charge of a passenger-train, in order to find for the plaintiff, an engineer on a following freight-train, injured by reason of such negligence, was more favorable to the defendant than the law authorized, as ordinary negligence was sufficient to make the defendant liable: Louisville &c. R. Co. v. Hiltner, 21 Ky. L. Rep. 1826; s. c. 56 S. W. Rep. 654; s. c. on rehearing, 22 Ky. L. Rep. 1141; 60 S. W. Rep. 2 (no off. rep.). So, the failure of the employés in charge of the first section of a freight-train, which was running more slowly than the schedule required, to signal the following section which left the station only ten minutes after the first section, was gross negligence toward the employés in charge of the second section, rendering the company liable to them for injuries thereby received: Chesapeake &c. R. Co. v. Hoskins, 19 Ky. L. Rep. 1359; s. c. 43 S. W. Rep. 484 (no off. rep.). Under the law of Kentucky a car-inspector and the man in charge of an engine in a railroad-yard are not fellow servants, not being of the same grade or rank in the service; nor are they considered to be in the same department of work; so that the master is liable for an injury to the car-inspector resulting from

injury are of the same grade or rank, and engaged in the same field of labor, they are held to be fellow servants, and the master is not liable for the negligence of such servants toward each other whether it be ordinary or gross.^{17c}

§ 4942. **Illustration in the Case of a Superintendent of a Machine-Shop and an Errand-Boy Employed therein.**—The Supreme Court of the United States ruled, affirming a judgment of a very able Circuit Judge, that an errand-boy in a railway machine-shop was not a fellow servant with the superintendent of the shop; so that if the latter ordered the former into a position of exceptional hazard, to perform a service outside the line of duty which he had contracted to do, and he was there injured, he might recover damages. In giving the judgment of the court, Mr. Justice Davis said: "For the consequences of this hasty action the company are liable, either upon the maxim of *respondeat superior*, or upon the obligations arising out of the contract of service. The order of Collett was their order. They cannot escape responsibility on the plea that he should not have given it. Having entrusted to him the care and management of the machinery, and, in so doing, made it his rightful duty to adjust it when displaced, and having placed the boy under him, with directions to obey him, they must pay the penalty for the tortious act he committed in the course of the employment. If they are not insurers of the lives and limbs of their employés, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so. The very able judge¹⁸ who tried the case instructed the jury on the point at issue in conformity with these views, and we see no error in the record."¹⁹

§ 4943. **Engineer in Manufacturing Establishment and his Fireman.**—So, it was held in Rhode Island that the engineer of a manufacturing establishment is not a fellow servant with the fireman, but is his superior, standing towards him in the relation of vice-principal. When, therefore, an engineer ordered the fireman to perform a duty outside of that which he had engaged to do, and extra haz-

the *ordinary* negligence of the man in charge of the engine: Louisville &c. R. Co. v. Lowe, — Ky. —; s. c. 66 S. W. Rep. 736.

^{17c} Volz v. Chesapeake &c. R. Co., 95 Ky. 188; s. c. 15 Ky. L. Rep. 727; s. c. *sub nom.* Volz v. Cincinnati &c. R. Co., 24 S. W. Rep. 119;

Louisville &c. R. Co. v. Sander, 19 Ky. L. Rep. 1941; s. c. 44 S. W. Rep. 644 (no off. rep.).

¹⁸ Hon. John F. Dillon, U. S. Circuit Judge.

¹⁹ Railroad Co. v. Fort, 17 Wall. (U. S.) 553; aff'g s. c. 2 Dill. (U. S.) 259.

ardous, in consequence of which he was injured, it was held that the company was liable for the damages.²⁰

§ 4944. **Locomotive-Engineer and his Fireman.**—So, it was held in Iowa that the fireman on a locomotive-engine, while engaged in his duties as such, may properly be found to have been acting under the immediate control of the engineer;²¹ but it should be remembered that there is a statute in Iowa which takes this class of actions out of the ordinary rules.²² Under the exceptional rule in Ohio already indicated,²³ a fireman upon a locomotive, which was sent out by a superior officer under the sole charge of the engineer, without a conductor or brakeman, to do switching, without experience in coupling cars, but nevertheless directed by the engineer to make a coupling, in which act he was injured, had a right of recovery from the company, the engineer being his superior officer and the vice-principal of the company.²⁴ In the absence of statute, a locomotive-engineer and his fireman are generally regarded as fellow servants.²⁵ But in some jurisdictions, where the engineer is entrusted with authority or superintendence over his fireman with respect to the per-

²⁰ Mann v. Oriental Print-Works, 11 R. I. 152.

²¹ Cooper v. Iowa Cent. R. Co., 44 Iowa 134.

²² Post, §§ 5294, 5295.

²³ Ante, § 4940.

²⁴ Pennsylvania Co. v. Hickley, 20 Ohio C. C. 668; s. c. 11 Ohio C. D. 379. See also, Houston &c. R. Co. v. Stuart (Tex. Civ. App.), 48 S. W. Rep. 799; s. c. rev'd on other grounds, *sub nom.* Houston &c. R. Co. v. Stewart, 92 Tex. 540; 50 S. W. Rep. 333.

²⁵ Bull v. Mobile &c. Co., 67 Ala. 206; Kansas City &c. R. Co. v. Becker, 63 Ark. 477; s. c. 39 S. W. Rep. 358 (under a statute, where neither exercises any superintendence or control over the other); Parrish v. Pensacola &c. R. Co., 28 Fla. 251; s. c. 9 South. Rep. 696 (engineer, fireman, brakeman and shovellers on a gravel-train engaged in loading, hauling, and unloading gravel to repair the road-bed, are fellow servants engaged in the same common work); Illinois &c. R. Co. v. Swisher, 61 Ill. App. 611 (although the engineer occupies a superior position and has supervision of the work); Illinois &c. R. Co. v. Hosler, 45 Ill. App. 205 (engineer failed to notice a red

light denoting danger, in consequence of which fireman was killed—no recovery); Mulligan v. Montana &c. R. Co., 19 Mont. 135; s. c. 47 Pac. Rep. 795; Grattis v. Kansas City &c. R. Co., 153 Mo. 380; s. c. 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721; Hobbs v. Atlantic &c. R. Co., 107 N. C. 1; s. c. 9 L. R. A. 838; 45 Am. & Eng. R. Cas. 592; 12 S. E. Rep. 124; Nashville &c. R. Co. v. Handman, 13 Lea (Tenn.) 423 (boiler exploded through negligence of engineer); Gulf &c. R. Co. v. Blohn, 73 Tex. 637; s. c. 4 L. R. A. 764; 11 S. W. Rep. 867; Gulf &c. R. Co. v. Compton, 75 Tex. 667; s. c. 13 S. W. Rep. 667; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; s. c. 37 L. ed. 772; 54 Am. & Eng. R. Cas. 328; 29 Ohio L. J. 345; 47 Alb. L. J. 465; 48 Alb. L. J. 5; 13 Sup. Ct. Rep. 914; New Jersey &c. R. Co. v. Young, 1 U. S. App. 96; s. c. 49 Fed. Rep. 723; Briegal v. Southern Pac. R. Co., 98 Fed. Rep. 958; s. c. 39 C. C. A. 359 (although the fireman was injured while engaged in oiling a turntable under the direction of the engineer, and in consequence of the negligence of the engineer).

formance of the duties of the fireman, they are not deemed fellow servants.²⁶ The Supreme Court of the United States have held that a rule of a railroad company to the effect that, where a train or engine is run without a conductor, the engineer shall be regarded as the conductor, does not change the general rule of law as to the liability of the company for injuries to an employé caused by the engineer's negligence, so as to make the company liable to a fireman for the negligence of the engineer.²⁷

§ 4945. **Servant Authorized to Employ and Discharge Other Servants Acts as Vice-Principal in So Doing.**²⁸—The master being under an obligation of taking care to employ fit and competent servants to the end of promoting the safety of his other servants,²⁹ this is regarded as one of his primary or absolute duties, in the sense that the servant to whom he entrusts the performance of it acts, in performing it, as his vice-principal. Accordingly, it is held that if a master delegates to a superintendent the power to employ and discharge servants, he thereby makes himself liable for injuries sustained by a servant, caused by the negligence of such superintendent³⁰ in selecting an insufficient number of servants for the duty required of them,³¹ or in selecting a servant unfit for the duties required of him,³² or for an injury through the negligence of the servants employed by such superintendent *while acting under his orders*.³³ Within the meaning of this rule, a yardmaster of a railroad company, charged with the duty of employing and discharging hands for switching and

²⁶ *Pennsylvania Co. v. Hickley*, 20 Ohio C. C. 668; s. c. 11 Ohio C. D. 379. See also, *Houston & C. R. Co. v. Stuart* (Tex. Civ. App.), 48 S. W. Rep. 799; s. c. rev'd on other grounds, *sub nom.* *Houston & C. R. Co. v. Stewart*, 92 Tex. 540; 50 S. W. Rep. 333.

²⁷ *Baltimore & C. R. Co. v. Baugh*, 149 U. S. 368; s. c. 37 L. ed. 772; 29 Ohio L. J. 345; 47 Alb. L. J. 465; 48 Alb. L. J. 5; 54 Am. & Eng. R. Cas. 328; 13 Sup. Ct. Rep. 914.

²⁸ See *ante*, § 4883.

²⁹ *Ante*, § 4048.

³⁰ *Brothers v. Cartter*, 52 Mo. 372; *Stoddard v. St. Louis & C. R. Co.*, 65 Mo. 514; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Walker v. Bolling*, 22 Ala. 294; *Chapman v. Erie R. Co.*, 55 N. Y. 579. "When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the

management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants, in employing and selecting such servants, and in the general conduct of the business committed to his care": *Malone v. Hathaway*, 64 N. Y. 5, per Allen, J.

³¹ *Stoddard v. St. Louis & C. R. Co.*, 65 Mo. 514.

³² *Walker v. Bolling*, 22 Ala. 294; *Brown v. Gilchrist*, 80 Mich. 56; s. c. 20 Am. St. Rep. 496; 45 N. W. Rep. 82; *Henry v. Brady*, 9 Daly (N. Y.) 142; *Nelson v. S. Willey S. S. & Co.*, 26 Wash. 548; s. c. 67 Pac. Rep. 237.

³³ *Lydon v. Manion*, 3 Mo. App. 601.

making up trains, has been held to be the vice-principal of the company.³⁴

§ 4946. **Servant Vested with Exclusive Supervision, Direction and Control of the Work or of Any Department thereof is a Vice-Principal, and Not a Fellow Servant.**—The doctrine may be collected from many cases, without attempting to state it in the precise language of any of them, that a servant who is vested by the master with the general superintendence and control of the master's work or of any distinct and separate department of it,³⁵ with discretionary power in the conduct of it, will be deemed a vice-principal of the master, and not a fellow servant of those working under him, with respect to any duty growing out of such superintendence,³⁶ although not necessarily with respect to any work which he may undertake to perform such as ordinarily belongs to a servant.³⁷ For like reasons, the superintendent

³⁴ Stoddard v. St. Louis &c. R. Co., 65 Mo. 514.

³⁵ Nixon v. Selby Smelting &c. Co., 102 Cal. 458; s. c. 36 Pac. Rep. 803; Libby v. Scherman, 146 Ill. 540; s. c. 34 N. E. Rep. 801; 37 Am. St. Rep. 191; Dayharsh v. Hannibal &c. R. Co., 103 Mo. 570; s. c. 23 Am. St. Rep. 900; 15 S. W. Rep. 554; New Omaha &c. Elec. Light Co. v. Baldwin, 62 Neb. 180; s. c. 87 N. W. Rep. 27; Whalen v. Centenary Church, 62 Mo. 226 (architect and superintendent having general charge of erection of building not a fellow servant with workmen on building).

³⁶ Woodson v. Johnson, 109 Ga. 454; s. c. 34 S. E. Rep. 587 (was not acting in the capacity of a mere servant but in that of a superintendent, and as the employer's *alter ego*); Taylor v. Georgia Marble Co., 99 Ga. 512; s. c. 27 S. E. Rep. 768; 59 Am. St. Rep. 238; Illinois Steel Co. v. Schymanowski, 162 Ill. 447; s. c. 44 N. E. Rep. 876 (control over a particular class of workmen in any branch of the business); Fraser v. Schroeder, 163 Ill. 459; s. c. 45 N. E. Rep. 288; Chicago Dredging &c. Co. v. McMahon, 30 Ill. App. 358; Ft. Wayne v. Christie, 156 Ind. 172; s. c. 59 N. E. Rep. 385 (inspector of water-works deemed a vice-principal in superintending the digging of a trench); Mitchell v. Robinson, 80 Ind. 281; s. c. 41 Am. Rep. 812; Kansas Pac. R. Co. v. Little, 19 Kan. 267; s. c. 6 Repr. 199; 6 Cent. L. J. 60; Shumway v. Walworth &c. Man.

Co., 98 Mich. 411; s. c. 57 N. W. Rep. 251; Slater v. Chapman, 67 Mich. 523; s. c. 12 West. Rep. 60; 11 Am. St. Rep. 593; 35 N. W. Rep. 106; Hunn v. Michigan &c. R. Co., 78 Mich. 513; s. c. 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452; Cox v. Syenite Granite Co., 39 Mo. App. 424; Herriman v. Chicago &c. R. Co., 27 Mo. App. 435; Gormly v. Vulcan Iron-Works, 61 Mo. 492 (though the superintendent is engaged at the same work with the injured servant); Brothers v. Cartter, 52 Mo. 372; Devany v. Vulcan Iron-Works, 4 Mo. App. 236 Chicago &c. R. Co. v. Sullivan, 27 Neb. 673; s. c. 43 N. W. Rep. 415; 41 Am. & Eng. R. Cas. 463; Kimmer v. Weber, 151 N. Y. 417; s. c. 56 Am. St. Rep. 630; aff'g s. c. 81 Hun (N. Y.) 599; 63 N. Y. St. Rep. 291; 30 N. Y. Supp. 1103 (where he gave all the orders to the men, even in the presence of the employer, who left the whole conduct of the work to him); Spelman v. Fisher Iron Co., 56 Barb. (N. Y.) 151 Malone v. Hathaway, 64 N. Y. 5; authorities cited in Lewis v. Seifert, 116 Pa. St. 628; s. c. 11 Atl. Rep. 514; 20 W. N. C. (Pa.) 145; 2 Am. St. Rep. 631; Mullan v. Philadelphia &c. S. S. Co., 78 Pa. St. 25; Mulcairns v. Janesville, 67 Wis. 24; s. c. 29 N. W. Rep. 565 (employed by city to *superintend* the construction of a cistern); Coulson v. Leonard, 77 Fed. Rep. 538.

³⁷ Riley v. O'Brien, 53 Hun (N. Y.)

of a railway company who has been clothed by the board of directors with power to act as the immediate representative of the company—its corporate executive officer, entrusted with the power of the board of directors, so far as regards the control and management of its trains and the arrangements connected therewith—is the *alter ego* of the company, and not a fellow servant with its ordinary employés.³⁸ The *captain of a ship* is in a very large sense the representative of the owner. He can hypothecate the ship. He is not treated as an ordinary agent, but as a special owner of the ship. He unites in himself the double powers of an absolute and temporary owner, or charterer. The law treats him as being a special proprietor, and in charge of the ship. He has the authority to bind the owners for repairs and necessities; and he can settle claims for demurrage. This being so, if he is guilty of an act of negligence by which one of the crew is killed or injured, the owner is liable in damages.³⁹ It is to be kept in mind that the question cannot be made to depend upon the mere name by which the superior servant is known, whether foreman or superintendent. For example, it has been held that a superintendent, employed by a city to superintend the digging of a trench, and one employed as a laborer to dig the trench by the same master, are *prima facie* fellow servants.⁴⁰

147; s. c. 24 N. Y. St. Rep. 720; 6 N. Y. Supp. 129; Kolb v. Carrington, 75 Ill. App. 159 (if the proximate cause of the injury which the servant received was an act of superintendence or control on the part of the foreman, the master will be none the less liable because the foreman co-operated with the servant in doing the work); Barnicle v. Conner, 110 Iowa 238; s. c. 81 N. W. Rep. 452 (holding that as to the particular act, the moving of a heavy column, the foreman was a fellow servant); Consolidated Kansas City Smelting & Co. v. Peterson, 8 Kan. App. 316; s. c. 55 Pac. Rep. 673 (holding that where the foreman, after negligently throwing a switch, was also assisting in the mere manual service of pushing a car, it did not make the act of throwing the switch any the less that of the principal); Lindvall v. Woods, 44 Fed. Rep. 855.

³⁸ Washburn v. Nashville & C. R. Co., 3 Head (Tenn.) 638; s. c. 75 Am. Dec. 784.

³⁹ Ramsay v. Quinn, 8 Ir. R. C. L. 322; s. c. 1 Cent. L. J. 478.

⁴⁰ Flynn v. Salem, 134 Mass. 351. Thus, it has been held that a superintendent in charge of the work of removing a telephone-pole is a fellow servant of one of the workmen, in directing such workman and others to let go their hold on the pole before it can be done safely, and no recovery can be had from the employer for an injury resulting therefrom,—the reason being that with respect to the work in which he is engaged at the time of the accident he is a fellow workman of the person injured: Morgridge v. Providence Teleph. Co., 20 R. I. 386; s. c. 39 Atl. Rep. 328; 78 Am. St. Rep. 879. So, it has been held that the negligence of the superintendent and manager of a quarry, having power to hire and discharge employés, in directing workman with whom he is engaged in blasting to put powder in a hole, without waiting a sufficient time for the hole to cool after giant powder has been exploded therein for the purpose of drying it,—is that of a fellow servant, and not of a vice-principal: Mast v. Kern, 34 Or. 247; s. c. 75

§ 4947. **Illustrations of this Doctrine.**—Thus, the general agent in charge of the track-laying,—which is a distinct department in the construction of a railroad,—having five gangs of men under him, each subject to its particular foreman, whom he has authority to hire and discharge, and having supreme control of his department in the absence of the general superintendent,—acts as a vice-principal in directing the foremen how the spiking of the track shall be done, and the company is liable for an injury to one of the men resulting from his negligence in thus directing the work.⁴¹ So does, generally, an experienced bridge-builder, to whom the proprietor has given the full control of the construction of a trestle, as its superintendent and representative, with respect to his conduct in superintending and directing the piling of certain timbers, though he also assists the men in the work,—the conclusion being that he is not a fellow servant of a laborer engaged in the work, who is injured by the timber falling upon him.⁴² So does a foreman having general control, with power to employ and discharge workmen, in ordering a workman to go upon an elevator, and operating it himself, whereby the workman is injured, since the injury arises from an act of superintendence or from the exercise of authority.⁴³ And so, where the plaintiff was employed by the superintendent, and told to report to a foreman, and the plaintiff was

Am. St. Rep. 580; 5 Am. Neg. Rep. 88; 54 Pac. Rep. 950. So, the negligence of a superintendent in charge of certain work of construction in giving erroneous information to a workman as to whether the way below was clear so that he could safely throw down blocks, whereby another workman was injured, was not chargeable to the master but was deemed the negligence of a fellow servant: *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417; s. c. 49 Pac. Rep. 559. If there are two servants working together, and one of them, through negligence, injures the other, the fact that the one inflicting the injury is the superintendent of *other servants* does not exclude the conclusion that they may be fellow servants with respect to the act done out of which the injury proceeded, even under a statute providing that a superior is not a fellow servant of his subordinate: *Texas & C. R. Co. v. Tatman*, 10 Tex. Civ. App. 434; s. c. 31 S. W. Rep. 333. There is a holding to the effect that the master will not be relieved from liability for the negli-

gence of his foreman, by reason of the fact that, at the time of the injury, the foreman was engaged in working as a laborer with the injured person: *Hutson v. Missouri Pac. R. Co.*, 50 Mo. App. 300. But this seems to be opposed to the general doctrine. But the liability of the master for the negligence of his superintendent in performing an act of superintendence,—that is to say, in directing the work,—is not affected by the fact that the superintendent *afterwards* assists in its performance: *Malcolm v. Fuller*, 152 Mass. 160; s. c. 25 N. E. Rep. 83.

⁴¹ *Colorado & C. R. Co. v. Naylor*, 17 Colo. 501; s. c. 30 Pac. Rep. 249; 31 Am. St. Rep. 335.

⁴² *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382; s. c. 50 Atl. Rep. 1030.

⁴³ *Swift v. Bleise*, 63 Neb. 739; s. c. 89 N. W. Rep. 310. The Court stated that if the injury had arisen from the foreman merely *assisting* in the work, apart from any exercise of any authority by him, the fellow-servant rule would apply, and the master would not be liable.

not instructed in his duties, or warned of danger by the superintendent, and the plaintiff and others were called by the foreman to assist him in starting an elevating-belt on certain machinery managed by him, the foreman was a vice-principal, and not a fellow servant of the plaintiff, and the duty to instruct the plaintiff devolved upon him.⁴⁴ Where, by special order of the superintendent, which was unreasonable, a train was allowed to stand on the track, and through the negligence of a flagman was run into, to the injury of the plaintiff, it was held, that the fact that the flagman, as a fellow servant, contributed to the injury, was no defense,⁴⁵—the superintendent being the representative of the company, and the principle being that, where the combined negligence of the master and a fellow servant results in an injury, the master is liable.⁴⁶

§ 4948. Application of this Doctrine in Case of Corporations.—

The doctrine of the preceding sections applies with even greater force to corporations; for, as these bodies can, from their nature, act only through agents, then, unless the executive agent of a corporation is deemed, for the purposes of this rule, the corporation itself, it will result that an immunity will be extended to men when prosecuting their business in powerful combinations, through the forms of a corporate organization, which is denied to men who prosecute their business in person. Such a result is certainly against public policy, and will not knowingly be sanctioned by the courts. Many American courts accordingly hold that the officer of a corporation who has charge of its business must for all practical purposes be regarded as the corporation itself;⁴⁷ and in the view of some of the courts there is a

⁴⁴ Waxahachie Oil Co. v. McLain, 27 Tex. Civ. App. 334; s. c. 66 S. W. Rep. 226. Circumstances under which the testimony of the defendant's foreman, that he had general charge of, and the right to employ and discharge all employes, was deemed sufficient to support a finding that he was authorized to bind the defendant by his promise to furnish lights at the place where an accident took place: Hillje v. Hettich (Tex. Civ. App.), 65 S. W. Rep. 491 (no off. rep.); s. c. rev'd on other grounds, *sub nom.* Hilje v. Hettich, 95 Tex. 321; 67 S. W. Rep. 90.

⁴⁵ Pittsburgh & C. R. Co. v. Henderson, 37 Ohio St. 549. There is a decision to the effect that a superintendent and a subordinate workman engaged in putting out a fire

in their employer's factory, were not fellow servants, unless their relations were such that the subordinate could "exercise an influence" upon the superintendent "promotive of proper caution"; so that, unless such co-association were shown, the subordinate could recover of the employer for injuries caused by the negligence of the superintendent: Hobbold v. Chicago Sugar Ref. Co., 44 Ill. App. 418.

⁴⁶ *Ante*, § 4856, *et seq.*

⁴⁷ See cases in the preceding sections, and also Cumberland & C. R. Co. v. State, 44 Md. 283; Cumberland & C. R. Co. v. State, 45 Md. 229; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Patterson v. Pittsburgh & C. R. Co., 76 Pa. St. 389; Brickner v. New York & C. R.

distinction in this regard between a corporation and a natural person. This distinction is, however, denied in England.⁴⁸ "That," said Blackburn, J., "cannot make any difference. In *Morgan v. Vale of Neath Railway Company*,⁴⁹ the defendants were a corporation, and nobody thought of suggesting any distinction on that ground."⁵⁰ It was accordingly held that a certified manager of a coal mine, appointed under a statute, was a fellow servant with a person working in the mine. His relation to the other workmen in the mine was just the same as it would have been if the statute had not been passed.⁵¹

Co., 2 Lans. (N. Y.) 506; s. c. aff'd, 49 N. Y. 672. "A corporation," said Potter, J., in this case, "cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. *They are then* the executive head, or master. Their acts are the acts of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointees, equally with themselves, represent the corporation, as master, in all those respects. And though in the performance of these executive duties he may be, and is, a servant of the corporation, he is not in those respects a coservant, a collaborer, a coemployé, in the common acceptance of those terms, any more than is a director, who exercises the same authority. Though such superintendent may also labor like other collaborers, and he may be in that respect a collaborer, and his negligence as such collaborer, when acting only as a laborer, may be likened to that of any other; yet when, by appointment of the master, he exercises the *executive duties of master*, as in the employment of servants, in the selection or adoption of the machinery, apparatus, tools, structures, appliances, and means suitable and proper for the use of other and subordinate servants, then his acts are executive acts,—are the acts of a master; and then the corporation are responsi-

ble that he shall act with a reasonable degree of care for the safety, security, and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent, within his sphere, may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues *their* orders to *their* operatives. Then he is the mouthpiece and interpreter of their will. Their voice, which is silent, is spoken by him. He then only speaks their executive will, not the irresponsible will of a fellow workman or collaborer. His executive acts are their acts. His negligence is their negligence. His control, their control. He has in this executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common collaborer or coservant:" *Brickner v. New York &c. R. Co.*, *supra*.

⁴⁸ *Allen v. New Gas Co.*, 1 Exch. Div. 251; *Conway v. Belfast &c. R. Co.*, 1 R. 9 C. L. 498.

⁴⁹ L. R. 1 Q. B. 149; s. c. 5 Best. & S. 736; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; 14 Wkly. Rep. 144; aff'g s. c. 5 Best. & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Wkly. Rep. 1031.

⁵⁰ *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62; s. c. 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Week. Rep. 335; 31 L. T. (N. S.) 433.

⁵¹ *Howells v. Landore Siemens Steel Co.*, *supra*.

§ 4949. Who Deemed Vice-Principal where there is No Division of the Business into Distinct Departments.—Where there is no division of the business of a corporation into distinct departments, then it is said that only the directors, or the general superintendent in whose hands the entire management of its business is vested, is to be regarded as a vice-principal in an action by an employé for a personal injury.⁵²

§ 4950. Servant whose Duty is Exclusively Supervision, Direction, and Control Deemed a Vice-Principal, and Not a Fellow Servant.—Again, it is said that the test as to whether a person occupies the relation of vice-principal or fellow servant is not whether he has charge of an important department of the master's service, but whether his duties are exclusively supervision, direction, and control of the work, over subordinate employés engaged therein, whose duty it is to obey him, and whether he has been vested with such power by the master.⁵³

§ 4951. General Superintendent is a Vice-Principal and Not a Fellow Servant.—From this it follows that the *general* superintendent in charge of the business of a proprietor will ordinarily be deemed his vice-principal, and not a fellow servant of his other servants.⁵⁴ This status is ascribed to the general superintendent of a railroad company, with respect to the giving of such information to the company's servants in charge of its trains, and to the making and enforcing of such orders, as will enable them to avoid collisions; so that his neglect in this particular is the neglect of the company, making it liable to a section-hand for an injury thereby visited upon him.⁵⁵

⁵² *What Cheer Coal Co. v. Johnson*, 6 C. C. A. 148; s. c. 56 Fed. Rep. 810.

⁵³ *Northern Pac. R. Co. v. Peterson*, 4 U. S. App. 574; s. c. 2 C. C. A. 157; 32 Am. L. Reg. 340; 51 Fed. Rep. 182.

⁵⁴ *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; s. c. 47 Am. Rep. 653; *Hoosier Stone Co. v. McCain*, 133 Ind. 231; s. c. 31 N. E. Rep. 956.

⁵⁵ *Galveston & C. R. Co. v. Smith*, 76 Tex. 611; s. c. 13 S. W. Rep. 562; 18 Am. St. Rep. 78. A decision of an authoritative court affirms the doctrine that, at common law, a master is not responsible for injuries to a servant resulting from the *superintendent's choice*, for a certain purpose, of materials which were unsafe for that purpose, though

suitable for the purpose for which the master provided them, instead of suitable material furnished for the particular purpose: *Meehan v. Spiers Man. Co.*, 172 Mass. 375; s. c. 5 Am. Neg. Rep. 363; 52 N. E. Rep. 518. The doctrine seems to be unsound, since the act of making the selection was one of superintendence. Compare *post*, § 5281, *et seq.* The decision of another respectable court is to the effect that a railroad company is not liable to an employé for an injury happening to him in executing an errand of danger upon which he is sent by its superintendent, unless the superintendent is guilty of negligence in ordering the dangerous act to be performed: *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461; s. c. 22 Atl. Rep. 367.

§ 4952. Distinction between Superintendent or General Manager of the Work and Foreman in Charge of Some Branch or Detail.—Many of the cases justify a distinction between the superintendent or manager of the whole work, and a foreman who is subordinate to the general manager, who has charge of some department or detail of the work,—holding that the former is a vice-principal and the latter a fellow servant. According to this view, in order to be a vice-principal, “the subordinate must have general power and control over the business, not a mere authority to superintend a certain class of work or a certain gang of men.”⁵⁶ Applying this doctrine, it has been held that where the business of a mill is conducted under the direction of a foreman who is a subordinate under a general manager, and who acts temporarily in the place of the general manager when he is absent, as manager or foreman of the “steel department,”—one of several employes in such mill, working under the foreman, cannot recover from his employer for injuries resulting from the negligence of the foreman.⁵⁷

§ 4953. When Superintendent Deemed a Fellow Servant.—As in the case of a mere foreman of work, so with respect to a matter as to which the superintendent is assisting, *in ordinary service*, he may be deemed a fellow servant and not a vice-principal of the master, notwithstanding his rank and grade or authority over the servant who is injured.⁵⁸

§ 4954. Power to Employ or Discharge as a Test of Relation of Fellow Servant or Vice-Principal.—Some of the courts make the power to employ and discharge men possessed by a foreman or superintendent of work, who has command over the men, a test by which to determine whether the servant or agent possessing this power is to be deemed the fellow servant of the servant killed or injured, or a vice-

⁵⁶ New York &c. R. Co. v. Bell, 112 Pa. St. 400; Duffy v. Oliver, 131 Pa. St. 203; s. c. 18 Atl. Rep. 872 (no opinion).

⁵⁷ Duffy v. Oliver, 131 Pa. St. 203; s. c. 18 Atl. Rep. 872 (no opinion). In this case it appeared that the foreman was superintending some experiments with melted metal, and caused a mixture of brick-dust and water to be thrown into it. An explosion followed, putting out one of plaintiff's eyes and injuring the other. Plaintiff was working near the place where the experiments were being made, but was not engaged therein.

⁵⁸ As where a workman in a quarry sought to recover damages from the owner because of the alleged negligence of the superintendent in failing to inform such workman of the defective condition of an exploder given to him by the superintendent for use,—it not being, in theory of the court, the duty of the superintendent or of the owner to inspect the exploders, but the negligence, if any, in failing to warn plaintiff of the defect in the exploder, being that of a fellow servant: Shea v. Wellington, 163 Mass. 364; s. c. 40 N. E. Rep. 173.

principal of the master,—holding that a servant or agent who represents the employer in hiring and discharging men is a vice-principal of the employer, and not a fellow servant of the men under his command; so that his negligence, whereby one of them is killed or injured, is chargeable to the employer, and is not deemed the negligence of a fellow servant, for which the employer is not liable.⁵⁹ This view has been extended so far as to hold that an employé empowered to employ and discharge other servants who are subject to his superintendence and control, is not their fellow servant while they are working under him, although he undertakes to perform duties which would otherwise make him their fellow servant.⁶⁰ Other courts, with obvious propriety, decline to make the power to employ and discharge the men under him a conclusive test by which to determine his relation to his employer and to the servant working under him.⁶¹ Thus, in a jurisdiction where a foreman of work with full power to command the men under him is deemed a vice-principal and not a fellow servant, the fact that such foreman has no power to employ and discharge the men does not make him a fellow servant of the men.⁶² On the other hand, in the view of another court, the fact that an employé has authority from his employer to discharge his fellow servants does not alone constitute him more than a fellow servant himself.⁶³ In the

⁵⁹ *Olsen v. Andrews*, 168 Mass. 261; s. c. 47 N. E. Rep. 90; *Blomquist v. Chicago & C. R. Co.*, 60 Minn. 426; s. c. 62 N. W. Rep. 818; 27 Chic. Leg. N. 324 (Canty, J., dissenting); *Bryan v. Southern R. Co.*, 128 N. C. 387; s. c. 38 S. E. Rep. 914 (holding that, in the absence of evidence that the foreman had power to discharge the injured servant, the employer was not liable for the negligence of the foreman as his vice-principal); *Maughmer v. Behring*, 19 Tex. Civ. App. 299; s. c. 46 S. W. Rep. 917; 4 Am. Neg. Rep. 463 (holding that power to employ and discharge is essential to constitute the foreman of a contractor in charge of the construction of a building a vice-principal as to the other employés of the contractor working under his direction and control).

⁶⁰ *Texas & C. R. Co. v. Reed*, 88 Tex. 439; s. c. 31 S. W. Rep. 1058.

⁶¹ *Lincoln Coal Min. Co. v. McNally*, 15 Ill. App. 181; *Kolb v. Carington*, 75 Ill. App. 159 (the question is, as a general rule, one of fact for the jury).

⁶² *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356.

⁶³ In a case illustrating this view the plaintiff, a railway flagman, was ordered by the yardmaster to couple some cars. Plaintiff got on the back of an engine, and, as it approached the cars which were to be coupled, he signalled the engineer to stop; but the engineer failed to do so and moved the engine back quickly, injuring the plaintiff. There was evidence tending to show that the yardmaster had power to discharge employés, and that it was his duty to give signals to the engineer when coupling was to be done, but that he had failed to do so. The plaintiff asked the court to instruct the jury that if the yardmaster had authority to discharge the plaintiff they were not fellow servants. This instruction was refused and the ruling was affirmed. The Supreme Court said that the injury appeared to be the result of casualty; but that if there was any carelessness on the part of any employé engaged in shifting or moving the cars, it was obviously that of a fellow serv-

view of another court, the most satisfactory evidence that one is a vice-principal of his co-employés is that the latter are under his supervision and control and subject to his orders and directions.⁶⁴

§ 4955. Servant Vested with General Superintendence and with Authority to Employ or Discharge Workmen Deemed a Vice-Principal.

—If, in addition to being vested with general superintendence of the master's work, or with general superintendence of a distinct department of it, the superior servant is vested with *power to employ and discharge* workmen, so that a disobedience of his orders may be followed up by a discharge, he is deemed to be the *alter ego* of the master, and not a fellow servant with those employed under him, so that the master is liable for an injury visited upon such inferior servants through his negligence.⁶⁵ The possession of the power to employ and

ant: Webb v. Richmond &c. R. Co., 97 N. C. 387; s. c. 2 S. E. Rep. 440.

⁶⁴ Union &c. R. Co. v. Doyle, 50 Neb. 555; s. c. 70 N. W. Rep. 43.

⁶⁵ Bloyd v. St. Louis &c. R. Co., 58 Ark. 66; s. c. 41 Am. St. Rep. 85; 22 S. W. Rep. 1089 (negligence in giving orders as to the mode of conducting the work, imputed to the master); Lantry v. Silverman, 1 Colo. App. 404; s. c. 29 Pac. Rep. 180; Colorado &c. R. Co. v. O'Brien, 16 Colo. 219; s. c. 10 Rail. & Corp. L. J. 351; 48 Am. & Eng. Corp. Cas. 235; 27 Pac. Rep. 701; Denver &c. R. Co. v. Driscoll, 12 Colo. 520; s. c. 21 Pac. Rep. 708; 13 Am. St. Rep. 243; Augusta v. Owens, 111 Ga. 464; s. c. 36 S. E. Rep. 830 (an instruction upon this subject held to be correct); Chicago Anderson Pressed-Brick Co. v. Sobkowiak, 148 Ill. 573; s. c. 36 N. E. Rep. 572; aff'g s. c. 45 Ill. App. 317 (superintendent of brick company assured a workman that an overhanging bank was not dangerous—bank fell, injuring workman—company liable); Hathaway v. Des Moines, 98 Iowa 333; s. c. 66 N. W. Rep. 188 (superintendent of street work not a fellow servant with a common laborer shovelling dirt for the city); Baldwin v. St. Louis &c. R. Co., 75 Iowa 297; s. c. 39 N. W. Rep. 507; 9 Am. St. Rep. 479; Vicars v. Cumberland Telephone &c. Co., 52 La. An. 2153; s. c. 28 South. Rep. 367 (foreman in charge of construction of telephone-line); Erickson v. Milwaukee &c. R. Co., 93 Mich. 414; s. c. 53 N. W.

Rep. 393; Shumway v. Walworth &c. Man. Co., 98 Mich. 411; s. c. 57 N. W. Rep. 251; Brown v. Gilchrist, 80 Mich. 56; s. c. 20 Am. St. Rep. 496; 45 N. W. Rep. 82 (liable for the negligence of a foreman in employing incompetent persons); Hill v. Winston, 73 Minn. 80; s. c. 75 N. W. Rep. 1030 (duty of foreman conducting an excavation to protect the laborers from unnecessary dangers from the fall of loose earth); Stahl v. Duluth, 71 Minn. 341; s. c. 74 N. W. Rep. 143 (foreman of public work carried on by a municipal corporation, entrusted with entire charge of details and with the direction of the laborers, and having power to discharge them); Stephens v. Hannibal &c. R. Co., 86 Mo. 221; Hussey v. Coger, 39 Hun (N. Y.) 639 (with power to hire, discharge, and direct workmen, and to obtain and employ suitable means and appliances, etc.); Sulphur Lumber Co. v. Kelley (Tex. Civ. App.), 30 S. W. Rep. 696 (no off. rep.) (foreman failed to allow machinery to be stopped to make the necessary repairs); Missouri &c. R. Co. v. Williams, 75 Tex. 4; s. c. 16 Am. St. Rep. 867; 12 S. W. Rep. 835 (car-repairer and foreman of repair-shop, the latter possessing power to employ and discharge); International &c. R. Co. v. Hinzle, 82 Tex. 623; s. c. 18 S. W. Rep. 681; Galveston &c. R. Co. v. Eckles, 25 Tex. Civ. App. 179; s. c. 60 S. W. Rep. 830 (yardmaster, to whom a railroad company has com-

discharge men is not, however, in all cases deemed a decisive test, but there are cases where superior servants possess this power and yet are deemed to be the fellow servants of men placed under their orders.⁶⁶

§ 4956. **Workman Discharging the Duties of Superintendent in his Absence.**—Assuming that the superintendent has authority to delegate to an ordinary workman the power to discharge the superintendent's duties during his temporary absence, then a workman so appointed will be the superintendent *pro hac vice* and the *alter ego* of the general master, who will be responsible for any injury visited upon another servant through his negligence in performing his duties of superintendent,—that is, in directing the manner in which the work shall be done.⁶⁷ So also, if a train-despatcher habitually performs certain duties of a superintendent in his name, when he is absent, with the authority of the company, he becomes, when so acting, the vice-principal of the company, so that an order issued by him to an employé of the company in the name of the superintendent, will impose the same liability upon the company as though it had been made by the superintendent himself.⁶⁸

§ 4957. **Assistant Superintendent.**—The principles which govern the liability of an employer for the acts of his superintendent, whereby a subordinate employé is injured, will equally apply to the act of an

mitted the power to discharge for incompetency employés within the yard); *Ft. Worth &c. R. Co. v. Peters*, 87 Tex. 222; s. c. 27 S. W. Rep. 257; aff'g s. c. 7 Tex. Civ. App. 78; 25 S. W. Rep. 1077 (rule applies to any special business of the master carried on by a number of employés under the charge of another, and is not confined to a principal department of the business); *Anderson v. Ogden &c. R. Co.*, 8 Utah 128; s. c. 30 Pac. Rep. 305 (railroad foreman in a gravel-pit, having full charge of the work, with power to hire and discharge men and direct and control their work); *McDonough v. Great Northern R. Co.*, 15 Wash. 244; s. c. 46 Pac. Rep. 334; *Criswell v. Pittsburgh &c. R. Co.*, 30 W. Va. 798; s. c. 6 S. E. Rep. 31; *Schultz v. Chicago &c. R. Co.*, 48 Wis. 375; *Miller v. Union &c. R. Co.*, 17 Fed. Rep. 67; *Woods v. Lindvall*, 4 U. S. App. 49; s. c. 48 Fed. Rep. 62; *Mason v. Edison Machine Works*, 24 Blatchf. (U. S.) 93; s. c.

23 Fed. Rep. 228 (master liable for an injury to a laborer who was engaged with six others in moving the bed-plate of a heavy engine, where the foreman called the others away, and left the plaintiff to hold it alone, whereby he was injured).

⁶⁶ *Thomas v. Cincinnati &c. R. Co.*, 97 Fed. Rep. 245 (railway-yardmaster possessing power to employ and discharge men, but who is subject to the orders of the superintendent and trainmaster, deemed a fellow servant of the foreman of a switch-gang employed in the yard under him). That the power to employ and discharge does not prevent foreman from being regarded as a fellow servant with another servant when performing common labor with him,—see *Reed v. Stockmeyer*, 74 Fed. Rep. 186; s. c. 20 C. C. A. 381; 34 U. S. App. 727.

⁶⁷ *Steube v. Christopher &c. Iron &c. Co.*, 85 Mo. App. 640.

⁶⁸ *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461; s. c. 22 Atl. Rep. 367.

assistant superintendent. If the act is one of superintendence, and not one of mere labor in common with the other servants, the master will be liable for negligence in its performance, whereby another servant is injured.⁶⁹

§ 4958. **When Foreman Not Deemed a Fellow Servant with Those Working Under Him.**—It is difficult to extract from the cases any consistent theory or principle with respect to this question. If a foreman is plainly engaged in the work of superintending, then the rule seems to be that his negligence while so engaged, whereby an inferior servant is injured, will be the negligence of the common master. But if, notwithstanding his office of foreman, he is engaged in the mere work of an ordinary servant with the others, and, in that capacity, inflicts an injury upon another servant, then it will be an injury inflicted by one fellow servant upon another, and the master will not be liable.⁷⁰ We find that in the following cases foremen, or bosses, have been held to be *representatives of the master, and not fellow servants*, under the circumstances named:—A boss car-repairer in charge of a gang of car-repairers, who ordered one of them to go under a car and then negligently permitted the car to be started;⁷¹ a foreman who permitted a wagon, reported to him to be unsafe, to be used for hauling heavy loads,—since the duty of furnishing a safe wagon was a duty resting upon the master;⁷² a foreman in charge of a squad of railwaymen engaged in repairing bridges, water-tanks and telegraph-lines,—with the conclusion that the company was liable for a negligent injury visited by him upon one of them in going to or from their labors on a hand-car;⁷³ a foreman of a cable-car company, so as to make the company liable for an injury inflicted by him upon a gripman;⁷⁴ a foreman of a construction-train, who, in unloading a tie, projected it so far beyond the side of a caboose as to strike a danger-post, which caused the tie to fly around and hit another employé on the train while endeavoring to get out of the way,—with the conclusion that the company was liable;⁷⁵ a superintendent and foreman engaged in

⁶⁹ *Zintek v. Stimson Mill Co.*, 9 Wash. 395; s. c. 37 Pac. Rep. 340 (liable for negligence of assistant superintendent in piling lumber). See also, *Baldwin v. St. Louis & R. Co.*, 75 Iowa 297; s. c. 39 N. W. Rep. 507; 9 Am. St. Rep. 479.

⁷⁰ *Newbury v. Getchell & Co. Lumber & Co.*, 100 Iowa 441; s. c. 69 N. W. Rep. 743; *Hawk v. McLeod Lumber Co.*, 166 Mo. 121; s. c. 65 S. W. Rep. 1022.

⁷¹ *Hannibal & C. R. Co. v. Fox*, 31 Kan. 586.

⁷² *Boelter v. Ross Lumber Co.*, 103 Wis. 324; s. c. 79 N. W. Rep. 243.

⁷³ *Sioux City & C. R. Co. v. Smith*, 22 Neb. 775; s. c. 36 N. W. Rep. 285.

⁷⁴ *Keown v. St. Louis R. Co.*, 141 Mo. 86; s. c. 41 S. W. Rep. 926.

⁷⁵ *Galveston & C. R. Co. v. Dehnisch* (Tex. Civ. App.), 57 S. W. Rep. 64 (no off. rep.). Similarly, see *Claybaugh v. Kansas City & C. R. Co.*, 56 Mo. App. 630 (foreman in charge of section gang).

repairing a canal, who failed to give notice to employ  s working beneath a derrick which was used in handling heavy material, at the time it was started, rendering the Crown liable under a Canadian statute;⁷⁶ a foreman who was picking at a pile of ore beside which he had set a laborer at work, so that he loosened the support of the upper part of it, and caused it to fall upon the laborer,—with the conclusion that the master was liable;⁷⁷ a foreman entrusted with the superintendence of a gang of men employed in loading cars, who was accustomed to make and abrogate rules for the conduct of the work at his pleasure, where an employ   was injured in consequence of his abrogating a rule so made by him;⁷⁸ a foreman in charge of a gang of men engaged in loading cars, who was guilty of negligence in ordering the engineer to start the engine which operated the drum on which a rope used in operating the car was coiled, without giving the employ   whose duty it was to warn the other employ  s of the tautening of the rope an opportunity to give such warning, and without giving an adequate warning himself, rendering the master liable;⁷⁹ a foreman entrusted with the superintendence and control of another employ  ;⁸⁰ a foreman of the shipping-department of an ice manufactory, with respect to the carpenters who removed the cover of a hot-water tank under the floor of a factory in order to place a guard around the opening;⁸¹ a foreman of a gang of men employed by a railway company, who negligently gave and insisted upon an order with respect to moving a car and some lumber, obedience to which, on the part of one of the men, caused the lumber to fall, injuring him;⁸² a foreman in charge of a gang of railway laborers, who neglected to inform the laborers of a rule of which he had knowledge, but which was unknown to them,—with the conclusion that his negligence would be imputed to the company;⁸³ a foreman with respect to the act of setting another employ  

⁷⁶ *Filion v. Reg.*, 4 Can. Exch. 134. Under the statute, the Crown is liable for the death of any person on a public work caused by the negligence of officers or servants of the Crown acting within scope of their employment. The question here was, whether the superintendent and foreman were *guilty of negligence*. It was held also, that the Crown was liable if the foreman was only a fellow servant, as the fellow-servant doctrine is not in force in Lower Canada: *Filion v. Reg.*, *supra*.

⁷⁷ *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; s. c. 44 N. E. Rep. 876.

⁷⁸ *Richmond Granite Co. v. Bailey*, 92 Va. 554; s. c. 24 S. E. Rep. 232.

⁷⁹ *Richmond Granite Co. v. Bailey*, 92 Va. 554; s. c. 24 S. E. Rep. 232.

⁸⁰ *San Antonio & c. R. Co. v. McDonald* (Tex. Civ. App.), 31 S. W. Rep. 72 (no off. rep.).

⁸¹ *Musick v. Jacob Dold Packing Co.*, 58 Mo. App. 322 (so held because they were engaged in *different departments*, and not because foreman was a vice-principal).

⁸² *Chicago & c. R. Co. v. May*, 108 Ill. 288.

⁸³ *Covey v. Hannibal & c. R. Co.*, 27 Mo. App. 170. Compare *Atchison & c. R. Co. v. Martin*, 7 N. M. 158; s. c. 34 Pac. Rep. 536.

to work in a trench from which the material was hoisted by a machine set up and put to work under the foreman's direction, making the master liable for his negligence in leaving the machine out of gear, whereby an employé was injured;⁸⁴ a foreman of men engaged in removing a pier, who adopted a mode which was improper, careless and dangerous, whereby one of the men working under him was injured;⁸⁵ a foreman of a machine-shop who failed to use a proper appliance to secure a machine, whereby another employé was injured;⁸⁶ a foreman who assisted his workmen in lowering a heavy sewer-pipe into a trench, who ordered a departure from the usual manner of lowering such pipe, by letting it fall of its own weight, without giving the men in the trench notice and an opportunity to escape;⁸⁷ a foreman of a gang of twenty men engaged in taking down a shed standing between railroad-tracks, with respect to a member of such gang;⁸⁸ a foreman of the work of cleaning, repairing and inspecting railway-cars, with power to determine when cars should be brought in upon the repair-track and where they should be placed, though the foreman himself brought the cars in;⁸⁹ a foreman supervising the switching of cars of ore at a smelter, so far as concerned his act in approving the throwing of a switch, though at the time of the injury he was engaged in assisting the injured man in pushing a car;⁹⁰ a foreman in charge of men working with a derrick, whose duty it was to direct repairs and keep the derrick in a safe condition.⁹¹

§ 4959. **Foreman Vested with Entire Management.**—Another class of decisions holds that where a foreman is vested with entire

⁸⁴ *Higgins v. Williams*, 114 Cal. 176; s. c. 45 Pac. Rep. 1041.

⁸⁵ *Eagan v. Tucker*, 18 Hun (N. Y.) 347.

⁸⁶ *Stimper v. Fuchs & Co. Man. Co.*, 26 App. Div. (N. Y.) 333; s. c. 49 N. Y. Supp. 785.

⁸⁷ *Chicago v. Cronin*, 91 Ill. App. 466.

⁸⁸ *Cleveland & Co. R. Co. v. Brown*, 6 C. C. A. 142; s. c. 56 Fed. Rep. 804.

⁸⁹ *Metropolitan & Co. R. Co. v. Skola*, 183 Ill. 454; s. c. 75 Am. St. Rep. 120; 56 N. E. Rep. 585; aff'g s. c. 83 Ill. App. 659 (the foreman handled the cars in such a way as to cause a collision and the death of the deceased,—foreman deemed a fellow servant in moving the cars upon the track but a vice-principal in determining that it should be done and in omitting to warn the deceased).

⁹⁰ *Consolidated Kansas City Smelting & Co. v. Peterson*, 8 Kan. App. 316; s. c. 55 Pac. Rep. 673.

⁹¹ *Union & Co. R. Co. v. Fray*, 43 Kan. 750; s. c. 23 Pac. Rep. 1039. For a case where a foreman did not know that the workman was in a dangerous position, and was not negligent in not knowing it, nor, consequently, in proceeding with the work; but where the master would have been liable had any negligence on the part of the foreman been shown,—see *McCarthy v. Chicago & Co. R. Co.*, 83 Iowa 485; s. c. 50 N. W. Rep. 21. The negligent failure of a foreman to perform a duty owing by the master is not imputable to a servant injured by reason thereof: *Stucke v. Orleans R. Co.*, 50 La. An. 172; s. c. 23 South. Rep. 342.

management of a particular work, he is not a fellow servant but a vice-principal.⁹²

§ 4960. **Assistant Foreman, when Deemed a Vice-Principal.**—It has been held that an engineer employed to manage a stationary steam-engine used in drilling a well is not a fellow servant of an assistant foreman having charge of the drilling, with power to employ and discharge the engineer, if the assistant foreman *also* had power, as the engineer's superior, to direct and control him in his work.⁹³

§ 4961. **When Knowledge of Foreman or Vice-Principal is the Knowledge of the Master.**—Whenever one of the primary or absolute duties of the master is devolved upon a servant of whatever grade, whether he be called foreman or superintendent or what not, notice to such servant or knowledge possessed by him of any fact requiring the discharge of the duty is notice to or knowledge of the master, and any negligence of such servant with respect to taking such suitable action as is required by the fact of the notice or knowledge, is the negligence of the master;⁹⁴ and, generally, the knowledge of the vice-princi-

⁹² Brown v. Sennett, 68 Cal. 225; s. c. 58 Am. Rep. 8.

⁹³ Nix v. Texas &c. R. Co., 82 Tex. 473; s. c. 18 S. W. Rep. 571; 27 Am. St. Rep. 897.

⁹⁴ Ray v. Diamond State Steel Co., 2 Pen. (Del.) 525; s. c. 47 Atl. Rep. 1017 (notice given to a foreman of work of a defect in a machine is notice to the master, and his promise to repair it is the promise of the master); Falkenau v. Abrahamson, 66 Ill. App. 352; s. c. 1 Chic. L. J. Wkly. 307 (notice to foreman in charge of workmen using an elevator, of the defective condition of the cable, is notice to the master); Atchison &c. R. Co. v. Midgett, 1 Kan. App. 138; s. c. 40 Pac. Rep. 995 (knowledge of foreman in charge of works, with power to employ and discharge, of defects in the machinery, imputable to the employer); Atchison &c. R. Co. v. Napole, 55 Kan. 401; s. c. 40 Pac. Rep. 669 (knowledge possessed by an assistant roadmaster and a foreman and assistant foreman, of a defect in a hand-car, imputable to the company); Anderson v. Elder, 105 La. 672; s. c. 30 South. Rep. 120 (the attention of the foreman was directed to the dangerous condition of an appliance for loading a ship,

not open to the observation of an employé, and the foreman neglected to remedy it, and the employé was injured in consequence of it, and the master was held liable); East Tennessee &c. R. Co. v. Wright, 100 Tenn. 56; s. c. 42 S. W. Rep. 1065 (knowledge of train-conductor of the recklessness or misconduct of the engineer imputable to the company, the conductor being the immediate superior of the engineer, though without power to employ or discharge him); International &c. R. Co. v. Smith (Tex. Civ. App.), 30 S. W. Rep. 501 (no off. rep.) (knowledge of a foreman, having power to employ and discharge, of the dangerous condition of a steer, is imputable to the employer); Connor v. Saunders, 9 Tex. Civ. App. 56; s. c. 29 S. W. Rep. 1140 (knowledge of superintendent authorized to employ and discharge, and to direct and control, of the dangerous character of machinery, is imputable to the employer); Galveston &c. R. Co. v. Slinkard, 17 Tex. App. 585; s. c. 44 S. W. Rep. 35 (knowledge of railway division superintendent of the habitual violation of a promulgated rule, imputable to the company).

pal of any fact concerning the safety of the servants employed under him is the knowledge of the principal.⁹⁵ On the other hand, knowledge possessed by the servant of a defect in an appliance furnished by the master to *another servant* is not chargeable to the master, unless the former servant had authority to deal with reference to the defect as a vice-principal.⁹⁶ The governing principle is that the agent receiving the notice or acquiring the knowledge must be an agent of such a character, or must sustain such a relation to the subject-matter of the notice, that it will be his duty either to act for the master with respect to it or to communicate the fact to the master.

§ 4962. Effect of Foreman or Superintendent Sending Servant to a Dangerous Place or Putting Him at Dangerous Work.—If the foreman, superintendent, or boss, by whatever name called, exercising a power conferred upon him by the master, sends a man who is serving under his orders to a dangerous place in which to work, or puts him at dangerous work outside the scope of his employment, this will be the act of the master and not the act of a fellow servant, because it is not an act of mere service, but is an act of authority or superintendence, which can only be done in virtue of being an *alter ego* or vice-principal of the master.⁹⁷

⁹⁵ *Mattise v. Consumers' Ice Man. Co.*, 46 La. An. 1535; s. c. 16 South. Rep. 400; 49 Am. St. Rep. 356.

⁹⁶ *Brown v. Hershey Land & Co.*, 65 Mo. App. 162; s. c. 2 Mo. App. Repr. 1186.

⁹⁷ *Camp v. Hall*, 39 Fla. 535; s. c. 22 South. Rep. 792 (although such agent may not have had exclusive control and authority over the injured employé, as the master may appoint as many agents as he pleases to execute any particular work, and the acts of each, within the scope of his authority, are binding on the employer, unless the authority is a joint one only); *William Graver Tank Works v. O'Donnell*, 191 Ill. 236; s. c. 60 N. E. Rep. 831; aff'g s. c. 91 Ill. App. 524 (nor did the fact that the foreman was temporarily acting as a collaborer with the deceased at the time of the injury relieve the master from liability on the ground that they were fellow servants); *Norton v. Nadebok*, 190 Ill. 595; s. c. 60 N. E. Rep. 843; aff'g s. c. 92 Ill. App. 541 (one who was vice-principal in ordering an employé to remove tin-can bodies from a body-

machine was also a vice-principal in negligently starting the machine, the two acts being parts of the operation of the machine); *Fraser v. Hand*, 33 Ill. App. 153 (servant injured while using defective machinery by direction of a superior servant); *Cole v. Wood*, 11 Ind. App. 37; s. c. 36 N. E. Rep. 1074; *Spaulding v. Forbes Lithograph Man. Co.*, 171 Mass. 271; s. c. 68 Am. St. Rep. 424; 50 N. E. Rep. 543 (superior servant having control of another directed the latter to feed a revolving cylinder with his right hand instead of his left, whereby he was injured—master liable); *Cook v. Hannibal & C. R. Co.*, 63 Mo. 397 (superintendent of work told teamster to drive into a dangerous place, where he was injured—company liable); *Fremont & C. R. Co. v. Leslie*, 41 Neb. 159; s. c. 59 N. W. Rep. 559; *Stahl v. Duluth*, 71 Minn. 341; s. c. 74 N. W. Rep. 143 (city liable for negligence of general foreman having full power of superintending and commanding, with power to discharge, in ordering employé to pick and remove loose rock around a hole in which an unex-

§ 4963. **Servant Injured by Superintendent or Other Superior while Performing Work of Servant.**—In order to understand this subject we must keep in mind the sound principle (not, however, assented to by all courts) that the question whether the servant inflicting the injury upon the other servant is to be deemed a fellow servant or a vice-principal of the master is not determined by his rank, or grade in the service, but by *the character of the work which he is doing*. If he is exercising the office of a vice-principal or representative of the master, and is performing one of the absolute and unalienable duties of the master,⁹⁸ then his negligence is the negligence of the master, and the injured servant, in the absence of fault on his own part, is entitled to recover damages. If, on the other hand, the servant inflicting the injury is not discharging an absolute and unalienable duty of the master under the principle already spoken of,⁹⁹ but is performing a mere *act of service* in con-association with the injured servant, then the injury will be deemed to have been inflicted by a fellow servant; so that, under the fellow-servant rule under consideration, the master will be exonerated from liability. From this it follows that a servant may occupy the place of vice-principal as to some duties, while as to others he may be merely a fellow servant.¹⁰⁰ He may, for example, be a vice-principal with respect to *furnishing* those appliances which it is the duty of the master to furnish, but a fellow servant as to the *construction* or *adjustment* of the appliances, where this duty is imposed upon the servants themselves, suitable materials therefor being furnished by the master.¹⁰¹ So, if a superior

ploded charge of dynamite remained); Cullen v. Norton, 56 Hun (N. Y.) 639; s. c. 29 N. Y. St. Rep. 700; 9 N. Y. Supp. 174 (foreman put workmen to drilling new holes near an unexploded one in perpendicular wall, and put injured employé to work drilling holes near bottom of wall and under other workmen—fine distinction as to whether master liable); Cullen v. Norton, 52 Hun (N. Y.) 9; s. c. 22 N. Y. St. Rep. 221 (holding that a foreman entrusted with the performance of work represents the master in assigning a servant to his place of work); San Antonio &c. R. Co. v. McDonald (Tex. Civ. App.), 31 S. W. Rep. 72 (no off. rep.) (master liable for failure of vice-principal to use ordinary care to the end of giving notice to a servant before exposing him to danger); Hayes v. Colchester Mills, 69 Vt. 1; s. c. 37 Atl. Rep. 269; 60 Am. St. Rep. 915

(injured servant ordered to the performance of work beyond his capacity); Neilon v. Marinette &c. Paper Co., 75 Wis. 579; s. c. 44 N. W. Rep. 772 (foreman directed boy to do dangerous work,—his act deemed the act of the master); Pullman's Palace Car Co. v. Harkins, 5 C. C. A. 326; s. c. 55 Fed. Rep. 932 (although the foreman giving the order is himself engaged at the manual work).

⁹⁸ *Ante*, § 4924.

⁹⁹ *Ante*, § 4924.

¹⁰⁰ National Fertilizer Co. v. Travis, 102 Tenn. 16; s. c. 49 S. W. Rep. 832 (engineer in operating an engine, is a fellow servant of one who adjusts the belts; but in keeping in repair the signal-appliances intended for the belt-adjuster's safety, he is a vice-principal); *ante*, § 4918.

¹⁰¹ Callan v. Bull, 113 Cal. 593; s. c. 45 Pac. Rep. 1017.

servant undertakes to do the work of a fellow servant, he becomes as to that particular work a fellow servant of another servant engaged in or about the work; and his negligence, whereby the other servant is injured, is that of a fellow servant, and not that of a vice-principal of the master, although he is a vice-principal generally.¹⁰² The prin-

¹⁰² *Railway Co. v. Torry*, 58 Ark. 217; *Callan v. Bull*, 113 Cal. 593; s. c. 45 Pac. Rep. 1017; *Deep Min. & Co. v. Fitzgerald*, 21 Colo. 533; s. c. 43 Pac. Rep. 210 (employer not liable to an employé for the acts of a vice-principal relating to the common employment and on a level with the acts of the employé, unless such acts are done by the vice-principal against the reasonable objection of the employé); *Taylor v. Evansville & C. R. Co.*, 121 Ind. 124; s. c. 6 L. R. A. 584; 22 N. E. Rep. 876 (but where the vice-principal negligently makes unsafe work which he has specifically ordered the servant to perform, the master is liable; unless the servant enters the employment with knowledge that the vice-principal is to work with him); *Nall v. Louisville & C. R. Co.*, 129 Ind. 260; s. c. 23 N. E. Rep. 611; 48 Am. & Eng. R. Cas. 315; *Small v. Allington & C. Man. Co.*, 94 Me. 551; s. c. 48 Atl. Rep. 177; *O'Niel v. Great Northern R. Co.*, 80 Minn. 27; s. c. 82 N. W. Rep. 1086; *Cornelson v. Eastern R. Co.*, 50 Minn. 23; s. c. 52 N. W. Rep. 224 (negligence of superior occurred in regard to a mere detail of the work of drilling out an unexploded charge, though in a dangerous manner ordered by the superintendent); *Hussey v. Coger*, 112 N. Y. 614; s. c. 3 L. R. A. 559; 21 N. Y. St. Rep. 848; 20 N. E. Rep. 556; 8 Am. St. Rep. 787; rev'g s. c. 9 N. Y. St. Rep. 340 (superintendent of repairs of a ship, in giving an order relating to the removal of a hatch, acted as a fellow servant); *Meeker v. Remington & C. Co.*, 53 App. Div. (N. Y.) 592; s. c. 99 N. Y. St. Rep. 1116; 65 N. Y. Supp. 1116 (act of mill superintendent in opening a valve to test new steam-pipes deemed an act of service and not of vice-principals, although the superintendent was a millwright and had general charge of the machinery); *Loughlin v. State*, 105 N. Y. 159; s. c. 11 N. E. Rep. 271; *Ross v. Walker*, 139 Pa. St. 42; s. c. 21 Pitts. L. J. (N. S.) 256; 27 W. N. C. (Pa.) 165; 21 Atl. Rep. 157; *Ricks v. Flynn*, 196 Pa. St. 263; s. c. 46 Atl. Rep. 360; *Railroad Co. v. Bolton*, 99 Tenn. 273; s. c. 41 S. W. Rep. 442; 9 Am. & Eng. R. Cas. (N. S.) 868 (injury to a section-hand caused by the negligence of the temporary section-foreman, while the latter was engaged as a laborer in a common work with the former); *Gann v. Railroad Co.*, 101 Tenn. 380; s. c. *sub nom.* *Nashville & C. R. Co. v. Gann*, 47 S. W. Rep. 493; *Dwyer v. American Exp. Co.*, 82 Wis. 307; s. c. 52 N. W. Rep. 304; 12 Rail. & Corp. L. J. 62; *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; s. c. 23 Blatch. (U. S.) 209 (vice-principal doing work of a coservant is a fellow servant with person injured); *Stockmeyer v. Reed*, 55 Fed. Rep. 259. One court has reasoned loosely on the question to the effect that a foreman and general representative of the master may be a fellow servant of one working under him, where they are acting together at the time in performing the work,—depending upon the circumstances of each case, the question being for a jury under proper instructions from the court: *Chicago Architectural Iron Works v. Nagel*, 80 Ill. App. 492. Another court has made a seeming exception to the rule of the text,—an exception which does not seem to be well founded in principle,—by holding that an employé who acts as a vice-principal in any emergency in selecting men, machinery, and a place to work, does not become a fellow servant immediately upon beginning the work, with all suitable agencies provided therefor, but continues to be a vice-principal in directing the movements of the individual employés. The case was that one H. had the sole charge of the work of saving a railroad-bridge which was endangered by a freshet, and for this purpose he called out many employés of the company from various departments.

ciple may be stated differently by saying that, in order that an employé may recover damages from his employer in an action at common law for an injury sustained by the negligence of a superior employé,—for example, the superintendent,—he must show that the negligence of the superior was in a matter with respect to which the law imputes his carelessness to the master.¹⁰³

While one of the employés was working in the stream among the debris, H. negligently gave an order for a locomotive-engine to start up rapidly, in order, by means of ropes attached to it, to drag out some of the debris. One of the ropes, on being thus violently jerked, slipped and struck the other servant, killing him. It was held that the act of H. in giving the order was to be deemed an act of vice-principalship, and not an act of fellow service, and that the railroad company was consequently liable: *Nall v. Louisville & C. R. Co.*, 129 Ind. 260; s. c. 28 N. E. Rep. 611; 48 Am. & Eng. R. Cas. 315. But it is quite plain that on the theories of preceding decisions the act was an act of fellow service unless it was taken out of this category by the fact that it was an act of command or authority, which would be the theory of some courts. The principle of the text was applied in a case where the roadmaster of a railroad, directing the work of tearing down a bridge, omitted to give warning of a particular detail of the work which portended danger, whereby a workman was injured,—the theory of the court being that a vice-principal can only, in any event, represent the master in the performance of some general function of the work. Plaintiff was caught by a protruding undrawn bolt, in rolling a stringer over an embankment. The roadmaster had given a general warning to look out for danger from that source: *O'Neil v. Great Northern R. Co.*, 80 Minn. 27; s. c. 82 N. W. Rep. 1086.

¹⁰³ Thus, a superintendent ordered naphtha to be used in cleaning a tank. Plaintiff, while holding a light for the men to work by, was injured by an explosion which took place. It did not appear that naphtha had been provided for the purpose of cleaning the tanks, but that theretofore a safer material

had been used. The evidence tended to show that the superintendent chose a dangerous method when he might have chosen a safe one, for which negligence the master was not liable. The danger was a transitory one, and due to no fault of plan or construction, or lack of repair, or permanent defect or want of safety in the works, or in the manner in which they were ordinarily used: *Meehan v. Speirs* Man. Co., 172 Mass. 375; s. c. 5 Am. Neg. Rep. 363; 52 N. E. Rep. 518. In another case it was held that, assuming that the foreman of a gang of men engaged in the erection of a wall, which work included the removal of large stones from the cars to the wall, was a vice-principal in respect of his general employment, yet his negligence was that of a fellow servant of members of the gang, where, taking the place of one whose duty it was to hook the tongs attached to the derrick into the stones on the car, after holes had been drilled in them, he hooked the tongs into a stone in which he knew that but one hole had been drilled, and ordered the engineer to raise it, with the result that it slipped off and injured one of the gang. The theory of the court was that the drilling of the holes in the stones in order to remove them was not an absolute duty of the master; that the holes were not an appliance or tool to be furnished by him, but simply a means of adjusting the machinery to the material which was being removed: *Ricks v. Flynn*, 196 Pa. St. 263; s. c. 46 Atl. Rep. 360. Another court has held that an express company is not liable for injuries sustained by an employé while riding on its wagon, caused by the negligent driving of the wagon by another employé in the performance of the company's business, the latter being agent for the company in the town where the

§ 4964. **Contrary Doctrine that Even the Acts of Service of a Vice-Principal are Imputable to the Master.**—The foregoing doctrine, although well founded in principle, provided the fellow-servant rule itself is well founded in principle,—is denied by some courts, which hold that a master cannot escape liability for injury to a servant through the negligence of his vice-principal, on the ground that the latter was at the time of the injury performing the duties of an ordinary employé,—the view being that all the acts of a vice-principal are those of the master, whatever duty the vice-principal may be performing.¹⁰⁴ Thus, it has been held under this view that an employer is liable for an injury to an employé caused by the negligent act of a foreman in charge of the work, with power to employ and discharge the

accident occurred, as the two are fellow servants in the particular business in which they are engaged: *Dwyer v. American Exp. Co.*, 82 Wis. 307; s. c. 52 N. W. Rep. 304; 12 Rail. & Corp. L. J. 52.

¹⁰⁴ *Texas & C. R. Co. v. Reed* (Tex. Civ. App.), 32 S. W. Rep. 118 (no off. rep.); *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; s. c. 48 N. E. Rep. 915; aff'g s. c. 70 Ill. App. 55; *Davies v. Griffith*, 27 Ohio Wkly. L. Bull. 180 (liable for negligence of superior servant, to whom he has delegated the duty of providing and maintaining safe scaffolding, in failing to do so, or, knowing the dangerous condition of the scaffolding, in failing to prevent a workman going upon it who was ignorant of the danger); *Stockmeyer v. Reed*, 55 Fed. Rep. 259; s. c. 47 Alb. L. J. 488. Applying this doctrine it has been held that an employer is responsible for the negligence of a vice-principal ordering the use of a tag-line to be dispensed with in raising the framework of a bridge, notwithstanding that he attempted to control the swaying framework by seizing it with his hands and holding it in proper position by his unaided strength, in which act he was a fellow servant of the plaintiff; since his order to dispense with the tag-line was an exercise of the authority conferred on him by the master to order, direct and control the operation of raising the framework: *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; s. c. 48 N. E. Rep. 915; aff'g s. c. 70 Ill. App. 55. Under this theory the fore-

man of an ice company who directed a laborer under him to perform work in such manner and under such circumstances as to subject the laborer to great danger of injury, did not become a co-employé of such laborer as to an injury to him caused directly by the foreman's negligent order, merely because the foreman performed an act of manual labor in setting in motion the agency which caused the injury. The foreman directed plaintiff to loosen a block of ice which was stuck fast in a chute. While plaintiff was engaged in doing so, his back being turned toward the foreman, the latter negligently started another large block of ice down the chute, injuring plaintiff: *Crystal Ice Co. v. Sherlock*, 37 Neb. 19; s. c. 55 N. W. Rep. 294. Refining on this subject quite beyond any distinction which could be drilled into the head of the proprietor of a stone quarry, it was held by one court that a foreman in a quarry, in ordering a quarryman to work below a stone which is being quarried, performs an act pertaining to the duties of the master; but in pounding and prying upon such stone in attempting to remove it from its bed, whereby the stone is broken and falls upon the quarryman, he performs the duty of a servant and becomes a fellow servant with such quarryman, for whose negligence no recovery can be had from the master: *Stockmeyer v. Reed*, 55 Fed. Rep. 259; s. c. 47 Alb. L. J. 488.

employé injured, although, as to the act causing the injury, he acted as a fellow servant of the employé.¹⁰⁵

§ 4965. Presumptions as between Negligence of Vice-Principals and Negligence of Fellow Servants.—In an action by an employé against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, it appeared that the fire was caused by the heating of a bearing in one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern at the top of the building with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when an attempt was made to use it. It was held, in the absence of evidence of any reason why the water did not run, that it must be attributed to the negligence of the fellow servants of the plaintiff in failing to keep the apparatus in order, or in failing to put it in operation; and that the defendant was not liable. Accordingly the plaintiff was nonsuited. The decision proceeds upon the ground that the defendant had done its whole duty when it supplied the proper appliances, the care and use of which must necessarily be entrusted to its servants.¹⁰⁶ The tipping over of a pile of boards, which workmen working without supervision are piling up in their work, by which one of them is crushed, has been held to raise a presumption that the accident occurred through their negligence.¹⁰⁷ But negligence in running a railway-train at a time when, by reason of a storm and the danger of washouts, it was unsafe to run it at all, will, in the absence of evidence as to who directed it to be run, be attributed to the railway company and not to the engineer and fireman, who were fellow servants of a trainman killed thereby.¹⁰⁸

§ 4966. Greater Age or Experience does not make a Servant a Vice-Principal.—The fact that one of several co-servants is older than

¹⁰⁵ *Texas &c. R. Co. v. Nix* (Tex. Civ. App.), 23 S. W. Rep. 328 (no off. rep.).

¹⁰⁶ *Jones v. Granite Mills*, 126 Mass. 84. This is one of the most unconscionable decisions to be found in the books. It deserves to be characterized as 'monstrous, cruel, and wicked. It ignores the obvious consideration that the master is under the same duty of maintaining a proper inspection for the purpose of seeing that his means of extinguishing fires are kept in

proper order, as rests upon him to provide such means in the first instance. See *ante*, §§ 3941, 4702.

¹⁰⁷ *McQueen v. Mechanics' Institute*, 107 Cal. 163; s. c. 40 Pac. Rep. 114.

¹⁰⁸ *Stoher v. St. Louis &c. R. Co.*, 105 Mo. 192; s. c. 16 S. W. Rep. 591. Circumstances under which the act of repairing a ladder was attributed to a vice-principal, and not to a fellow servant: *Huth v. Dohle*, 76 Mo. App. 671; s. c. 1 Mo. App. Repr. 586.

the others and that directions for the conduct of the work are given more particularly to him than to the others;¹⁰⁹ or that one of them has had more experience than another and is authorized to give the latter directions with respect to their common work,¹¹⁰—does not make the former a vice-principal with respect to the latter.

¹⁰⁹ *Hartman v. Kloeppinger*, 9 (N. Y.) 132; s. c. 39 N. Y. Supp. Ohio C. C. 433; s. c. 3 Ohio Dec. 19. 363.

¹¹⁰ *Rozelle v. Rose*, 3 App. Div.

CHAPTER CXXVI.

WHAT IS COMMON EMPLOYMENT WITHIN THIS DOCTRINE.

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4971. The Illinois doctrine of con-association.	4976. Servant who has charge of the construction and repairs of machinery deemed not to be a fellow servant with one engaged at work with the machinery.
4972. Other jurisdictions in which the con-association doctrine obtains.	4977. Contrary doctrine that such a servant is a fellow servant with one engaged at work with the machinery.
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§ 4970. **Servants so Closely Associated that they can Watch Over Each Other's Conduct.**—It is perhaps on the question, What is common employment? that we find the greatest divergencies of opinion. In a few jurisdictions the rule under consideration is restricted to cases where the servant injured and the servant inflicting the injury are so closely associated that they can watch over each other's conduct, and, if necessary, report it to the common master. The reason for the general rule is one of public policy. Its object is to secure to the public a more faithful service from the employés of railway companies, navigation companies, and other companies conducting a business wherein the safety of the public is involved, by making it the interest of each one of the employés of such persons or corporations to look after and encourage carefulness and fidelity in all the rest. This reason can have no application to employés whose situation allows them no corrective influence over each other;¹ but

¹ Stephens, J., in *Cooper v. Mullins*, 30 Ga. 146, 150; s. c. 76 Am. Dec. 638; *Krogg v. Atlanta &c. R. Co.*, 77 Ga. 202; s. c. 4 Am. St. Rep. 79; *Frost Man. Co. v. Smith*, 98 Ill. App. 308; s. c. aff'd, 197 Ill. 253; 64 N. E. Rep. 305; *Toledo &c. R. Co. v. O'Connor*, 77 Ill. 391; *Louis-*

where this doctrine obtains and the servants are so disassociated that the purpose of the rule is defeated, they are not deemed fellow servants within the meaning of the rule under consideration, but the rule of *respondeat superior* applies and the master is liable to one who is injured by the negligence of the other. It has been reasoned that an application of the fellow-servant rule which would put one servant in the situation of accepting the risk of the negligence of another servant, engaged in a service so remote from him that there is no opportunity of exercising that superintending care which the rule is intended to enforce, would operate as a penalty and would be sheer cruelty.² On the other hand, where the con-association above spoken of exists, the servants thus associated are fellow servants unless one of them is placed in such a superintendence over the others as to be deemed a vice-principal of the common master.³

§ 4971. **The Illinois Doctrine of Con-Association.**—The doctrine of the preceding section is chiefly in vogue in the State of Illinois; and as formulated in many decisions of the Supreme Court and of the Appellate Court of that State, with little variation, it is that, in order to constitute the servants of a common master fellow servants within the meaning of the law, it is essential that they should be, at the time in question, actually coöperating with each other in the particular business in hand in the same line of employment, or that their duties should be such as to bring them into habitual association, so that they may exercise a mutual influence on each other promotive of proper caution.⁴ Stated differently, the same doctrine is

ville &c. R. Co. v. Cavens, 9 Bush (Ky.) 559; Louisville &c. R. Co. v. Edmonds, 23 Ky. L. Rep. 1049; s. c. 64 N. W. Rep. 727 (no off. rep.) (where a disassociated servant is injured by the gross negligence of another servant—Kentucky rule); Fort Hill Stone Co. v. Orm, 84 Ky. 183; Quincy Min. Co. v. Kitts, 42 Mich. 34 (so long as both are in the same general business, so that the negligence of the one may contribute to the danger of the other); Nashville &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27.

² Stephens, J., in Cooper v. Mullins, 30 Ga. 146, 150; s. c. 76 Am. Dec. 638. That the rule in question did not apply to *slaves*, whose status was such that they could not watch over or intermeddle with their fellow workmen, being free white men,—see Scudder v. Wood-

bridge, 1 Ga. 195; Louisville &c. R. Co. v. Yandell, 17 B. Mon. (Ky.) 586. Compare Walker v. Bolling, 22 Ala. 294; Lewis v. McAfee, 32 Ga. 465; Memphis &c. R. Co. v. Jones, 2 Head (Tenn.) 517.

³ North Chicago St. R. Co. v. Conway, 76 Ill. App. 621 (where their labors directly co-operate with his own in the particular work in which they are engaged).

⁴ Western Tube Co. v. Polobinski, 94 Ill. App. 640; s. c. aff'd, 192 Ill. 132; 61 N. E. Rep. 451; Chicago &c. R. Co. v. Stallings, 90 Ill. App. 609 (therein a good statement of the doctrine); Chicago City R. Co. v. Leach, 80 Ill. App. 354; Pagels v. Meyer, 88 Ill. App. 169; Chicago &c. R. Co. v. Kelly, 127 Ill. 637; s. c. 21 N. E. Rep. 203; Edward Hines Lumber Co. v. Ligas, 68 Ill. App. 523; s. c. 2 Chic. L. J. Wkly.

that where one employé is injured by the negligence of another while they are coöperating with each other in a particular business in the line of their employment, and in the due observance of their duties, necessarily exercising an influence upon each other promotive of proper caution, they are to be considered fellow servants, and the employer is not liable, if he is himself guilty of no negligence.⁵ The reader will observe from the foregoing statements that in order to the application of this doctrine, it is essential either that the servants actually coöperate at the time of the injury in the particular work then in hand, or that their *usual duties* should bring them into habitual con-association, so that the exercise of proper caution would be likely to result in the promotion of their mutual safety and in the promotion of the safety of others whose safety depends upon their conduct.⁶ Nor is this rule without solid support in reason, although it is but meagerly supported by authority either in England or in this country. It is really an affirmation of the principle of *respondeat superior*, and not a negation of it. At least, it rests upon the same reason which supports the rule of *respondeat superior*, which is the expediency and propriety of throwing the risk upon those who can best guard against the danger, and of not putting it upon those who are so situated that they cannot guard against it.⁷ Where the servants are so associated that they can watch over each other, they are in a position where they can guard against the consequences of each other's negligence; but where they are not so situated, then it should seem that they are entitled to look to the common master to guard against the dangers springing from the negligence of his other servants, under the rule of *respondeat superior*, as

160; Chicago &c. R. Co. v. Hoyt, 122 Ill. 369; s. c. 9 West. Rep. 785; 12 N. E. Rep. 225; John Spry Lum-ber Co. v. Duggan, 182 Ill. 218; s. c. 51 N. E. Rep. 1002; aff'g s. c. 80 Ill. App. 394; Swisher v. Illinois Cent. R. Co., 182 Ill. 533; s. c. 55 N. E. Rep. 555; aff'g s. c. 74 Ill. App. 164 (fireman and switchman held to be fellow servants); Chicago &c. R. Co. v. Moranda, 93 Ill. 302; s. c. 34 Am. Rep. 168 [disapproving Chicago &c. R. Co. v. Murphy, 53 Ill. 336; s. c. 5 Am. Rep. 48; Valtez v. Ohio &c. R. Co., 85 Ill. 500]; Chicago &c. R. Co. v. O'Brien, 155 Ill. 630; s. c. 40 N. E. 1023; aff'g s. c. 53 Ill. App. 198. But a *personal acquaintance* between the two servants is not necessary to make them fellow servants by reason of their con-association, within

the meaning of this rule: World's Columbian Exposition v. Bell, 76 Ill. App. 591.

⁵ Cleveland &c. R. Co. v. Lawler, 94 Ill. App. 36; Illinois Steel Co. v. Bauman, 78 Ill. App. 73; s. c. aff'd, 178 Ill. 351; 53 N. E. Rep. 107; 69 Am. St. Rep. 316 (always keeping in mind that the master has been guilty of no negligence in employing or in retaining in his service the servant who did the injury); Joliet Steel Co. v. Shields, 146 Ill. 603; s. c. 34 N. E. Rep. 1108; aff'g s. c. 45 Ill. App. 453; Cleveland &c. R. Co. v. McLaughlin, 56 Ill. App. 53.

⁶ Chicago &c. R. Co. v. Moranda, 93 Ill. 302; s. c. 34 Am. Rep. 168.

⁷ Chicago &c. R. Co. v. Moranda, 93 Ill. 302; s. c. 34 Am. Rep. 168.

though the injured servant were a stranger to him.⁸ It must be kept in mind that it is not necessary that both of the foregoing conditions should concur in order to make the servant inflicting the injury a fellow servant of the one receiving the injury; but it is enough . . . that they are actually operating with each other in the particular work, or that their duties are such as to bring them into habitual con-association.⁹

§ 4972. Other Jurisdictions in which the Con-Association Doctrine Obtains.—The Illinois con-association doctrine has been admitted, with more or less distinctness, in several other jurisdictions, sometimes under the influence of statutes.¹⁰

⁸In the case of *Chicago &c. R. Co. v. Murphy*, 53 Ill. 336; s. c. 5 Am. Rep. 48, it was said: "When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be regarded as fellow servants, within the meaning of the rule which exempts the common master from liability in cases of this character." This language was referred to with approbation in the case of *Valtez v. Ohio &c. R. Co.*, 85 Ill. 500; but as a definition of what shall constitute fellow servants in this class of cases it is regarded as too broad and is disapproved: *Chicago &c. R. Co. v. Moranda*, 93 Ill. 302; s. c. 34 Am. Rep. 168.

⁹It is, therefore, error, where this rule obtains, to *instruct a jury* that if the servants are not directly co-operating with each other in a particular business in the same line of employment, they are not fellow servants; since, although they may not be so co-operating, yet their duties may be such as to bring them into habitual association, in which case the rule would equally apply: *Chicago &c. R. Co. v. Stallings*, 90 Ill. App. 609.

¹⁰*Parker v. Hannibal &c. R. Co.*, 109 Mo. 362; s. c. 18 L. R. A. 802; 46 Alb. L. J. 286; 35 Cent. L. J. 187; 50 Am. & Eng. R. Cas. 521; 19 S. W. Rep. 1119; *Union Pac. R. Co. v. Erickson*, 41 Neb. 1; s. c. 29 L. R. A. 137; 59 N. W. Rep. 347 (holding that con-association in the same department of duty or line of employment is necessary to make fellow

servants); *Daniels v. Union &c. R. Co.*, 6 Utah 357; s. c. 23 Pac. Rep. 762 (must be engaged in the same line of work, be under the control of the same foreman, and be employed and discharged by the same head of the department in which they work); *Webb v. Denver &c. R. Co.*, 7 Utah 363; s. c. 26 Pac. Rep. 981; *McTaggart v. Eastman's Co.*, 27 Misc. (N. Y.) 184; s. c. 57 N. Y. Supp. 222 (driver of a meat-wagon not a fellow servant of a hod-carrier); *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160; s. c. 55 S. W. Rep. 772 (decision at common law and also under a statute; recovery allowed for the death of a brakeman where a switch had been tampered with; evidence showed that railroad company was negligent in not maintaining a careful inspection). In Tennessee, when servants of the same master are engaged in *different departments* of a common service, or one is the *superior* of another in the same department, either temporarily or permanently, they are not fellow servants, within the meaning of this rule: *East Tennessee &c. R. Co. v. De Armond*, 86 Tenn. 73; s. c. 6 Am. St. Rep. 816; 5 S. W. Rep. 556. In the same State, where the servants of the same master are engaged in different departments of a common service, or where one is the superior of another in the same department, either temporarily or permanently, they are not fellow servants because of the statute: *East Tennessee &c. R. Co. v. De Armond*, *supra*. Under the provision of the Constitution of *Mississippi*

§ 4973. **Illustrations of the Con-Association Doctrine.**—Under the con-association doctrine, where the servants of a railway company operating a train of cars were guilty of negligence, whereby the servants of the same company on another train, or on a hand-car, were injured, the latter might recover damages from the company. The two classes of servants were deemed not to be in such situations as to be enabled to watch over each other's conduct.¹¹ So, a laborer in the car-shops of a railway company and the foreman of the switchmen in the train department of the same company are not fellow servants.¹² So, switch-crews belonging to different trains of the same railroad company, where the evidence fails to show the existence of any habitual association which may exercise a mutual influence promotive of proper caution among servants of the common master, cannot be regarded as fellow servants.¹³ So, where a conductor of a train on one division of a railroad was injured by the gross negligence of one of the servants in charge of a train on another division of the same road at a point where the divisions crossed, the common master was liable because there was no con-association within the meaning of the rule in question.¹⁴ So, where a mining company was

(Miss. Const. 1890, § 193) that every employé of a railroad company, or his personal representative, shall have the same remedies for an injury produced by the act of omission of the corporation, or of its employés, as other persons not employés, where the injury results from the negligence of a fellow servant engaged in another department of labor,—it is held that a *railway fireman* and a *telegraph-operator* are engaged in different departments, and that there may be a recovery for the injury or the death of the fireman brought about by the negligence of the telegraph-operator: *Illinois &c. R. Co. v. Hunter*, 70 Miss. 471; s. c. 12 South. Rep. 480.

¹¹ *Cooper v. Mullins*, 30 Ga. 146; s. c. 76 Am. Dec. 638; *Louisville &c. R. Co. v. Cavens*, 9 Bush (Ky.) 559; *Nashville &c. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347 [reaff'd in *Nashville &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27]; *Toledo &c. R. Co. v. O'Connor*, 77 Ill. 391. The doctrine of *Louisville &c. R. Co. v. Cavens*, *supra*, seems directly opposed to the previous case of *Louisville &c. R. Co. v. Robinson*, 4 Bush (Ky.) 507, where it was held

that fellow servants engaged in the same common employment were within the rule. In that case, *Robertson, J.*, said (4 Bush (Ky.) 509): "The appellee [the brakeman] and the engineer, in this case, were employed in the same running operations; and the fact that one served on a passenger and the other on a freight train does not affect the reason and policy of implying, as between themselves, such associations, knowledge, and trust as to have induced an undertaking mutually to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert." There is, however, as elsewhere seen, a statute in Kentucky, the construction of which, as laid down by the Court of Appeals of that State, is at variance with the ordinary rules relating to this subject. The conclusions of these courts are expressly denied in Missouri: *Connor v. Chicago &c. R. Co.*, 59 Mo. 285, per *Hough, J.*

¹² *Pool v. Southern Pac. R. Co.*, 20 Utah 210; s. c. 58 Pac. Rep. 326.

¹³ *Illinois Cent. R. Co. v. Jones*, 97 Ill. App. 131.

¹⁴ *Louisville &c. R. Co. v. Ed-*

excavating two tunnels—one above the other—on a hillside, and a rock negligently ordered thrown down the hill by the superintendent of the gang at the upper tunnel struck and injured a man working under another superintendent at the lower tunnel, the superintendent of the upper-tunnel gang and the injured man were not fellow servants, not having opportunity to take precautions against each other's negligence.¹⁵ On the other hand, a conductor of a drill-crew, a car-coupler, a railway signal-man, a railway pin-puller, and a locomotive-engineer, all engaged in "drilling" cars in a railroad yard,—that is, sorting them upon various tracks according to their destinations,—are fellow servants.¹⁶ So, the different squads or groups of house-painters occupying stages which, though separate, are near each other, the groups doing the same kind of work, under the same foreman, and the various stages, brushes, buckets, etc., being used interchangeably, exhibit a condition of con-association; so that if a workman on one of the stages is injured through the negligence of a workman on the next stage, he cannot recover damages from the common master, because the servant inflicting the injury is his fellow servant.¹⁷

§ 4974. This Con-Association Doctrine Generally Denied.—It should not escape attention that this "con-association doctrine" is local and peculiar, and that, in the conception of a great majority of the courts, the question of the non-liability of the master for an injury inflicted by one servant upon another through negligence does not depend upon the fact of the two servants being so closely associated together that the one receiving the injury can acquire knowledge of the negligent habits of the other and guard against the consequences of them, so as to put him in the position of accepting the

monds, 23 Ky. L. Rep. 1049; s. c. 64 S. W. Rep. 727 (no off. rep.). See *post*, § 5297. The defendant's lumber was being unloaded from a vessel into the defendant's dock. The defendant's yard-men were piling it up after it was passed out of the boat by another set of men, but it was disputed whether the latter set were in the defendant's employ. The plaintiff, belonging to the latter set, was injured by the falling of a pile of lumber, while he was passing from the vessel to a water-closet, on the dock, for the men there engaged. The plaintiff's association with the former set of men ended with passing the lumber over the vessel's rail. It was held that

even if the defendants were the common master of both sets of men, the verdict, that the plaintiff was not a fellow servant of the yard-men would be justified: *John Spry Lumber Co. v. Duggan*, 182 Ill. 218; s. c. 51 N. E. Rep. 1002; *aff'g* s. c. 80 Ill. App. 394.

¹⁵ *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; s. c. 64 Pac. Rep. 174.

¹⁶ *Central R. Co. v. Keegan*, 82 Fed. Rep. 174; s. c. 51 U. S. App. 489; *Central R. Co. v. Keegan*, 160 U. S. 259; s. c. 16 Sup. Ct. Rep. 269.

¹⁷ *World's Columbian Exposition v. Lehigh*, 196 Ill. 612; s. c. 63 N. E. Rep. 1089; *rev'g* s. c. 94 Ill. App. 433.

risk of injury from them. On the contrary, servants engaged under a common master in the same general service,—such, let us say, as railway service,—are deemed fellow servants, and assume the risk of each other's negligence, although they are engaged in different departments of such service.¹⁸

§ 4975. Cases Where there is No Con-Association or Common Employment and where the Employés are Deemed Not to be Fellow Servants.—It is not to be inferred from the last collection of cases that there are not many situations where the departments of service are so distinct and disconnected that the con-association doctrine does not apply upon any conception; but in many cases the servants engaged in the one department are deemed not to be fellow servants of those engaged in the other department; so that, if the servant in one department is injured in consequence of the negligence of a servant in another department, the common master will be liable for the damages. Thus in Illinois, where the con-association doctrine pre-

¹⁸ *Ante*, § 4917; Brush Electric Light & Co. v. Wells, 110 Ga. 192; s. c. 35 S. E. Rep. 365 (within Ga. Civ. Code, § 2610, excepting in the case of railway service); Clarke v. Pennsylvania Co., 132 Ind. 199; s. c. 17 L. R. A. 811; -31 N. E. Rep. 808 (member of one section-gang and the section-boss of another gang, employed by the same railroad company); Farwell v. Boston & C. R. Co., 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924; Adams v. Iron Cliffs Co., 78 Mich. 271; s. c. 44 N. W. Rep. 270; 41 Am. & Eng. R. Cas. 414; 18 Am. St. Rep. 441 (founder in a blast furnace in charge of the inside work of such furnace, and an engineer of a locomotive used in moving cars on the premises of the company, although such founder's department and the department in which the engineer works are separate and under the charge of different foremen); Foster v. Minnesota & C. R. Co., 14 Minn. 360; Sherrin v. St. Joseph & C. R. Co., 103 Mo. 378; s. c. 23 Am. St. Rep. 881 (foremen of different gangs of section-men of the same company); McAndrews v. Burns, 39 N. J. L. 117 (where the servants, though in different departments, are closely associated); Coon v. Syracuse & C. R. Co., 5 N. Y. 492; Wright v. New York & C. R. Co., 25 N. Y. 562; Ross v. New York

& C. R. Co., 5 Hun (N. Y.) 488; Whaalan v. Mad River & C. R. Co., 8 Ohio St. 248; Manville v. Cleveland & C. R. Co., 11 Ohio St. 417; Brunell v. Southern Pac. Co., 34 Or. 256; s. c. 5 Am. Neg. Rep. 711; 56 Pac. Rep. 129 (section-men working on a railroad-track and their overseer, and other employés of the same company employed on bridge-work, although of different gangs); New York & C. R. Co. v. Bell, 112 Pa. St. 400 (member of railway gang of workmen injured by a member of another gang engaged in a different sort of work); Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; s. c. 6 Repr. 125; 17 Alb. L. J. 513; Coal Creek Min. Co. v. Davis, 90 Tenn. 711; s. c. 18 S. W. Rep. 387 (except employés in railway service, and this by statute); Nashville & C. R. Co. v. Carrol, 6 Heisk. (Tenn.) 347; International & C. R. Co. v. Ryan, 82 Tex. 565; s. c. 18 S. W. Rep. 219 (railroad employé working in a bridge gang, although he has no duties in common with a workman in the transportation department, and although they are under the direction of independent superintendents); Wilson v. Charleston & C. R. Co., 51 S. C. 79; s. c. 23 S. E. Rep. 91; 9 Am. & Eng. R. Cas. (N. S.) 211 (car-cleaner injured through the negligence of a switchman).

vails,¹⁹ it was said: "That the duties of an employ   of a railway company may be so entirely distinct from all occupation upon its trains, as to leave him at liberty to pursue the same legal remedies for injuries received as a passenger, may very probably be true. If, for example, a bookkeeper in a railway office should be injured when travelling as a passenger, through the carelessness of the engineer, the reasons upon which the rule above referred to is founded might be well held to have no application."²⁰ Carrying out this principle, it was ruled that an engine-driver of a railway is not in the same common employment with a laborer in the carpenter-shop of the company, since they have no opportunity to watch over each other and observe each other's conduct and report to the master any delinquencies.²¹ And so in Pennsylvania, it has been held that a carpenter in the employ of a railway company, transported by the company to and from his place of labor, is not a fellow servant in the same common employment with the men who have charge of the train.²² So, a draughtsman in a locomotive-works is not a fellow servant with a carpenter employed in "jobbing" for the proprietor, and with laborers who, under the directions of such carpenter, are engaged in excavating a cellar under the building.²³ So, on the

¹⁹ *Ante*, § 4971.

²⁰ *Chicago & C. R. Co. v. Keefe*, 47 Ill. 110.

²¹ *Ryan v. Chicago & C. R. Co.*, 60 Ill. 171, 174; s. c. 14 Am. Rep. 32.

²² *O'Donnell v. Allegheny & C. R. Co.*, 59 Pa. St. 239.

²³ *Baird v. Pettit*, 70 Pa. St. 477, 482. In giving the judgment of the court upon this case, Williams, J., uses the following language: "In accepting the employment, he [the plaintiff] took upon himself all the risks necessarily incident to the business. But the workmen by whose negligence he was injured were not engaged in the manufacture of the engines, nor in the performance of any service connected with the business. There is not a particle of evidence that the cellar they were excavating had been, or was intended to be, used for any purpose connected with the business carried on by the defendant. If, in order to exempt the master from responsibility, it is not necessary that 'the servant causing and the servant sustaining the injury should both be engaged in precisely the same, or even similar, acts,' it is essential that they should

be engaged in the same common employment, and that they should be working for the same common end. As it was the plaintiff's business to make drawings for tools and engines, all persons engaged in their manufacture, or in carrying on the works, however employed, must undoubtedly be regarded as his fellow workmen, and engaged in the same common employment. But with what propriety can it be said that the workmen who excavated the cellar were engaged in the same common employment as the plaintiff? Servants, it is said, are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their servants; namely, that the servant takes the risk into account when fixing his wages. He cannot take into an account a risk which he

other hand, the negligence of another servant engaged in the same general business with the injured servant is the negligence of a fellow servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant as contradistinguished from the duties of the master to his employés.²⁴

§ 4976. Servant who has Charge of the Construction and Repairs of Machinery Deemed Not to be a Fellow Servant with One Engaged at Work with the Machinery.—The books present a conflict of authority as to whether the servant who has charge of the construction and repairs of the machinery used, is, in the master's absence, to be

has no reason to anticipate, and he does take into account the risks which the average experience of his fellows has led them, as a class, to anticipate. If this is the rule,—and we are not disposed to question its soundness,—how could the plaintiff, in the exercise of ordinary sagacity, foresee, when accepting the employment of draughtsman, that it would probably expose him to the risk of injury from the negligence of the workmen employed by the defendant to excavate the cellar? What reason had he to anticipate the risk, so as to take it into account in fixing his wages? Manifestly, the negligence which occasioned the plaintiff's injury was not one of the risks which he assumed in entering into the defendant's employment": *Baird v. Pettit*, *supra*. In another case, the principle which lies at the foundation of the master's exemption, in any case, is thus stated: "That the servant, having voluntarily entered into a contract of service to do a specified work for a specified compensation, has thereby accepted the ordinary perils incident to doing that work; and whenever the negligence of another employé of the same master can be considered an ordinary risk, one which he might reasonably anticipate at the time of making his contract, he accepts also the perils liable to happen through such negligence. And it seems clear that upon this principle those only are fellow servants for whose negligence, one to another, the master is exempt, who serve in

such capacity, and in such relation to the master and each other, that the means of the servants to protect themselves are equal to, or greater than, those of the master to afford them protection; and that, further than this, justice and policy forbid us to carry the implied portion of the contract of service. Beyond this, an injured servant has as clear title to relief against the master as a stranger, upon the maxim of *respondeat superior*": *Kielley v. Belcher Silver-Min. Co.*, 3 Sawy. (U. S.) 437, 444. In this case, a declaration which stated in substance that the plaintiff, while engaged as an employé in a silver mine of the defendant, was injured by the negligence of certain miners of the defendant, in blasting, was held good on demurrer. But when the case came to trial (3 Sawy. 500), it was held, with obvious propriety, that the plaintiff was a fellow servant with the miners.

²⁴*Ell v. Northern Pac. R. Co.*, 1 N. D. 336; s. c. 12 L. R. A. 97; 26 Am. St. Rep. 621; 43 Alb. L. J. 414; 48 N. W. Rep. 222. See also, *Guggenheim Smelting Co. v. Sofield*, 64 N. J. L. 605; s. c. 46 Atl. Rep. 711; 50 L. R. A. 417; *Gates v. Chicago &c. R. Co.*, 2 S. D. 422; s. c. 50 N. W. Rep. 907; *American Teleph. &c. Co. v. Bower*, 20 Ind. App. 32; s. c. 49 N. E. Rep. 182; *New Pittsburgh Coal &c. Co. v. Peterson*, 14 Ind. App. 634; s. c. 43 N. E. Rep. 270 (foreman a fellow servant of a workman when the two are engaged in cleaning the machinery).

deemed a fellow servant with a servant who is employed in connection with its running-operations. To use a frequent illustration: Is the master machinist of a railway company a fellow servant with a fireman or brakeman? The better opinion is, that he is not.²⁵ If this is not so, the rule which charges the master with responsibility to the servant for defective machinery²⁶ falls wholly to the ground in the case of corporations; for, since a corporation can act only through its agents, if the agent or servant who has charge of the construction and repairs of its machinery is a fellow servant with him who is employed in running it, it follows that corporations will be exempt, in all cases, from the obligation of furnishing their servants with safe machinery which attaches to other proprietors.^{26a} Such a servant, then, is fairly deemed a vice-principal of the master, and his negligence is the master's negligence to all intents and purposes, the same as though the master were present, performing his duties in person.²⁷ Another way of stating what seems to be the correct rule is, that the mechanics having charge of the construction and repairs of the master's machinery are not fellow servants engaged in the same common employment with the servants who are engaged in operating it.²⁸ Accordingly, those employed in the repair-shops of a railway company are not fellow servants with those engaged in the running of its trains;²⁹ nor are those whose duty it is to construct and keep in repair the track, bridges, etc., fellow servants with those engaged in the running-operations of the road, such as engineers, firemen, brakemen, and the like.³⁰

²⁵ *Colorado &c. R. Co. v. Ogden*, 3 Colo. 499; *Chicago &c. R. Co. v. Jackson*, 55 Ill. 492; *Chicago &c. R. Co. v. Gregory*, 58 Ill. 272; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Cumberland &c. R. Co. v. State*, 44 Md. 283; *Cumberland &c. R. Co. v. State*, 45 Md. 229; charge of trial court in *Seaver v. Boston &c. R. Co.*, 14 Gray (Mass.) 466; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Illinois &c. R. Co. v. Welch*, 52 Mo. 183; *Lewis v. St. Louis &c. R. Co.*, 59 Mo. 495; *Flike v. Boston &c. R. Co.*, 53 N. Y. 549; *Mullan v. Philadelphia &c. S. S. Co.*, 78 Pa. St. 25; *Houston &c. R. Co. v. Dunham*, 49 Tex. 181; *Brabbitts v. Chicago &c. R. Co.*, 38 Wis. 289; *post*, § 5119.

²⁶ *Ante*, § 3986.

^{26a} As to which see *ante*, § 4948.

²⁷ It is so held in the following

cases: *Van Dusen v. Letellier*, 78 Mich. 492; s. c. 44 N. W. Rep. 572; *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151; *Laning v. New York &c. R. Co.*, 49 N. Y. 521; s. c. 2 Thomp. Neg. (1st ed.), p. 932; *Gunter v. Graniteville Man. Co.*, 18 S. C. 262; s. c. 44 Am. Rep. 573; *Lasure v. Graniteville Man. Co.*, 18 S. C. 275; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 553; aff'g s. c. 2 Dill. (U. S.) 294.

²⁸ *Toledo &c. R. Co. v. Moore*, 77 Ill. 217; *Chicago &c. R. Co. v. Keefe*, 47 Ill. 108; *Chicago &c. R. Co. v. Shannon*, 43 Ill. 338; *Sadowski v. Michigan Car Co.*, 84 Mich. 100; s. c. 47 N. W. Rep. 598.

²⁹ *Toledo &c. R. Co. v. Moore*, 77 Ill. 217; *Chicago &c. R. Co. v. Keefe*, 47 Ill. 108; *Chicago &c. R. Co. v. Shannon*, 43 Ill. 338.

³⁰ *Chicago &c. R. Co. v. Swett*, 45 Ill. 197.

§ 4977. **Contrary Doctrine that Such a Servant is a Fellow Servant with One Engaged at Work with the Machinery.**—Other courts, however, exempt the master from liability where the injury happens in consequence of the negligence of his master mechanic, inspector of machinery, or other servant or servants, whose duty it is to see that his machinery is kept in safe condition for use, if such servant is a competent and fit person to be so employed, and if the master has been guilty of no personal negligence in employing him or retaining him in his service.³¹ Thus, where a contractor for the excavation of a tunnel furnished proper appliances for the safety of his workmen, and placed them in the hands of competent subordinates, and a workman in the tunnel was killed through the negligence of the persons at the surface of the tunnel having charge of the appliances,—it was held that the contractor was not liable for the accident. “The laborer whose duty it was to deliver on the surface, at the shafts, or there use or keep in repair, the instrumentalities provided by the defendant for the safe conduct of the laborers to and from the tunnel, was, in the view of the law, a fellow servant of the deceased, whose place of labor was in the tunnel, and they were engaged in a common employment.”³² So, the person who, under the English railway system, is called the “ganger,” whose duty it is to inspect the railway-track, and see that the tree-nails are not decayed, and renew them if they are, is a fellow servant with a “guard” who travels on a passenger-train.³³ So, all of the persons engaged under a

³¹ *Columbus &c. R. Co. v. Arnold*, 31 Ind. 174; *O'Connell v. Baltimore &c. R. Co.*, 20 Md. 212; *Schauck v. Northern &c. R. Co.*, 25 Md. 462; *Wonder v. Baltimore &c. R. Co.*, 32 Md. 411; *Hanrathy v. Northern &c. R. Co.*, 46 Md. 280; s. c. 5 Repr. 698; *Long v. Pacific R. Co.*, 65 Mo. 225; *McAndrews v. Burns*, 39 N. J. L. 117; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Malone v. Hathaway*, 64 N. Y. 5 [distinguishing *Laning v. New York &c. R. Co.*, 49 N. Y. 521; s. c. 2 Thomp. Neg. (1st ed.), p. 932, and *Flike v. Boston &c. R. Co.*, 53 N. Y. 549; *Church, C. J.*, and *Rapallo, J.*, dissenting]; *Columbus &c. R. Co. v. Webb*, 12 Ohio St. 475; *Manville v. Cleveland &c. R. Co.*, 11 Ohio St. 417; *Hard v. Vermont &c. R. Co.*, 32 Vt. 473; *Waller v. South-Eastern R. Co.*, 2 Hurl. & Colt. 102; *Searle v. Lindsay*, 11 C. B. (N. S.) 429; s. c. 8 Jur. (N. S.) 746; 31 L. J.

(C. P.) 106; 10 Wkly. Rep. 89; 5 L. T. (N. S.) 427). See *Smith v. Lowell Man. Co.*, 124 Mass. 114.

³² *McAndrews v. Burns*, 39 N. J. L. 117, 120.

³³ *Waller v. South-Eastern R. Co.*, 2 Hurl. & Colt. 102. This, however, is contrary to the doctrine of most of the American courts, which hold the company liable, for defects in its permanent way, to those of its servants who are exclusively engaged in running its trains: *Ante*, § 4260; *post*, § 5104. Where a railway bridge was carefully examined, and tested under the weight of a train of cars, by the repairer of bridges and the division superintendent, both competent men, who pronounced it entirely safe, but it nevertheless broke down the next day under a passing train, killing a brakeman thereon, it was held that the company was not liable for his death, the court deeming the repairer of bridges and the division

common employer in repairing a building are fellow servants; so that if one of them, a carpenter, puts up a defective staging, in consequence of which another of them, a coppersmith, is injured while repairing the gutter, the employer is not liable.³⁴

§ 4978. **Illustrations of what is Common Employment.**—Within the meaning of this rule the following servants have been held to be in common employment:—A locomotive-engineer and a switch-tender;³⁵ a mill superintendent and a common spinner;³⁶ a track-repairer and those in charge of a train upon which he rode;³⁷ a brakeman on one train, and the engineer of another colliding with the first;³⁸ a locomotive-engineer and a master mechanic of a railroad;³⁹ several persons engaged in a mine,—some breaking down the ore with picks and by blasting, others loading and wheeling it out;⁴⁰ the persons in charge of a railway locomotive, and a sectionman engaged in repairing the track;⁴¹ a laborer engaged in hoisting coal out of a vessel by machinery, and the engineer in charge of the engine;⁴² an underground workman in a coal-pit, and the engineer at the top of the pit;⁴³ a licensed waterman, employed by a warehouseman by the week, but whose duties only required him to attend three hours at every high tide, and the other servants of the warehouseman engaged in hoisting goods;⁴⁴ the foreman of a shop, having charge of the machinery therein, and a workman in the shop, injured by a defect in the machinery;⁴⁵ the heads of different departments in the same coal mine, working together under a common superin-

superintendent fellow servants, in the same common employment: *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324. But it is obvious that this decision might have been rested on the ground that the company had been guilty of no negligence.

³⁴ *Killea v. Faxon*, 125 Mass. 485; s. c. 6 Repr. 778. To the same effect is *Colton v. Richard*, 123 Mass. 484; *Kelley v. Norcross*, 121 Mass. 508. Compare *Arkerson v. Dennison*, 117 Mass. 407.

³⁵ *Farwell v. Boston & C. R. Co.*, 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924. See also, *Slattery v. Toledo & C. R. Co.*, 23 Ind. 81.

³⁶ *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75.

³⁷ *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228. See also, *Seaver v. Boston & C. R. Co.*, 14 Gray (Mass.) 466; *Gilman v. Eastern R.*

Co., 10 Allen (Mass.) 233; s. c. 13 Allen (Mass.) 433; *Russell v. Hudson River R. Co.*, 17 N. Y. 134; *Ohio & C. R. Co. v. Tindall*, 13 Ind. 366.

³⁸ *Wright v. New York & C. R. Co.*, 25 N. Y. 562.

³⁹ *Hard v. Vermont & C. R. Co.*, 32 Vt. 473.

⁴⁰ *Kielley v. Belcher Silver-Min. Co.*, 3 Sawy. (U. S.) 500.

⁴¹ *Foster v. Minnesota & C. R. Co.*, 14 Minn. 360; *Coon v. Syracuse & C. R. Co.*, 5 N. Y. 492; *Whaalan v. Mad River & C. R. Co.*, 8 Ohio St. 249.

⁴² *Wood v. New Bedford Coal Co.*, 121 Mass. 252.

⁴³ *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; s. c. 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 785.

⁴⁴ *Lovell v. Howell*, 1 C. P. Div. 161; s. c. 45 L. J. 387.

⁴⁵ *Hanrathy v. Northern & C. R. Co.*, 46 Md. 380; s. c. 5 Repr. 698.

tendent;⁴⁶ a master of a vessel and the mate;⁴⁷ and an "underlooker" in a coal mine whose duty it is to examine the roof, and prop it up if dangerous, and a common laborer in the mine.⁴⁸ On this principle, it was held that there could be no recovery for the death of a person employed by a railway company to tend a chain across a street, for the purpose of preventing travel over the track when trains were about to pass, but who occasionally signalled trains with his flag, where his death was caused by the negligence of a switch-tender in misplacing a switch, which produced a collision of trains.⁴⁹ A fireman on an engine engaged in hauling freight-cars into the yard of a railroad company has been held to be in the same general business with another servant of the same company whose duties were usually confined to the roundhouse of the company, within the yard, but who occasionally acted as a substitute for the switch-tender.⁵⁰ For like reasons, a brakeman in the employ of a railroad company cannot maintain an action against the company for personal injuries caused by the making up of cars with platforms of unequal height, by the ordinary servants of the company, under the direction of one of its station-masters.⁵¹ So, the following injuries have been ascribed to the negligence of fellow servants:—An injury to an employé in a warehouse, who, at the direction of a servant working with him, who had no authority to give the order, used in the work an elevator, in a dangerous and improper manner, for which it was not intended or provided, the master having no reason to believe that it would be thus used;⁵² an injury to a servant through the negligence of a fellow servant in not tightening a screw in a wooden button on a machine, which kept in place a movable board, by reason of which neglect the board yielded to the pressure of the plaintiff's hand in rubbing a part of the frame, injuring him.⁵³

§ 4979. **Servants Working under Different Overseers.**—In Illinois, where the "con-association doctrine"⁵⁴ obtains, the fact that servants, if thrown into association by their work, are working under different overseers or foremen, does not make them any the less fellow

⁴⁶ *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; s. c. 6 Repr. 125; 17 Alb. L. J. 513.

⁴⁷ *Halverson v. Nisen*, 3 Sawy, (U. S.) 562.

⁴⁸ *Hall v. Johnson*, 3 Hurl. & Colt. 589; s. c. 11 Jur. (N. S.) 180; 34 L. J. (Exch.) 222; 13 Wkly. Rep. 411; 11 L. T. (N. S.) 779.

⁴⁹ *Sammon v. New York &c. R. Co.*, 62 N. Y. 251.

⁵⁰ *Tinney v. Boston &c. R. Co.*, 52 N. Y. 632; aff'g s. c. 62 Barb. (N. Y.) 218.

⁵¹ *Hodgkins v. Eastern R. Co.*, 119 Mass. 419.

⁵² *Felch v. Allen*, 98 Mass. 572.

⁵³ *Smith v. Lowell Man. Co.*, 124 Mass. 114.

⁵⁴ *Ante*, § 4971.

servants with respect to each other. Although servants work under different overseers, if they are engaged in the same line of employment, such as necessarily brings them into frequent contact with each other in the prosecution of their work, they are coservants.⁵⁵

⁵⁵ Chicago &c. R. Co. v. O'Bryan, 15 Ill. App. 134 (employés in machine-shop and car-shops).

CHAPTER CXXVII.

RELATION OF THE PARTIES.¹

ART. I. Servant or Stranger, §§ 4982-4993.

ART. II. Servants of Different Masters, §§ 4996-5011.

ARTICLE I. SERVANT OR STRANGER.

SECTION

- 4982. Volunteers who undertake to assist servants.
- 4983. Persons invited by the servants of a master to assist them.
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§ 4982. **Volunteers who Undertake to Assist Servants.**—It has been shown, when treating of the subject ASSUMPTION OF THE RISK,^{1a} that volunteers, intermeddlers, or trespassers, who assume without request and in the absence of an emergency to lend a helping hand in the work of an employer, take the risk of things as they find them, and do not thereby put the employer under any liability to them further than to use ordinary or reasonable care to avoid injuring them after discovering them in a position of danger. Among the risks which they assume is the risk of injury through the carelessness or negligence of the servants of the employer. By thus volun-

¹ See also, *ante*, § 3721, *et seq.*

^{1a} *Ante*, § 4680.

teering or intermeddling the volunteer or intermeddler subjects himself to the fellow-servant rule to the same extent as though he were for the time being a servant of the employer; so that if he is injured through the negligence of a servant of the person with whose business he thus interferes he cannot recover damages against such person.² The principle has been frequently applied in cases where a servant of a shipper or consignee of goods is engaged in discharging them for shipment upon a railway or in receiving them from cars of a railway company, and while so doing assumes to assist the servants of the railway company. Here, the distinction has been well taken that if such assistance was necessarily rendered by him for the purpose of expediting the business of his own master he may recover damages for the injury from the railway company; but not if he was a mere volunteer assisting a servant of the company to oblige him.³

§ 4983. Persons Invited by the Servants of a Master to Assist Them.—The principle of the preceding paragraph has been frequently held to apply in the case where a person who has been invited by the servants of a master to assist them in performing their work, is injured while complying with such invitation. Here, if the servant inviting him had authority to do so, the person invited becomes an employé and hence a fellow servant of those whom he undertakes to assist.⁴ If the servant inviting him had no authority to do so, then he is at most a mere volunteer, and he cannot, without invitation from the master or from some one for whose act the master is responsible, acquire, by voluntarily joining a class of persons, any greater right than the members of that class have against their employer.⁵ The liability of the employer in such a case is therefore substantially the same whether the injured person be regarded as a fellow servant or as a mere volunteer.⁶ Thus, one who voluntarily performs a service as switchman upon a train of cars, at the request

² Wischam v. Rickards, 136 Pa. St. 109; s. c. 10 L. R. A. 97; 42 Alb. L. J. 522; 8 Rail. & Corp. L. J. 491; 26 W. N. C. (Pa.) 467; 48 Phila. Leg. Int. 198; 20 Atl. Rep. 532; Mayton v. Texas & C. R. Co., 63 Tex. 77; s. c. 51 Am. Rep. 637; Bonner v. Bryant, 79 Tex. 540; s. c. 15 S. W. Rep. 491; Degg v. Midland R. Co., 1 Hurl. & N. 773; s. c. 3 Jur. (N. S.) 395; 26 L. J. (Exch.) 171; Osborne v. Knox & C. R. Co., 68 Me. 49.

³ Bonner v. Bryant, 79 Tex. 540; s. c. 15 S. W. Rep. 491; *post*, § 4986.

⁴ Marks v. Rochester R. Co., 41 App. Div. (N. Y.) 66; s. c. 92 N. Y. St. Rep. 210; 58 N. Y. Supp. 210.

⁵ Wischam v. Rickards, 136 Pa. St. 109; s. c. 10 L. R. A. 97; 42 Alb. L. J. 522; 8 Rail. & Corp. L. J. 491; 26 W. N. C. (Pa.) 467; 48 Phila. Leg. Int. 198; 20 Atl. Rep. 532 (since he makes himself one of a class who, as against their master, have no right of recovery for each other's negligence).

⁶ Stevens v. Chamberlin, 40 C. C. A. 421; s. c. 100 Fed. Rep. 378.

of the foreman of the switch-crew, who has no authority to employ him, thereby becomes a fellow servant with the foreman and the engineer of the train, through whose negligence he is injured.⁷ But if the servant so inviting him has authority to employ the necessary assistance in his department, the person accepting the invitation may become a servant of the master of the servant extending the invitation, to the extent of acquiring a right of recovery against the master for an injury received in consequence of a negligent defect in his appliances;⁸ whereas, if he were assigned to the category of mere volunteers, intermeddlers, or trespassers, he would be deemed to take things as he found them.⁹

§ 4984. Persons Rendering Assistance to Servant in an Emergency.—The rule of the preceding paragraph does not apply in the case where a stranger is injured who voluntarily renders assistance to the servant of a master in an emergency such as justifies such actions. Such persons do not, by the performance of meritorious acts of this kind, put themselves in the category of volunteers or inter-

⁷ *Texas &c. R. Co. v. Skinner*, 4 Tex. Civ. App. 661; s. c. 23 S. W. Rep. 1001; *McDaniel v. Highland Ave. &c. R. Co.*, 90 Ala. 64; s. c. 8 South. Rep. 41 (occasional employé, when off duty, boarded a train of his own accord, and, in the absence of necessity or emergency, complied with the order of the conductor to turn a switch, and in doing so was hurt—no recovery).

⁸ *Central Trust Co. v. Texas &c. R. Co.*, 32 Fed. Rep. 448.

⁹ *Ante*, § 4982. In an exceptional case calling for the application of this principle, it appeared that a railway station-agent, without authority, hired a boy to clean and light the lamps and place them on the switch-stands. While so engaged, the boy was injured by a railroad *torpedo* which had been negligently left on the track, and which he picked up and ignorantly put down in his lamp. It was held that he was entitled to recover damages from the company. The court reasoned that one who is invited by a servant of a corporation in charge of its work or service, to assist him therein, and who does so with some purpose of benefit to be subserved in his own behalf in addition to the purpose of so assisting, is no volun-

teer, but is entitled to be protected while so assisting, against the negligence of a servant of the company. The law assigns to him the position of one who, being upon the premises of another by the sufferance of such other, performing labor or service for his own purpose and benefit and in his own behalf, is entitled to be protected against the negligence of the owner of the premises or of his servants; he is in a class between mere volunteers and trespassers on the one hand, and servants on the other hand: *Cleveland &c. R. Co. v. Marsh*, 63 Ohio St. 236; s. c. 52 L. R. A. 142; 58 N. E. Rep. 821. In another case it appeared that the plaintiff was employed by persons shipping lumber on the cars of the defendant railroad company. The company was short of hands, and the defendant's conductor asked the plaintiff to make a coupling. It was held that, in doing this, the plaintiff was not a volunteer, being engaged in a transaction of interest as well to his master as to the railroad company, and that the company was liable for its engineer's negligence whereby the plaintiff was hurt: *Eason v. Sabine &c. R. Co.*, 65 Tex. 577; s. c. 57 Am. Rep. 606.

meddlers, nor make themselves fellow servants *pro hac vice* of the servant whom they are assisting; but if, while rendering such assistance, they are injured through the negligence of such servant, they can recover damages from the master under the rule of *respondeat superior*.¹⁰

§ 4985. **Stranger Invited by Foreman or Superintendent to Assist in an Emergency.**—In like manner, if, in an emergency, a foreman or superintendent of work calls in a stranger to perform a special service, and, while so engaged, the stranger is injured in consequence of the negligence of such foreman, he may recover damages of the master. In such a case, the foreman, acting within his authority, is deemed the *alter ego* of the master, and his negligence is the master's negligence. This is well illustrated by a case in New York, where the foreman or track-master of a railway company, whose duty it was to keep the track clear from snow, and who was accustomed to do so with men hired temporarily for that purpose, employed the plaintiff with his team to scrape the tracks. The day was very stormy; the plaintiff was the only man out with a team; he was ignorant of the time of the passage of trains, and unused to the work. He objected to the employment, upon these grounds. The foreman agreed to advise him of the coming of trains; whereupon the plaintiff consented. While employed in the work, he was struck by a train, of whose coming the foreman failed to advise him. The court held that it was within the general authority of the foreman to use the necessary and proper means to have the work done; that, as the stipulation to protect the plaintiff from danger was not unreasonable, as he was the only one the foreman could procure to do the work, and him only upon those terms, the foreman was authorized to make the stipulation; that plaintiff had a right to rely upon it, and upon the greater knowledge and judgment of the foreman, and was not required to be on the lookout, or to listen for approaching trains; and that for a failure to perform the agreement the defendant was liable.¹¹

¹⁰ Geibel v. Elwell, 19 App. Div. (N. Y.) 285; s. c. 46 N. Y. Supp. 76; 80 N. Y. St. Rep. 86; rev'g s. c. 91 Hun (N. Y.) 550; 36 N. Y. Supp. 238; 70 N. Y. St. Rep. 812 (boy injured in attempting to release the stern hawser of a vessel in an emergency while the vessel was being towed out of the harbor); McDaniel v. Highland Ave. &c. R. Co., 90 Ala.

64; s. c. 8 South. Rep. 41. But see Marks v. Rochester R. Co., 41 App. Div. (N. Y.) 66; s. c. 92 N. Y. St. Rep. 210; 58 N. Y. Supp. 210 (street-car conductor called in a bystander to assist him in driving a car back to a switch; bystander became fellow servant of the conductor).

¹¹ Bradley v. New York &c. R. Co., 62 N. Y. 99.

§ 4986. **Persons Assisting the Servants of Another for the Purpose of Expediting their Business.**—Care must be taken to distinguish the case of mere volunteers or intermeddlers who undertake without the existence of any emergency to assist the servants of another, and the case of persons so assisting for the purpose of expediting their own or their master's business. In the latter case they are not deemed volunteers or intermeddlers; as between them and the servants of the master whom they undertake to assist, the fellow-servant rule does not apply, but the master becomes responsible for an injury visited upon them by the negligence of his servants, under the rule of *respondeat superior*.¹² The rule has been extended to cases where the injured servant is acting at the time partly in furtherance of the business of his own master and partly in furtherance of the business of the master of the servant inflicting the injury. Thus, one who was employed by a contractor having a contract to furnish wood to a railway company, who sustained injuries while assisting a brakeman of the company, at the brakeman's request, in pushing cars

¹² Degg v. Midland R. Co., 1 Hurl. & N. 773; s. c. 3 Jur. (N. S.) 395; 26 L. J. (Exch.) 171; Osborne v. Knox & C. R. Co., 68 Me. 49; Welch v. Maine & C. R. Co., 86 Me. 552; s. c. 10 Am. R. & Corp. Rep. 293; 30 Atl. Rep. 116; s. c. *sub nom.* O'Donnell v. Maine & C. R. Co., 25 L. R. A. 658; Holmes v. North-Eastern R. Co., L. R. 4 Exch. 254; s. c. affirmed in Exchequer Chamber, L. R. 6 Exch. 123; Wright v. London & C. R. Co., 1 Q. B. Div. 252; aff'g s. c. L. R. 10 Q. B. 298. The former of these cases was said by Lord Coleridge, C. J., in the latter case, to be one of the greatest authority, because in the Exchequer Chamber seven judges affirmed the decision, for the reasons given by the judges in the Court of Exchequer. — On the other hand, while the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his wagon, the plaintiff, who was waiting with a wagon to receive a load of cotton for his master, at the request of the defendant's carter, assisted him; and, in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. There was no negligence or want of reasonable care on the part of the plaintiff, or of the defendant's carter. It was

held that the defendant was not liable to an action: Potter v. Faulkner, 1 Best & S. 800, 806; s. c. 8 Jur. (N. S.) 259; 31 L. J. (Q. B.) 30; 10 Week. Rep. 93; 5 L. T. (N. S.) 455. But a passer-by who is casually appealed to by a workman, for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. Thus, workmen of the defendant, a gas-fitter, having come upon two pipes in the course of their digging in the road, and being doubtful as to which contained gas, asked information of the plaintiff, who happened to be passing. The plaintiff thereupon got into the trench and pointed out the gas-main, into which the defendant's workmen proceeded to make a hole for the insertion of a service-pipe. This was done in a manner unnecessarily hazardous, in consequence of which a chip of the metal entered the plaintiff's eye, while he stood by looking on, and seriously injured him, for which the plaintiff was held entitled to recover: Cleveland v. Spier, 16 C. B. (N. S.) 398.

loaded with the wood, the injury proceeding from the negligence of the brakeman, was not deemed to be a fellow servant of the brakeman, so as to preclude a recovery.¹³ But this is not the doctrine of all courts. Some of the courts hold that where, under such circumstances, the servants of different masters are thrown into a co-association, they become fellow servants within the meaning of the rule under consideration, although they are employed by, under the pay of, and subject to the orders of different masters.¹⁴

§ 4987. Servant Inflicting the Injury when Acting Outside the Line of His Duty.—If the servant whose negligence visits an injury upon another servant is acting outside the line of his duty at the time by doing what he was not only not employed to do, but what he was forbidden to do, the master will not be liable,—and this wholly without reference to the question of his fitness for doing what he was employed to do. Thus, it was held that a servant could not recover damages from his master for an injury arising from the negligence of another servant in moving the lever of a machine, where the duties of the other servant were merely to take away the product of the machine, and he had been directed not to touch the machine.¹⁵ Upon the question whether the servant from whose negligence the injury proceeded was acting within or without the scope of his employment at the time, it has been held that a railway engineer in charge of an engine employed in doing switching work acts within the scope of his employment in moving another engine belonging to another switch-crew out of the way, even though forbidden by the rules to do so, so as to render the railway company liable for an injury to a member of the other switching-crew due to his negligence in moving it, they not being deemed fellow servants within the meaning of a statute.¹⁶

§ 4988. Injured Servant Outside the Scope of His Employment or Duties.—We may state with confidence that a master is not liable for

¹³ *Bonner v. Bryant*, 1 Tex. Civ. App. 269; s. c. 21 S. W. Rep. 549.

¹⁴ *Post*, §§ 5009, 5010.

¹⁵ *Southern Cotton-Oil Co. v. DeVond* (Tex. Civ. App.), 25 S. W. Rep. 43 (no off. rep.). Where a railway section-hand, having in his possession a key to a hand-car house and of a switch, took the hand-car on the track for his own personal use, without any notice to the company of such use, and left it on an

open switch, resulting in the death of an engineer, whose train ran into the open switch, the company was not responsible: *Sammis v. Chicago & C. R. Co.*, 97 Ill. App. 28.

¹⁶ *Masterson v. Galveston & C. R. Co.* (Tex. Civ. App.), 42 S. W. Rep. 1001 (no off. rep.); writ of error denied, 91 Tex. 383; 43 S. W. Rep. 875 (saw no one on the engine of the other crew, and moved it killing the fireman who was under it).

an injury visited by one of his servants upon another servant, where the latter has stepped outside the line of his employment or duty, either to accomplish some purpose for himself or for a third person,¹⁷ unless the circumstances are such that the master would be liable for the injury had it been inflicted upon a stranger. The plain reason is that a servant cannot, by stepping outside the line of his duties, subject himself to dangers which were not contemplated by his contract of service, and then, when the injury falls upon him, charge the damages up to his master, who has done no wrong; and for the purpose of the operation of this principle it can make no difference whether the injury which befalls him proceeds from the negligence of a fellow servant¹⁸ or from some other source.¹⁹

¹⁷ *Hurst v. Chicago &c. R. Co.*, 49 Iowa 76 (plaintiff was alleged to have left his own section on a hand-car, and to have been going to a certain point for provisions for the section-boss).

¹⁸ Thus, where a section-foreman and his subordinate, in the employ of a railway company, are in the habit of carrying a gun on a hand-car, without the knowledge of their superiors, for the purpose of shooting game, and, through an accident, or the carelessness of the foreman, his assistant is injured by the discharge of such gun, there can be no recovery against the railway company for such injury; the acts not being authorized or done in the discharge of any duty toward the company: *Chicago &c. R. Co. v. Smith*, 10 Kan. App. 162; s. c. 63 Pac. Rep. 294. So, if a railway yardman, whose business is not to couple cars, attempts to do so in order to accommodate an engineer, who has no authority to order the yardman to do so, and the yardman, in attempting to do so, is killed through the negligence of the engineer, the company is not liable unless it would have been liable under the same circumstances to a stranger or intermeddler; but in order to a recovery it must be made to appear that the deceased was in the line of his employment, and that the fellow servant through whose negligence he was killed had command or control over him: *Bradley v. Nashville &c. R. Co.*, 14 Lea

(Tenn.) 374. From this it is easily concluded that an employé directed by his employer to do a particular work cannot recover damages from the employer for an injury received while engaged in doing another and dangerous piece of work, at the direction of a fellow servant whom he was not bound to obey: *Watts v. Hart*, 7 Wash. 178; s. c. 34 Pac. Rep. 423, 771. See also, *Nutzmann v. Germania Life Ins. Co.*, 82 Minn. 116; s. c. 84 N. W. Rep. 730; s. c. on first appeal, 78 Minn. 504; 81 N. W. Rep. 518 (circumstances under which it was held that the contention that a servant injured by the negligence of the operator of an elevator, and also the operator, were not acting within the scope of their employment, but were using the elevator without authority, and for their own convenience, was without merit).

¹⁹ Thus, it has been held that a servant who is injured while attempting to put a belt on a line-shafting cannot recover damages therefor from his master if the act was outside the line of his employment, and was undertaken without the order or consent of the master, and that actionable negligence was not imputable to the master for failing to warn and instruct him in regard to the work, it not being work which he was employed to do: *Chielinsky v. Hoopes &c. Co.*, 1 Marv. (Del.) 273; s. c. 40 Atl. Rep. 1127.

§ 4989. **Rule where the Master Orders the Servant into a Position of Danger Outside the Scope of his Employment, and he is there Injured by the Negligence of a Fellow Servant.**—Where the master orders his servant—a man of mature years and ordinary business capacity—to do a temporary work outside the scope of his ordinary employment, which the latter, without objection on account of his want of knowledge or experience of the danger, voluntarily undertakes, and, while thus engaged, is injured by his fellow servant, the master is not liable for the negligence, in the absence of any evidence tending to show that the master knew or should have known of the injured servant's want of knowledge, experience and skill to perform the work safely.²⁰

§ 4990. **Servant Injured by Fellow Servant Outside of Working-Hours.**—If a servant is injured outside of his working-hours, and while not on duty, by another servant of the same master, he can recover damages from the master provided a stranger might recover such damages under the same circumstances; for he is not a servant when injured, and is not injured by a fellow servant: in such a case the *status* of the injured servant is that of a *stranger*.²¹ Thus, a person employed by a railway company as "spiker," whose duty it was to walk up and down the track and examine the rails, and spike down such as were loose, after having finished his day's work, was walking home on the track, when he was killed by a train which came upon him without employing the usual signals. It was held a case to go to a jury, on proper instructions, as to whether the servants of the company in charge of the train were in the exercise of ordinary care, and as to whether the deceased was guilty of contributory negligence such as would bar a recovery.²² So, where an engineer of a railway company, whose train was lying idle in consequence of a "wash-out" on the road, quit his station without permission, and got aboard a passenger-train to go to another place on the line of the road, on a private errand of his own, and while so riding was in-

²⁰ *Cole v. Chicago &c. R. Co.*, 71 Wis. 114; s. c. 37 N. W. Rep. 84; 5 Am. St. Rep. 201.

²¹ *State v. Western Maryland R. Co.*, 63 Md. 433 (brakeman killed while travelling on Sunday on a visit to his family under a conductor's pass, he not being employed or paid for that day); *Dickinson v. West End St. R. Co.*, 177 Mass. 365; s. c. 59 N. E. Rep. 60; 52 L. R. A. 326 (supernumerary employé of a street-car company en-

gaged to make trips at certain hours of the day, injured while riding home on a car of the company after his morning's work free of charge, under a rule of the company permitting him to do so—held to be a passenger and entitled to recover damages); *Baltimore &c. R. Co. v. Trainor*, 33 Md. 542; *Baird v. Pettit*, 70 Pa. St. 477.

²² *Baltimore &c. R. Co. v. Trainor*, 33 Md. 542.

jured in consequence of a collision between the train on which he was riding and another train of the same company, it was held that, whatever his relation with the company might be, he was not then, in the sense of the rule; nor in any proper sense, acting in the service of the company. The fact that he was absent without permission may have made him liable to an action by the company, but it did not affect his right to maintain an action against the company for the injury which he had received.²³ But, as elsewhere seen, if a servant in the general service of a railway company, under such a contract as renders him liable to be called upon to perform a particular service, is injured by other employés of the company while on his way to take charge of a train at another point on the road, he is not to be deemed a passenger, but a servant, and entitled only to the rights which pertain to this relation.²⁴ So, an employé of a railroad company travelling from his home to his post of duty and back upon the cars of the company, free of charge, as stipulated for in the contract of service, is not a passenger, and the company is not liable for his death, caused while so travelling by the negligence of a coemployé.²⁵ So, where a railroad track-hand, ordered to quit work before the usual hour and take a train to carry him to a point where he was to be paid, while boarding the train, was injured by the negligence of other workmen in charge of a hand-car, it was held that he was in the service of the company at the time, so that the negligence was that of his fellow workmen, for which the company was not liable.²⁶ But where a section-foreman of a railroad company was injured after working-hours while on a crossing of the railroad, and presumably engaged about his own business, the duty of the company toward him was held to be the same as toward a passenger, and hence it could not avail itself of the fellow-servant rule as a defense to his action for damages.²⁷

§ 4991. Injury by Fellow Servant to Another Servant Working Overtime.—A servant who continues to work overtime after having

²³ Washburn v. Nashville &c. R. Co., 3 Head (Tenn.) 638. Compare Higgins v. Hannibal &c. R. Co., 36 Mo. 418.

²⁴ Manville v. Cleveland &c. R. Co., 11 Ohio St. 417.

²⁵ Vick v. New York &c. R. Co., 95 N. Y. 267; s. c. 47 Am. Rep. 36; rev'g s. c. 17 Wkly. Dig. (N. Y.) 316.

²⁶ O'Brien v. Boston &c. R. Co.,

138 Mass. 387; s. c. 52 Am. Rep. 279.

²⁷ Sullivan v. New York &c. R. Co., 73 Conn. 203; s. c. 47 Atl. Rep. 141. See also, Brydon v. Stewart, 1 Pat. Sc. App. 477; s. c. 2 Macq. H. L. Cas. 30; s. c. *sub nom.* Marshall v. Stewart, 33 Eng. Law & Eq. 1 (miner killed in cage in being brought out of mine after having quit work because he deemed mine unsafe—mine-owner liable).

finished his day's stint, is still a servant of the master and not a stranger to him; so that, if injured while so working, by the negligence of a fellow servant, he has no action for damages against the master.²⁸

§ 4992. Relations of the Parties in which the Employer was held Not Liable.—A chartered railroad company, which, under legislative authority, has leased its tracks and franchises to another such company, is not liable for the homicide of an employé of the latter, caused by the negligence of a coemployé.²⁹ A railroad company is not liable for an injury to a brakeman in the service of another railroad company, caused by the negligence of his fellow servant on a train owned and operated by his employer, merely because the injury was received while the train was running on the road of the former.³⁰

§ 4993. Cases where the Relation of Fellow Servant was held Not to Exist.—A shipper of live stock does not, by accepting a free pass from a railroad company, to enable him to care for his stock in transit, become a servant of the company so as to exonerate the company from liability for injuries inflicted upon him by its proper servants, under the fellow-servant rule.³¹ A person who is not in the employ of a railroad company, who presents for payment at the pay-office of the company an order for wages payable to a former employé of the company, is not the fellow servant of the person in charge of the pay-office, through whose negligence in failing to properly fasten the window through which payment is made the person presenting the order is injured.³² Where it appeared that the plaintiff was a machinist in the employ of W., a builder of steam-engines; that the

²⁸ *Kehoe v. Allen*, 92 Mich. 464; s. c. 52 N. W. Rep. 740.

²⁹ *Banks v. Georgia R. & C. Co.*, 112 Ga. 655; s. c. 37 S. E. Rep. 992 (car-coupler killed by reason of engineer negligently putting the cars in motion, causing deceased to catch his foot in an unblocked frog) [following *Jones v. Georgia & C. R. Co.*, 66 Ga. 558; and distinguishing *Macon & C. R. Co. v. Mayes*, 49 Ga. 355; *Singleton v. Southwestern R. Co.*, 70 Ga. 467]. Circumstances under which a lessor was not liable for an injury sustained by an employé of the lessee, in the operation of the leased plant and premises: *Ault Woodenware Co. v. Baker*, 26 Ind. App. 374; s. c. 58 N. E. Rep. 265.

Circumstances under which a recovery was denied against a manufacturing corporation for an injury inflicted upon a carpenter employed by the millwright of the corporation to assist him in hastening repairs, where \$50 had been offered him as an extra inducement: *National Tube Works Co. v. Bedell*, 96 Pa. St. 175.

³⁰ *Baltimore & C. R. Co. v. Paul*, 143 Ind. 23; s. c. 28 L. R. A. 216; 40 N. E. Rep. 519.

³¹ *Omaha & C. R. Co. v. Crow*, 54 Neb. 747; s. c. 74 N. W. Rep. 1066.

³² *Carroll v. Chicago & C. R. Co.*, 99 Wis. 399; s. c. 4 Am. Neg. Rep. 247; 67 Am. St. Rep. 872; 75 N. W. Rep. 176.

defendant, a teamster, was employed to transport engines from W.'s shop to the railroad-station, and went with his truck and servants to do this work; that, after the engine was loaded upon the truck, he falsely represented to the plaintiff that W. had agreed to send two of his men to assist in loading the engine upon the car; and that the plaintiff was thereby induced to go to the station and assist the defendant, and, while putting the engine upon the car, was injured,—it was held that the plaintiff did not become the servant of the defendant, and that the action could be maintained.³³

ARTICLE II. SERVANTS OF DIFFERENT MASTERS.

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5011. Influence of the con-association doctrine upon this question.

³³ Kelly v. Johnson, 128 Mass. 530; s. c. 35 Am. St. Rep. 398. The foreman of a gang of men building stone walls for a railroad company, under a contract by which the company is to furnish the necessary switching and side-track facilities to place the stone at the places where it is to be used, and the foreman's employers are to unload it promptly, the foreman directing the railroad employes where he wants carloads of stone placed, but having no voice in saying how they

shall get there, was held not to be a fellow servant with the railroad employes: Illinois & C. R. Co. v. McCowan, 70 Ill. App. 345. Circumstances under which an employe of a locomotive-works, was injured in its yard by a car set in motion by the train-crew of a railway company, where it was held that the train-crew were acting as servants of the railway company, and not as servants of the locomotive-works, and consequently that the fellow-servant rule did not apply, but that

§ 4996. **General Rule that Servants of Different Masters are Not Fellow Servants.**—Nearly all the definitions of fellow servants given in the books make it essential to the relation that they shall be servants of *the same master*.¹ The general rule is that the servants of different masters are not deemed fellow servants within the meaning of the rule in question, although they are working together in the same common employment or in what has been called a con-association.² "Mere co-operation or community of labor, and ultimate purpose, is not enough to make them fellow servants," but they must all be under the control and direction of a common master.³

the plaintiff could recover: *Stajkowski v. New York Cent. & C. R. Co.*, 63 App. Div. (N. Y.) 532; s. c. 71 N. Y. St. Rep. 710.

¹"A fellow servant I take to be any one who serves and is controlled by the same master": *Dalrimple, J.*, in *McAndrews v. Burns*, 39 N. J. L. 119. "They are not fellow servants unless they are all under the direction and control of a common master": *Shearm. & Redf. Neg.* (3d ed.), § 116. "The rule applies only where the action is brought for an injury to a servant or agent, against the principal by whom the servant or agent was himself employed": *Selden, J.*, in *Smith v. New York & C. R. Co.*, 19 N. Y. 132 (quoted by *Earl, C.*, in *Svenson v. Atlantic Mail S. S. Co.*, 57 N. Y. 112). See, to the same effect, *Abraham v. Reynolds*, 5 *Hurl. & N.* 142.

²*Zeigler v. Danbury & C. R. Co.*, 52 Conn. 543; *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382; s. c. 50 Atl. Rep. 1030; *Coggin v. Central R. Co.*, 62 Ga. 685; *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App. 379; *John Spry Lumber Co. v. Dugan*, 80 Ill. App. 394; *Smithson v. Chicago & C. R. Co.*, 71 Minn. 216; s. c. 11 Am. & Eng. R. Cas. (N. S.) 726; 73 N. W. Rep. 853; *Louisville & C. R. Co. v. Conroy*, 63 Miss. 562; *Union Pac. R. Co. v. Billeter*, 28 Neb. 422; s. c. 44 N. W. Rep. 483; 41 Am. & Eng. R. Cas. 431; *Hardy v. Delaware & C. R. Co.*, 57 N. J. L. 505; s. c. 31 Atl. Rep. 281; *Gerlach v. Edelmeyer*, 47 N. Y. Super. 292; s. c. aff'd, 88 N. Y. 645 (*mem.*); *Sullivan v. Tioga R. Co.*, 112 N. Y. 643; s. c. 21 N. Y. St. Rep. 827; 8 Am. St. Rep. 793; 20 N. E. Rep. 569; *Sanford v. Standard Oil Co.*, 118 N.

Y. 571; s. c. 24 N. E. Rep. 313; 29 N. Y. St. Rep. 855; *Murray v. Dwight*, 161 N. Y. 301; s. c. 55 N. E. Rep. 901; aff'g s. c. 15 App. Div. (N. Y.) 241; 44 N. Y. Supp. 234; *Harold v. New York & C. R. Co.*, 13 Daly (N. Y.) 89; *Young v. New York & C. R. Co.*, 13 Daly (N. Y.) 294; *Conlan v. New York & C. R. Co.*, 74 Hun (N. Y.) 115; s. c. 56 N. Y. St. Rep. 316; 26 N. Y. Supp. 659; s. c. aff'd, 148 N. Y. 748 (*mem.*); *Sullivan v. Tioga R. Co.*, 44 Hun (N. Y.) 304; s. c. aff'd, 112 N. Y. 643; *Tierney v. Syracuse & C. R. Co.*, 85 Hun (N. Y.) 146; s. c. 66 N. Y. St. Rep. 85; 32 N. Y. Supp. 627; s. c. aff'd, 155 N. Y. 642 (*mem.*); *Strader v. New York & C. R. Co.*, 86 Hun (N. Y.) 613; s. c. 67 N. Y. St. Rep. 434; 33 N. Y. Supp. 761; s. c. aff'd, 157 N. Y. 708 (*mem.*); *Krulder v. Woolverton*, 11 Misc. (N. Y.) 537; s. c. 32 N. Y. Supp. 742; *Nary v. New York & C. R. Co.*, 29 N. Y. St. Rep. 630; s. c. 9 N. Y. Supp. 153; 55 Hun (N. Y.) 612 (*mem.*); s. c. aff'd, 125 N. Y. 759 (*mem.*); *Kowalewska v. New York & C. R. Co.*, 72 Hun (N. Y.) 611; s. c. 55 N. Y. St. Rep. 167; 25 N. Y. Supp. 184; *Mills v. Thomas Elevator Co.*, 54 App. Div. (N. Y.) 124; s. c. 66 N. Y. Supp. 398; *Coates v. Chapman*, 195 Pa. St. 109; s. c. 45 Atl. Rep. 676; *Hoadley v. International Paper Co.*, 72 Vt. 79; s. c. 47 Atl. Rep. 169; *Crawford v. The Wells City*, 38 Fed. Rep. 47; *Central R. Co. v. Stoermer*, 1 U. S. App. 276; s. c. 2 C. C. A. 360; 51 Fed. Rep. 518; *The William F. Babcock*, 31 Fed. Rep. 418; *Johnson v. Lindsay*, [1891] 1 A. C. 371; s. c. 65 L. T. (N. S.) 97; 44 Alb. L. J. 354; rev'g s. c. 23 Q. B. Div. 508.

³*Union Pac. R. Co. v. Billeter*, 28 Neb. 422; s. c. 44 N. W. Rep. 483;

§ 4997. **Servant of Contractor and Servant of Proprietor.**—The doctrine of the preceding section finds many illustrations in cases where the servant of a contractor is injured in consequence of the negligence of a servant or agent of the proprietor, while working together on the same job; or where a servant of the proprietor is injured by the negligence of a servant of the contractor. Here the fellow-servant rule does not apply, because they are servants of different masters, but the rule of *respondeat superior* makes the master of the servant doing the injury liable to pay damages therefor.⁴ “Where a servant works side by side with one employed by his master as an independent contractor, or with a servant of such contractor, or the latter’s servant works with the servants of a subcontractor, they are not fellow servants, even though they help to do the same work, for the benefit of the same ultimate employer.”⁵

§ 4998. **Servants of Different Railway Companies.**—The rule that the fellow-servant doctrine does not apply as between servants of dif-

41 Am. & Eng. R. Cas. 431; quoting from Shearm. & Redf. Neg. (4th ed.), § 225.

⁴ *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App. 379 (engineer of machinery company injuring employé of laundry company in making repairs in the laundry); *John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394 (two sets of men unloading a boatload of lumber, one set being the servants of an independent contractor—member of this set injured by the negligence of the other set—recovery); *Louisville & C. R. Co. v. Conroy*, 63 Miss. 562 (laborer employed by a contractor in grading a railroad, not a fellow servant of the engineer of a train furnished by the company to remove the dirt); *Union Pac. R. Co. v. Billeter*, 28 Neb. 422; s. c. 44 N. W. Rep. 483; 41 Am. & Eng. R. Cas. 431 (servant of independent contractor engaged in removing coal, injured by negligence of engineer of railway company in starting the engine); *Gerlach v. Edelmeyer*, 47 N. Y. Super. 292; s. c. aff’d, 88 N. Y. 645 (*mem.*) (elevator fell through carelessness of engineer of a contractor, injuring a servant of a sub-contractor—contractor liable); *Mills v. Thomas Elevator Co.*, 54 App. Div. (N. Y.) 124; s. c. 66 N. Y. Supp. 398 (servant of contractor engaged in laying a concrete floor,

injured by the negligence of a man whom another contractor had employed to operate an elevator which he had put in to carry material to the workmen on the building); *Coates v. Chapman*, 195 Pa. St. 109; s. c. 45 Atl. Rep. 676 (carpenter employed by owner and builder of houses to construct the bay-windows not a fellow servant of an independent contractor for the brick-work, though both were working under a general superintendent); *Hoadley v. International Paper Co.*, 72 Vt. 79; s. c. 47 Atl. Rep. 169 (servant of a contractor at work in defendant’s mill killed by the negligence of a servant of defendant); *Crawford v. The Wells City*, 38 Fed. Rep. 47 (grain-trimmer employed by a contractor to trim a cargo of grain on a steamship, not a fellow servant of a mate and seamen of the ship); *Johnson v. Lindsay*, [1891] 1 A. C. 371; s. c. 65 L. T. (N. S.) 97; 44 Alb. L. J. 354; rev’g s. c. 23 Q. B. Div. 508 (employé of independent contractors to put in flats and floors, not a fellow servant with an employé of the general contractor to erect the building).

⁵ *Union Pac. R. Co. v. Billeter*, 28 Neb. 422; s. c. 44 N. W. Rep. 483; 41 Am. & Eng. R. Cas. 431; quoting from Shearm. & Redf. Neg. (4th ed.), § 225.

ferent masters, finds frequent and apt illustrations in railway service. For example, the following railway servants have been held not to be fellow servants of each other:—A brakeman on a train of one railway company which is run over the road of another company, and the conductor of a train of the latter company, where the two trains come into collision through the negligence of the conductor;⁶ the employés of two separate railroad companies, running over a terminal track under rules put in force by its owner, a third company;⁷ the trainmen in charge of a train of a railroad company, which has the right to use the track and turn-table of another company for reversing its engines, and an employé of the other company;⁸ the employé of an owner of cars engaged in cleaning them, and the employés of the railroad company on whose road the cars were run;⁹ the employé of a consignee, and a brakeman of a railroad company, by whose negligence the former is injured while “spotting” the cars,—that is, placing them upon the scales of his employer;¹⁰ the employé of the E. company, engaged in shovelling ashes from a pit, and the engineer of a locomotive of the T. company,—and this although the E. company had exclusive control over the servants of the T. company employed on its locomotives while in the yard;¹¹ a brakeman of a railroad-train running on the tracks of a company other than that of his employer, and a switchman in the employ of the latter company,—and this although the superintendent of the latter company has power in certain cases to discharge the employés of the former company while running trains on its tracks, and although the same person is the general manager of both companies;¹² a switchman hired and paid by the lessee of a railroad company, who is under the exclusive direction of its superintendent, and an engineer in the employ of another company, which uses the road jointly with such lessee under an agreement that it shall pay a stipulated proportion of the rental and expense of maintaining the

⁶ *Zeigler v. Danbury &c. R. Co.*, 52 Conn. 543 (recovery against the company employing the conductor).

⁷ *Smithson v. Chicago &c. R. Co.*, 71 Minn. 216; s. c. 11 Am. & Eng. R. Cas. (N. S.) 726; 73 N. W. Rep. 853 (trains brought into collision through the failure of the engineer of one company to comply with the rule of the terminal company, injuring a trainman of the other company,—held that they were not the employés of a common master, the terminal company).

⁸ *Sullivan v. Tioga R. Co.*, 112 N. Y. 643; s. c. 21 N. Y. St. Rep. 827;

8 Am. St. Rep. 793; 20 N. E. Rep. 569; aff'g s. c. 44 Hun (N. Y.) 304.

⁹ *Harold v. New York &c. R. Co.*, 13 Daly (N. Y.) 89; *Young v. New York &c. R. Co.*, 13 Daly (N. Y.) 294.

¹⁰ *Conlan v. New York &c. R. Co.*, 74 Hun (N. Y.) 115; s. c. 56 N. Y. St. Rep. 316; 26 N. Y. Supp. 659; s. c. aff'd, 148 N. Y. 748 (*mem.*).

¹¹ *Sullivan v. Tioga R. Co.*, 44 Hun (N. Y.) 304; s. c. aff'd, 112 N. Y. 643.

¹² *Tierney v. Syracuse &c. R. Co.*, 85 Hun (N. Y.) 146; s. c. 66 N. Y. St. Rep. 85; 32 N. Y. Supp. 627; s. c. aff'd, 155 N. Y. 642 (*mem.*).

road, including the wages of switchmen and other servants, such maintenance to be under the control of the lessee company,—and this notwithstanding a provision in the agreement that each company shall be responsible for the acts of the employés only when engaged in its own business;¹³ an employé of a railroad company engaged in shoveling coal out of the cars of another company, delivered by the latter company upon a trestle of the former company, and the employés of the company engaged in delivering such cars;¹⁴ a railroad engineer engaged in delivering coal to a coal company on the dock of such company, under directions of the agent of such company as to when and where the coal shall be dumped and what cars shall be brought in and taken out, but not engaged exclusively in doing the work of the coal company, or hired or borrowed by the coal company from the railroad company, and an exclusive employé of the coal company working upon the dock.¹⁵

§ 4999. Servants of Different Contractors Engaged on the Same Work.—Servants of different contractors engaged in a common employment upon the same work are not fellow servants within the meaning of the rule under consideration, because they do not work under the control of a common master.¹⁶ So, the employés of the general contractor to erect a building, who retains the carpenter-work for his own men to perform, are not fellow servants of an employé of a sub-contractor for the mason-work upon the building, in moving a derrick used by the masons the day before, for use in the carpenter-work.¹⁷

¹³ *Strader v. New York &c. R. Co.*, 86 Hun (N. Y.) 613; s. c. 67 N. Y. St. Rep. 434; 33 N. Y. Supp. 761; s. c. aff'd, 157 N. Y. 708 (*mem.*) (lessee company liable to the engineer for an injury resulting from the negligence of the switchman in leaving a switch open).

¹⁴ *Kowalewska v. New York &c. R. Co.*, 72 Hun (N. Y.) 611; s. c. 55 N. Y. St. Rep. 167; 25 N. Y. Supp. 184 (an inspector of the latter company negligently failed, just before delivering a car to the former company, to discover that the brake was out of order, but marked the car as all right, by reason of which negligence the car ran down the trestle and killed an employé of the other company).

¹⁵ *Central R. Co. v. Stoermer*, 1 U. S. App. 276; s. c. 2 C. C. A. 360; 51 Fed. Rep. 518 (brakeman in em-

ploy of coal company injured while coupling cars through negligence of engineer of railroad company,—recovery against railroad company).

¹⁶ *Morgan v. Smith*, 159 Mass. 570; s. c. 35 N. E. Rep. 101. Evidence from which a jury might find that a contractor had agreed to erect a hopper in a mill according to the defendant's specifications, under an agreement that it should be paid for at a reasonable price for materials used and time spent, and that the contractor alone had the right to direct and control plaintiff while he was engaged in the work, —would justify the conclusion that plaintiff was not the defendant's servant, nor a fellow servant of an employé in such mill: *Ward v. New England Fibre Co.*, 154 Mass. 419; s. c. 28 N. E. Rep. 299.

¹⁷ *Burrill v. Eddy*, 160 Mass. 198;

§ 5000. **Further Illustrations of the Preceding.**—It has accordingly been held, that where one railroad company, A., ran its cars over the track of another company, B., if an employé on the train of the A. company was injured by the negligence of a switch-tender of the B. company, the B. company was liable to him in damages.¹⁸ His right of action against the B. company did not rest in privity of contract, for there was no privity except between the two companies. It rested upon a general public duty which the B. company owed to all persons lawfully on its track to use ordinary or reasonable care to avoid injuring them. The engineer of the A. company occupied the position of a licensee upon the premises of the B. company; this being so, the liability of the B. company to him arose on principles already discussed.¹⁹ Neither was he deemed in any sense the servant of the B. company, nor the fellow servant of the switchman by whose negligence he was injured.²⁰ A similar view has been taken of this question in California, in a case much stronger on its facts. A road of the A. company formed a junction with that of the B. company, and the cars of the B. company, under an arrangement between the two companies, ran for four miles over the road of the A. company. The B. company entrusted a servant of the A. company with the duty of switching its trains, so as to avoid collisions with the trains of the A. company, and gave him a joint time-table of the two roads to enable him to do so. Owing to the negligence of this servant, a train of the B. company

s. c. 35 N. E. Rep. 483. The masons had left the derrick firmly guyed. The carpenters were negligent in moving it, letting it fall and injure one of the masons.

¹⁸ *Smith v. New York & C. R. Co.*, 19 N. Y. 127; *Sawyer v. Rutland & C. R. Co.*, 27 Vt. 370. There are some contrary rulings, but not from authoritative courts. Thus, it has been held by the Supreme Court of the District of Columbia, that if, by an agreement between two railway companies, which may be designated A. and B., B. company runs its cars over the track of A. company, a servant of A. company, injured while flagging a train of B. company, cannot recover damages of B. company, for he is deemed a fellow servant with the servants of B. company: *Mills v. Alexandria & C. R. Co.*, 2 McArth. (D. C.) 314. So, it has been held by one of the departments of the Supreme Court of New York, that if two railways, A. and B., have running connections with each other, and the arrangement be-

tween them is, that when the cars of A. company are received by B. company to be forwarded, they are to be first inspected by a servant of B. company, deputed for the purpose; and such servant of B. company, while so inspecting the cars of A. company, upon the track of A. company, before the cars have been delivered to B. company, while yet they are under the control of A. company, is injured by the negligence of the servants of A. company, he cannot recover damages of A. company, for he is deemed the common agent of A. company and B. company for inspecting such cars (it being for the benefit of both that they should be inspected), and the servants of A. company are deemed his fellow servants engaged in the same common employment: *Cruty v. Erie R. Co.*, 3 Thomp. & C. (N. Y.) 244.

¹⁹ Vol. I, § 1836, *et seq.*

²⁰ *Sawyer v. Rutland & C. R. Co.*, 27 Vt. 370.

collided with a train of the A. company while on the track of the A. company, killing a servant of the A. company. It was held that the B. company was liable for the damages. The negligent servant was deemed to have been acting at the time as a servant of the B. company, and was hence not a fellow servant with the deceased; and the fact that he was employed and paid by the A. company, in whose employ the deceased also was, made no difference.²¹ So, where a railway company, which may be called A., permitted another company, which may be called B., to use its station, subject to its rules and to the control of its station-master, and one of its servants was injured by the negligence of an engine-driver of the B. company, who shunted a train upon the siding without giving or receiving the signal required by the rules of the A. company, it was held that such servant of the A. company was not a fellow servant with the engine-driver of the B. company, and that the B. company must pay damages to him.²² The Supreme Court of Minnesota has held that if two railway corporations engaged in carrying passengers and freight over an entire route, for the purpose of carrying their passengers, freight and mails, run their conveyances so as to connect at the common terminus of both lines, and sell tickets over the entire road, but keep the fares and freights for each portion distinct, there is no such legal identity between them as will prevent an employé of one of them from maintaining an action against the other, although for an injury done him through the negligence of the latter's servant.²³

§ 5001. **Servants of Stevedores and Servants of Other Employers.**—Where, under an arrangement between a firm of stevedores and an oil company, the latter furnished steam-power and mechanical appliances, with persons to manage the same and aid in loading a vessel for the oil company, the stevedores paying the company a certain compensation per barrel for the total quantity of oil laden, a person who was in the immediate employ of the stevedores, and was stationed at the gangway to signal the man in charge of the hoisting, who was furnished by the oil company, was not a fellow servant of the latter; so that for the latter's negligence in raising a barrel without a signal being given, and without warning the former, whereby the former was injured, the former could recover.²⁴

²¹ Taylor v. Western Pac. R. Co., 45 Cal. 323. It is difficult to see how this case can be vindicated on sound principles.

²² Warburton v. Great Western R. Co., L. R. 2 Exch. 30; s. c. 36 L. J. (Exch.) 9; 4 Hurl. & Colt. 695; 15

Week. Rep. 108; 15 L. T. (N. S.) 361.

²³ Carroll v. Minnesota Valley R. Co., 13 Minn. 30.

²⁴ Sanford v. Standard Oil Co., 118 N. Y. 571; s. c. 24 N. E. Rep. 313; 29 N. Y. St. Rep. 855. See *post*,

§ 5002. Applications of the Fellow-Servant Rule in Cases of Joint Operation by Different Masters.—A train-hand upon a train operated over the road of another company is not in the service of the latter company, nor a fellow servant with its servants, from the mere fact that the trains of both companies, by agreement between them, are operated over a joint track, under rules and regulations established by the latter company, where the latter has no control over the servants of the former, and neither can discharge the servants of the other.²⁵ Under a contract between two railroad companies for the running of through trains over both roads, by which one is to furnish engines and men and the other to pay a rental for the engines, each company paying the men in proportion to the work done on the respective roads, the former is the master liable for the condition of the engines to its servants, even while the engines are running over the portion of the road belonging to the other company, although during the time they are subject to its rules.²⁶

§ 5003. In Case of a Joint Operation Both Masters may be Liable.—In case of a joint operation of the same plant or property by two masters or proprietors, if a servant is injured through the negligence of either, both may be liable, and one may be liable for the negligence of the other. Thus, where the putting of a heater in a distillery was the joint undertaking of the distillery company and the makers of the heater, both companies were liable to one of the servants of the distillery company, who assisted in the work by direction of its foreman, for an injury resulting from the breaking of a defective rope furnished for the work; and each company was liable for the negligence of the other.²⁷ In like manner, two railroad companies which jointly operated a road under one superintendent, were held jointly and severally liable for injuries to a fireman employed by one of them, caused by the negligence of such superintendent in not maintaining a safety-switch on a side-track on a steep down-grade, and the negligence of an engineer of the company not employing the fireman, in running his engine against cars on such side-track, and causing them to run on to the main track, and after proceeding down a mountain grade

§ 5185. Evidence which did not warrant the conclusion that the vessel was liable for an injury received by an employé of a master stevedore in stepping into a trimming-hatch while loading the vessel, which hatch was exposed by the removal of dunnage, the master of the vessel having given no direction to leave the hatch uncovered: The

William F. Babcock, 31 Fed. Rep. 418.

²⁵ **Bosworth v. Rogers, 82 Fed. Rep. 975; s. c. 53 U. S. App. 620; 27 C. C. A. 385.**

²⁶ **Hurlbut v. Wabash R. Co., 130 Mo. 657; s. c. 31 S. W. Rep. 1051.**

²⁷ **Old Times Distillery Co. v. Zehnder, 21 Ky. L. Rep. 753; s. c. 52 S. W. Rep. 1051 (no off. rep.).**

for some distance, to run against the train on which such fireman was employed.²⁸ Stated differently, it was held that an injury visited upon an employé of one of two railway companies, which operated a road jointly under one superintendent, caused by the negligence of the superintendent, and also by the negligence of the engineer operating at the time for the company which was not his employer, was not an injury which should be ascribed to the negligence of a fellow servant, but to the combined negligence of both railway companies, they being jointly and severally liable therefor.²⁹

§ 5004. **When One Servant May Become, *pro hac Vice*, the Servant of Another Master, so that the Servants of the Latter will be his Fellow Servants.**—A general servant of one person may, for a particular work or occasion, become, *pro hac vice*, the servant of another person, so that the latter will not be liable to him for an injury caused by the negligence of his proper servant engaged with him in a common employment;³⁰ and *vice versa*.³¹ But to establish this relation, it must appear that the servant has, expressly or by implication, consented to the transfer of his services to the new master, and to accept him as his master *pro hac vice*, and has entered upon such new service, and has submitted himself therein to the direction and control of the new master.³² Where the servant is in the general employment of one master, and temporarily passes under the control of another master, by whom the servant inflicting the injury is employed, the injured servant not knowing that he has changed masters,—the fellow-servant rule does not apply, but he may recover damages from the master whose servant has done the injury.³³ What is here said has no refer-

²⁸ Galveston &c. R. Co. v. Croskell, 6 Tex. Civ. App. 160; s. c. 25 S. W. Rep. 486.

²⁹ Galveston &c. R. Co. v. Croskell, 6 Tex. Civ. App. 160; s. c. 25 S. W. Rep. 486.

³⁰ Anderson v. Boyer, 156 N. Y. 93; rev'g s. c. 13 App. Div. (N. Y.) 258; 43 N. Y. Supp. 87; 77 N. Y. St. Rep. 87 (owner of a boat had put the charterer in absolute possession of boat and captain, so that the captain became the servant of the shipper in the work of unloading, so that another employé of the shipper, injured through the negligence of the captain, could not recover against the owner of the boat).

³¹ Rozelle v. Rose, 3 App. Div. (N. Y.) 132; s. c. 39 N. Y. Supp. 363. In this case it appeared that the de-

fendants occupied a room in a wire factory, and paid the wire factory for the services of two men in the employ of the factory. The defendants later hired a man directly, who was injured while working with the other two, through the negligence of one of them. It was held that all three were employés of the defendants, and hence fellow servants, and that the defendants were not liable for that reason.

³² Delaware &c. R. Co. v. Hardy, 59 N. J. L. 35; s. c. 4 Am. & Eng. R. Cas. (N. S.) 577; 34 Atl. Rep. 986; s. c. on former appeal, 58 N. J. L. 205; 35 Atl. Rep. 1130; aff'g s. c. 57 N. J. L. 505; 31 Atl. Rep. 281.

³³ Morgan v. Smith, 159 Mass. 570; s. c. 35 N. E. Rep. 101. It has been held that one who is in the

ence to a case where one master merely borrows the facilities of another master and operates them by means of his own servants, and injury is visited in operating them by one servant upon another. Here the question arises as among fellow servants, and the fellow-servant rule applies. Thus, where a shipper, by consent of a railroad company, undertakes with the help of his own employés alone, to run cars which have been hired to him down a grade to a place where they are needed for loading, and while so employed one of such employés is injured by the negligence of his coemployés, the railroad company is not liable to an action for damages on account of such injuries.³⁴

§ 5005. One Employer Lending his Servant to Another Employer.

—“If I lend my servant to a contractor who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of

general employment of a truckman, who, at the request of a third person, is sent with a horse to operate the hoisting apparatus in certain warehouses, is not a fellow servant of the employes of the latter so as to exonerate the latter from liability for injuries to him, while passing from one warehouse, after completing the work there, to the other, from the fall of a part of the apparatus owing to their negligence, although he received his orders from the latter's foreman when to start the horse forward and when to stop him or back him up: *Murray v. Dwight*, 161 N. Y. 301; s. c. 55 N. E. Rep. 901; aff'g s. c. 15 App. Div. (N. Y.) 241; 44 N. Y. Supp. 234. In another case the plaintiff, while employed by an iron company, was taken by his employer to where a gang of bridge-men were at work, and told to do what their superintendent should direct. He did not know by which company such men were employed, and was not told that he was working for the bridge company, but was paid by the iron company, which in turn was paid by the bridge company for his services, and he considered himself subject to the orders of the iron company. It was held that he was not a fellow servant with the superintendent of the bridge-gang, who placed him at certain work: *Brennan v. Berlin*

Iron Bridge Co., 74 Conn. 382; s. c. 50 Atl. Rep. 1030.

³⁴*Hanna v. Railway Co.*, 88 Tenn. 310; s. c. 12 S. W. Rep. 718; 6 L. R. A. 727. An engineer running a train laden with telegraph-poles was held to be the servant of the railroad company employing and paying him, although temporarily subject to the orders of the telegraph company, represented in the immediate control of the train by one of its employés; and accordingly, the railroad company was held to be liable for a personal injury to a servant of the telegraph company rightfully on the train as a laborer, resulting from the negligence of the engineer: *Coggin v. Central R. Co.*, 62 Ga. 685. The relation of master and servant did not exist between plaintiff and defendant so as to render applicable the rule in regard to injuries caused by fellow servants, where the plaintiff, a driver, regularly employed and paid by a truckman, was sent by his master with a horse to furnish power for operating hoisting-appliances in defendant's warehouse, and was injured while so engaged by the negligence of defendant's servants: *Murray v. Dwight*, 161 N. Y. 301; s. c. 55 N. E. Rep. 901; aff'g s. c. 15 App. Div. (N. Y.) 241; 44 N. Y. Supp. 234 (Gray, J., dissenting).

the independent contractor.”³⁵ To illustrate: The defendant employed a stevedore to unload his vessel. The stevedore employed his own laborers, amongst whom was the plaintiff, and also one of the defendant’s crew, named Davis, whom he paid, and over whom he had entire control, to assist them in unloading. The plaintiff, while engaged in the work, was injured from the negligence of Davis. It was held that the defendant was not liable. Davis was not his servant while so engaged, but was the servant of the stevedore.³⁶

§ 5006. Distinction between Joint Operation and Joint Employment.—A comparison of many of the foregoing cases will lead to the discovery that there is a well-grounded distinction between the joint operation of property by two or more employers and a joint employment of servants by them. The general rule is, that where there are two or more masters, each one of whom hires, pays, discharges and controls his own servants, the fellow-servant rule does not apply as between the servants of these different masters, although there may be a joint operation of the properties by them, and although the servants may be thrown together in a state of co-association in prosecuting their work. Thus, where two railway companies jointly operating a railway under one superintendent, employed brakemen, station-agents, telegraph-operators, etc., jointly, but each company employed its own trainmen, an engineer employed by one of the companies was not a fellow servant of a fireman employed by the other company, so as to prevent a recovery by such fireman of damages from the company whose servant the engineer was, for personal injuries caused by the negligence of the engineer.³⁷ So, where two railway companies owned and used a joint track, operating it under the orders of the train-dispatcher and superintendent of one of the companies, an engineer in the employ of the other company was not deemed a fellow servant of an engineer in the employ of the company whose train-dispatcher and superintendent operated the road, so as to prevent his recovering for injuries proceeding from the negligence of the engineer of the latter company in disregarding an order of the dispatcher as to where to meet the train operated by the injured engineer.³⁸ Quite within this doctrine was the case where the defendant railroad com-

³⁵ Brett, J., in *Murray v. Currie*, L. R. 6 C. P. 24, 28; s. c. 40 L. J. (C. P.) 26; 19 Week. Rep. 104; 23 L. T. (N. S.) 557.

³⁶ *Murray v. Currie*, *supra*. To the same effect is *Murphy v. Caralli*, 3 Hurl. & Colt. 461; s. c. 34 L. J. (Exch.) 14.

³⁷ *Galveston & c. R. Co. v. Croskell*, 6 Tex. Civ. App. 160; s. c. 25 S. W. Rep. 486.

³⁸ *Texas & c. R. Co. v. Easton*, 2 Tex. Civ. App. 378; s. c. 21 S. W. Rep. 575.

pany was the lessee of the railroad on which the plaintiff was employed as a brakeman, and the plaintiff's train was permitted to run over the defendant's road, and while doing so was subject to the defendant's division superintendent, and the general officers of each road were the same, but each road was operated by different rules, had different superintendents and subordinate officers, different freight and transportation offices and accounts, and each road selected its own employes. Here it was held that the plaintiff was not a fellow servant with an engineer on the defendant's road.³⁹

§ 5007. Further Illustrations of this Distinction in Railway Service.—From the preceding doctrine it follows that an agreement between several connecting railroad companies, entered into for the purpose of securing speed and comfort for their through passenger-traffic between certain points, does not have the effect of making an employé of one of the companies a fellow servant of an employé of one of the other ones; so that where an employé of one company, while delivering cars to the station on the road of another of the companies, had his foot caught in the defective track of the road of the latter company, whereby he was run over and injured by the car which he was delivering, and from which he had just detached the horses,—he could recover damages from the latter company.⁴⁰ So, the trainmen on a train belonging to one railroad company, but run into the yard of another company, are not fellow servants of an employé of the latter company, who is engaged in repairing the track and who is killed by the negligence of the employes of the former company, although the rules of the latter company in regard to the management of trains in the yard govern them.⁴¹ Where a collision occurred between two trains belonging to different railway companies, neither of which controlled the employes of the other, except that on the piece of track belonging to the defendant company, which was used in common by both companies, on which the collision occurred, the employes of one company were obliged to obey the general rules of the defendant company and the special orders of its train-dispatcher,—it was held that the employes of the two companies were not fellow

³⁹ *Hurl v. New York Cent. & C. R. Co.*, 68 App. Div. (N. Y.) 400; s. c. 73 N. Y. Supp. 1042.

⁴⁰ *Philadelphia & C. R. Co. v. State*, 58 Md. 372.

⁴¹ *Noonan v. New York & C. R. Co.*, 42 N. Y. St. Rep. 41; s. c. 16 N. Y. Supp. 678. Employes of the former company neglected to observe the

rule of the latter company requiring a brakeman to be on the end of a backing train, and ran over the employé of the latter company, who was engaged in repairing the track, and who had a right to presume that the rules of his company would be observed by the defendants.

servants of a common employer, nor within the operation of the fellow-servant rule.⁴²

§ 5008. **Miscellaneous Illustrations of the Principle that the Servants of Different Masters are Not Fellow Servants.**—It has been held that the servant of a lighterman, at work upon his master's barge unloading a steamship, is not a fellow servant with one of the crew of the steamship.⁴³ So, if A., a master-carter, is engaged at the request of B., a cotton-factor, in hauling cotton from the warehouse of B., and sends his servant with his lorry to get the cotton, and the servant, while receiving the cotton into his lorry, is injured by the negligence of B.'s servants, the servant of A. may recover damages of B. He is not deemed the fellow servant of the servants of the cotton-factor, because he was not under the same control, did not form a part of the same establishment, was not employed upon a common object, but

⁴² *Phillips v. Chicago &c. R. Co.*, 64 Wis. 475. A railroad company, at the request of a telegraph company, selected a brakeman to guard a car used by the telegraph company in moving materials while constructing its line along defendant's track; it being his duty to flag trains, so as to prevent their colliding with such car. He had exclusive charge of the switches, and was paid by the telegraph company for his services in accompanying the car. While thus engaged he ran the car on to a side-track, but carelessly left the switch open; and a passing engine, running into it, was derailed and the engineer killed. It was held that such brakeman was the servant of the telegraph company, and that he and the engineer were not coemployés, and the railroad company was liable for the engineer's death: *Hallett v. New York &c. R. Co.*, 167 N. Y. 543; s. c. 60 N. E. Rep. 653; rev'g s. c. 42 App. Div. (N. Y.) 123; 58 N. Y. Supp. 943. In the *Supreme Court*, holding them to be coservants, two judges dissented. In the *Court of Appeals* three judges were for reversal on the ground that they were not coservants; one for reversal on the ground that the switchman was the sole representative of the railroad company to protect the tracks; and three judges were for affirmance. It is not stated why the railroad company was liable. — — — A track

in the yards of the L. Co. was kept clear for the use of the C. Co. The engineer of the C. Co. kicked some cars in upon this track and left them so near the track of the L. Co. that a switchman employed by the L. Co. was knocked off the side of a car and killed. The cars had not been there long enough to charge the yardmaster or other employés of the L. Co. with notice of their presence. It was held that both the C. Co. and the engineer were liable for the death of the switchman, and that the L. Co. was not liable: *Martin v. Louisville &c. R. Co.*, 95 Ky. 612; s. c. 16 Ky. L. Rep. 150; 26 S. W. Rep. 801. Construction of an agreement for joint operation between two railroad companies with respect to an apportionment of the damages paid to injured workmen: *Louisville &c. R. Co. v. Chesapeake &c. R. Co.*, 107 Ky. 191; s. c. 21 Ky. L. Rep. 875; 53 S. W. Rep. 277. Non-liability of a railroad company for injuries to one of its own employés, caused by the negligence of another company running its trains over the track of the employing company, subject to the rules of the employing company, where the employing company is itself free from negligence: *Atwood v. Chicago &c. R. Co.*, 72 Fed. Rep. 447.

⁴³ *Svenson v. Pacific Mail S. S. Co.*, 57 N. Y. 108; aff'g s. c. 1 Jones & Sp. (N. Y.) 277.

represented an interest different from that represented by the servants of the latter.⁴⁴ So, the servant of a contractor engaged in repairing a railroad bridge has been held not a fellow servant with the servants of the company in charge of a passing train.⁴⁵ So, the servant of a contractor engaged in removing the cargo of a ship to the cars of a railway company is not a fellow servant with the company's trainmen,—the court deeming the fact that he was not in the pay of the company a conclusive test.⁴⁶ So, a switch-tender employed by a railroad company on a portion of its track on which it permits another company to run its trains is not a fellow servant with the servants of the latter company; so that if one of such servants is injured by his negligence, the company by which the switch-tender is employed must pay damages.⁴⁷ A similar view has been taken by the English Court of Appeal. Two stations belonging respectively to the defendants and another railway company abutted one upon another, and were approached by parallel lines of rails. The movement of trains was regulated by signalmen whose duty was common to both stations. The plaintiff's husband was one of these signalmen; he was engaged and paid by the latter company, and wore their uniform, but his duty was to attend to the defendants' trains as well as those of his employer. An engine of the defendants was upon the lines of the other company, and this signalman directed the engine-driver to go on to the defendants' lines, which he did, but negligently ran over and killed the signalman, who was then looking at a train coming from another direction. These two servants were held not to be engaged in a common employment.⁴⁸

§ 5009. **Cases Presenting a Divergent View.**—It has, however, been held in Massachusetts, but on grounds which are not very clear, that the servants of a contractor of a city for blasting rocks, employed at the construction of a sewer, with servants of the city, are, as to such servants, fellow servants; so that if injured by their negligence, they cannot recover damages of the city.⁴⁹ This view is supported by an English case, where it was held that the servants of a sub-contractor were fellow servants of the general contractor, where all were engaged together on the same work,—the court taking the view that the sub-

⁴⁴ *Abraham v. Reynolds*, 5 Hurl. & N. 142; s. c. 6 Jur. (N. S.) 53; 8 Week. Rep. 181.

⁴⁵ *Young v. New York & C. R. Co.*, 30 Barb. (N. Y.) 229. Compare *Woodley v. Metropolitan District R. Co.*, 2 Exch. Div. 384 (dissenting opinions of Mellish and Baggallay, L. J.).

⁴⁶ *Burke v. Norwich & C. R. Co.*, 34 Conn. 474.

⁴⁷ *Smith v. New York & C. R. Co.*, 19 N. Y. 127.

⁴⁸ *Swainson v. Northeastern R. Co.*, 3 Exch. Div. 341.

⁴⁹ *Johnson v. Boston*, 118 Mass. 114.

contractor, and all his servants, must be considered as being, for the purpose of the rule, the servants of the principal contractor.⁵⁰ A case in Illinois is somewhat similar. A contractor was under an engagement to furnish wood to a railway company. The company was to furnish a locomotive and train to deliver it where needed on the road, together with an engineer, fireman, conductor, and other necessary trainmen. The contractor had charge of the train, and the men on it had to obey his orders. It was held that the servants of the railway company and those of the contractor were fellow servants within the meaning of the rule.⁵¹

§ 5010. **Other Cases Presenting a Divergent View.**—On somewhat similar ground, if A., proposing to erect a building, engages for that purpose a master mason and a master rigger, each furnishing for his separate part of the work his own tools and men, and the servant of the master mason is injured by the negligence of a servant of the master rigger, he cannot recover damages of the proprietor, although all of the men thus engaged received their pay from the proprietor. "The alleged injury was caused by the breaking of the rope furnished by the master rigger. The rope broke while hoisting a beam, either by reason of its own imperfection, or the unskillfulness with which it was used by the rigger. The rigger was either the servant of the defendant, or a contractor having exclusive control of the work he had contracted to do. If he was a contractor, the defendant would not be liable for any injury caused by his negligence, whether arising from the selection of his tackle or the manner of using it."⁵² If not a contractor, but a servant, then he and those employed under him to do the hoisting were fellow servants with the master mason and the men employed as masons under him, of whom the plaintiff's intestate was

⁵⁰ *Wiggett v. Fox*, 11 Exch. 832; s. c. 2 Jur. (N. S.) 955; 25 L. J. (Exch.) 188. In this case, the defendants, having contracted with the Crystal Palace Company to erect a tower, manufactured the materials, and made sub-contracts with several persons to do, by "piece-work," particular portions of the hoisting and fixing of the materials, the scaffolding and tools being provided by the defendants. The workmen employed by the sub-contractors were paid weekly by the defendants, according to the time they worked, an account of which was kept by the defendants' foreman. One of these sub-contractors employed the plaintiff's

husband. While at work at the bottom of the tower, the defendants' men who were at the top, negligently let fall an instrument, which struck him on the head and caused his death. It was held that the subcontractor and his workmen were servants of the defendants, engaged in one common employment with their other servants, and, consequently, that the defendants were not liable under 9 & 10 Vict., c. 93, for the injury caused by their negligence: *Wiggett v. Fox*, *supra*.

⁵¹ *Illinois &c. R. Co. v. Cox*, 21 Ill. 20.

⁵² *Citing Connors v. Hennessey*, 112 Mass. 96.

one. They, together with the carpenters, were engaged in the common employment of erecting and completing the structure, under the general direction of the defendant's agent.⁵³ All the master mechanics thus employed were to furnish the men, tools and tackle necessary to do the work in their respective departments. A master thus employing servants to do a certain work, and to furnish the tools and other appliances necessary for the prosecution of the work, is responsible to a fellow servant only for care in the selection of the men thus employed. He is not responsible for a defective ax, rope, or trowel so furnished, which, in the hands and under the control of one of his servants, injures a fellow servant, any more than he is responsible to his servant for the careless and negligent manner in which such tool or appliance is used by a fellow servant. Suppose a carpenter and plumber are engaged in the common employment of making repairs, each bringing, as is usual in such cases, his own tools: the master would not be liable for an injury to the carpenter caused by a defect in the furnace of the plumber. Two woodmen are employed to cut down trees, and they both bring their own axes: it could not be contended, if one is injured by a defect in the ax of the other, that the master would be responsible. The workman takes the risks of the employment he engages in, which include the results of negligence on the part of others engaged in the same service; and where all furnish their own tools, and are engaged in a common employment, the workman takes the risk of the negligence of his fellow workman in selecting and caring for his tools, as well as in the use of them."⁵⁴

§ 5011. Influence of the Con-Association Doctrine upon this Question.—The con-association doctrine, elsewhere referred to,⁵⁵ which obtains in one or two jurisdictions, may have a possible influence upon this question. Thus, it has been held that the switching-crews in the employ of different railroad companies, are not to be regarded as fellow servants, though using the same track for their trains,—their duties not being such as to bring them into habitual con-association, such as would enable them to exercise a mutual influence over each other promotive of proper caution;⁵⁶ but another reason would be that they are servants of different masters.

⁵³ Citing *Johnson v. Boston*, 118 Mass. 114.

⁵⁵ *Ante*, § 4971.

⁵⁴ *Harkins v. Standard Sugar Refinery*, 122 Mass. 400.

⁵⁶ *Tierney v. Chicago &c. R. Co.*, 92 Ill. App. 631.

CHAPTER CXXVIII.

ILLUSTRATIONS OF THE FELLOW-SERVANT DOCTRINE IN RAILWAY SERVICE.

- ART. I. General Statements and Illustrations, §§ 5014–5018.
- ART. II. Trainmen and Employés Not Working on Trains, §§ 5020–5028.
- ART. III. Conductor, §§ 5030–5037.
- ART. IV. Engineer, §§ 5039–5058.
- ART. V. Switchmen, Yardmen, Roundhouse-men, etc., §§ 5062–5085.
- ART. VI. Inspectors and Repairers of Cars and Locomotives, §§ 5089–5098.
- ART. VII. Section-master, Section-foreman Section-boss, Section-men, §§ 5101–5112.
- ART. VIII. Station-Agents, §§ 5115–5117.
- ART. IX. Master Mechanic, Division Superintendent, Roadmaster, etc., §§ 5119–5123.
- ART. X. Various Other Illustrations, Alphabetically Arranged, §§ 5125–5147.

ARTICLE I. GENERAL STATEMENTS AND ILLUSTRATIONS.

SECTION	SECTION
5014. What is common employment in railway service.	5017. Doctrine that railway trainmen on different trains are not fellow servants of each other.
5015. General statements as to who are deemed fellow servants in railway service.	5018. Injuries which have been ascribed to the negligence of fellow servants in railway service.
5016. Doctrine that trainmen upon different railway-trains are fellow servants of each other.	

§ 5014. **What is Common Employment in Railway Service.**—Applying the general rule to railway service, it has been held that “all who are engaged in accomplishing the ultimate end in view,—that is, the running of the road,—must be regarded as engaged in the same

general business within the rule.”¹ In another case it is said: “*Prima facie*, all servants of a common master, employed in running, operating, and rendering service with a train of cars, are fellow servants. If there are facts which show that this relation does not really exist between all of such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or non-existence of such relation.”² It is not necessary that the servant injured, in order to exempt the master from liability within the rule, should have been engaged in the running operations of the road. “There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. * * * Whenever the employment is such as *necessarily to bring the person accepting it into contact with the traffic of the line of railway*, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule.”³ The English and Irish courts hold that the servants of the railway corporation whose duty it is to construct the roadway and maintain it in proper repair are fellow servants with those engaged in the running of its trains, and with those who are being transported over it to and from their labor while in the employ of the company.⁴ Some American courts have assented to the same doctrine.⁵ But it is believed that the weight of authority in this country is decidedly the other way.⁶ The following persons have been held to be fellow servants within the rule:—Servants engaged in operating different trains on the same road, so that if a collision takes place between two trains, none of the servants injured can, as a general rule, recover damages of the company;⁷ a

¹ *Hard v. Vermont &c. R. Co.*, 32 Vt. 473; *O’Connell v. Baltimore &c. R. Co.*, 20 Md. 212; *Wonder v. Baltimore &c. R. Co.*, 32 Md. 411; *Chicago &c. R. Co. v. Keefe*, 47 Ill. 108; *St. Louis &c. R. Co. v. Britz*, 72 Ill. 256.

² *McGowan v. St. Louis &c. R. Co.*, 61 Mo. 528, 532.

³ *Blackburn, J.*, in *Morgan v. Vale of Neath R. Co.*, 5 Best & S. 570, 580; s. c. 33 L. J. (Q. B.) 260; quoted with approval by *Erle, C. J.* (the other judges concurring), in the Exchequer Chamber, *L. R.* 1 Q. B. 154; s. c. 5 Best & S. 736.

⁴ *Conway v. Belfast &c. R. Co.*, 1 R. 9 C. L. 498.

⁵ *McDermott v. Pacific R. Co.*, 30 Mo. 115.

⁶ *Chicago &c. R. Co. v. Swett*, 45 Ill. 197; *Chicago &c. R. Co. v. Keefe*, 47 Ill. 108; *Chicago &c. R. Co. v. Gregory*, 58 Ill. 272; *Toledo &c. R. Co. v. Conroy*, 68 Ill. 560; *Houston &c. R. Co. v. Dunham*, 49 Tex. 181; *Snow v. Housatonic &c. R. Co.*, 8 Allen (Mass.) 441; *post*, §§ 5104, 5105.

⁷ *Hutchinson v. York &c. R. Co.*, 5 Exch. 343; s. c. 6 Eng. R. Cas. 580; 14 Jur. 837; 19 L. J. (Exch.) 296; *Louisville &c. R. Co. v. Robinson*, 4 Bush (Ky.) 507; *Pittsburgh &c. R. Co. v. Devinney*, 17 Ohio St. 197.

conductor of a "dump" or gravel-train, and a common laborer thereon;⁸ a brakeman on a train, and the mechanics in the repair-shops; a brakeman, and the inspector of machinery and rolling-stock;⁹ a conductor of a construction-train, and one of the laborers employed on it, in the absence of proof that the conductor was in fact a vice-principal;¹⁰ a carpenter, or other employé of a railway company, and the men in charge of the train by which he is carried to or from his work, in pursuance of his contract of service;¹¹ an employé, on a train going to his work, and a signal-man of the company;¹² a conductor travelling on another train to his place of service;¹³ a fireman, and the master machinist of the company;¹⁴ an engineer, brakeman, and shoveller;¹⁵ a coal-miner employed by a mining company, who has been detailed, with many other miners, to work at repairing a break in a railway belonging to the company, and the conductor of a construction-train on such railway, on which train the person injured was working;¹⁶ a switch-tender and a locomotive-engineer;¹⁷ a brakeman and another brakeman, together with a conductor of a freight-train;¹⁸ the general traffic-manager, and a "milesman" employed under the orders of the "ganger";¹⁹ a carpenter at work for a railway company, and the servants of the company in charge of a turn-table;²⁰ a conductor and a brakeman employed on the same train;²¹ a brakeman on a freight-train, and an engineer on a passenger-train of the same company;²² a repairer of cars at a particular station, and an engineer in charge of a switch-engine at the same station, although each received his orders

⁸ O'Connell v. Baltimore &c. R. Co., 20 Md. 212.

⁹ Wonder v. Baltimore &c. R. Co., 32 Md. 418.

¹⁰ McGowan v. St. Louis &c. R. Co., 61 Mo. 528.

¹¹ Seaver v. Boston &c. R. Co., 14 Gray (Mass.) 466. On substantially the same facts, so held in Gillshannon v. Stony Brook R. Co., 10 Cush. (Mass.) 228; Morgan v. Vale of Neath R. Co., 5 Best & S. 736; s. c. L. R. 1 Q. B. 149; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; aff'g s. c. 5 Best & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Week. Rep. 1031; Tunney v. Midland R. Co., L. R. 1 C. P. 291; s. c. 2 Jur. (N. S.) 691. *Contra*, O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239.

¹² Moran v. New York &c. R. Co., 3 Thomp. & C. (N. Y.) 770; s. c. 67 Barb. (N. Y.) 96.

¹³ Manville v. Cleveland &c. R. Co., 11 Ohio St. 417.

¹⁴ Columbus &c. R. Co. v. Arnold, 31 Ind. 174 [overruling Fitzpatrick v. New Albany &c. R. Co., 7 Ind. 436].

¹⁵ St. Louis &c. R. Co. v. Britz, 72 Ill. 256.

¹⁶ Cumberland Coal &c. Co. v. Scalley, 27 Md. 589.

¹⁷ Farwell v. Boston &c. R. Co., 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924.

¹⁸ Hayes v. Western R. Corp., 3 Cush. (Mass.) 270.

¹⁹ Conway v. Belfast &c. R. Co., I. R. 9 C. L. 498.

²⁰ Morgan v. Vale of Neath R. Co., L. R. 1 Q. B. 149; s. c. 5 Best & S. 736; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; 14 Week. Rep. 144; aff'g s. c. 5 Best & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Week. Rep. 1031.

²¹ Dow v. Kansas Pac. R. Co., 8 Kan. 642.

²² Louisville &c. R. Co. v. Robinson, 4 Bush (Ky.) 507.

from a different foreman;²³ the servants of a person who had contracted to deliver wood to a railway company, and the engineer, fireman, and conductor furnished by the railway company, in pursuance of the terms of the contract, who were associated together on the same train;²⁴ the engineer and shovellers on a gravel-train;²⁵ a servant employed at a particular station, whose duties (among others) consisted in coupling and uncoupling trains, and the engineer and conductor of any train that might come along and need his services in switching cars;²⁶ a brakeman, and a section-boss whose duty it was to tend the switch at a particular station;²⁷ a brakeman, and the engineer on the same train;²⁸ a guard on a train on an English railway, and the "ganger," whose duty it is to inspect the track and see that such tree-nails are renewed as are decayed;²⁹ a station-master having charge of the freight-trains on a certain division of the road, and the engineer of such a train;³⁰ a car-repairer, and the head-brakeman and yard-master at a particular yard;³¹ the general superintendent of a railway, the supervisor of the road and engineer, a section-master, and a common laborer;³² the laborers on a gravel or construction-train, and the conductor or engineer of the same;³³ a railway conductor, and an engineer on the same train;³⁴ one of a gang of track-repairers, and the foreman of the gang;³⁵ a brakeman on one train, and the conductor or engineer on another train belonging to the same company;³⁶ a track-repairer, and the fireman or engineer of a passing train;³⁷ an inspector of the track, and the servants of the company in charge of passing trains;³⁸ a laborer employed in getting out ballast, and a track-layer

²³ *Chicago &c. R. Co. v. Murphy*, 53 Ill. 336. And on similar facts, *Valtez v. Ohio &c. R. Co.*, 85 Ill. 500.

²⁴ *Illinois &c. R. Co. v. Cox*, 21 Ill. 20.

²⁵ *Ohio &c. R. Co. v. Tindall*, 13 Ind. 366; distinguishing *Fitzpatrick v. New Albany &c. R. Co.*, 7 Ind. 436.

²⁶ *Wilson v. Madison &c. R. Co.*, 18 Ind. 226.

²⁷ *Slattery v. Toledo &c. R. Co.*, 23 Ind. 81.

²⁸ *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *St. Louis &c. R. Co. v. Britz*, 72 Ill. 256.

²⁹ *Waller v. South-Eastern R. Co.*, 2 Hurl. & Colt. 102; s. c. 7 Jur. (N. S.) 501; 32 L. J. (Exch.) 205; 11 Week. Rep. 731; 8 L. T. (N. S.) 325.

³⁰ *Evans v. Atlantic &c. R. Co.*, 62 Mo. 49.

³¹ *Besel v. New York &c. R. Co.*, 70 N. Y. 171; rev'g s. c. 9 Hun (N. Y.) 457.

³² *Mobile &c. R. Co. v. Smith*, 59 Ala. 245; s. c. 6 Repr. 264.

³³ *Ryan v. Cumberland Valley &c. R. Co.*, 23 Pa. St. 384; *Chicago &c. R. Co. v. Keefe*, 47 Ill. 108.

³⁴ *Ragsdale v. Memphis &c. R. Co.*, 59 Tenn. 426.

³⁵ *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460.

³⁶ *Pittsburgh &c. R. Co. v. Deviney*, 17 Ohio St. 197.

³⁷ *Whaalan v. Mad River &c. R. Co.*, 8 Ohio St. 249; *Boldt v. New York &c. R. Co.*, 18 N. Y. 432; *Ohio &c. R. Co. v. Collarn*, 73 Ind. 261; s. c. 8 Cent. L. J. 12; 7 Repr. 143; 38 Am. Rep. 134.

³⁸ *Coon v. Syracuse &c. R. Co.*, 5 N. Y. 492.

who had laid a temporary track, on which such laborer was at work;³⁹ a brakeman, and the conductor and engineer of the same train.⁴⁰

§ 5015. **General Statements as to Who are Deemed Fellow Servants in Railway Service.**—Under the principles of the common law, a railway trainman is deemed a fellow servant of the other trainmen where all are engaged in the same general business,—such as the engineer and fireman.⁴¹ This includes employes attached to trains, but not engaged in operating them.⁴² The rule is the same under statutes embodying the principles of the common law.⁴³ The fact that one servant has the power of control over the other does not, in some jurisdictions, alter the rule.⁴⁴ In other jurisdictions, the “superior-servant” doctrine prevails to the extent of making the railway company answerable for an injury inflicted upon an inferior servant by a superior servant placed in command over the injured servant.⁴⁵ In other jurisdictions the sound rule which is applied is that the master is liable only where the “superior servant” acts in neglect or in violation of a duty imposed by law upon the master and by the master entrusted to the superior servant.⁴⁶

³⁹ *Lovegrove v. London &c. R. Co.*, 16 C. B. (N. S.) 669.

⁴⁰ *Sherman v. Rochester &c. R. Co.*, 17 N. Y. 153.

⁴¹ *Dillon v. Union &c. R. Co.*, 3 Dill. (U. S.) 319 (engineer); *Jenkins v. Richmond &c. R. Co.*, 39 S. C. 507 (fireman); *Pease v. Chicago &c. R. Co.*, 61 Wis. 163; s. c. 20 N. W. Rep. 508 (brakeman); *Hoover v. Beach Creek R. Co.*, 154 Pa. St. 362 (brakeman); *Sherman v. Rochester &c. R. Co.*, 15 Barb. (N. Y.) 574; s. c. aff'd, 17 N. Y. 153 (brakeman); *La Pierre v. Chicago &c. R. Co.*, 99 Mich. 112 (brakeman); *Robinson v. Houston &c. R. Co.*, 46 Tex. 540 (any employe); *Wilson v. Madison &c. R. Co.*, 18 Ind. 226 (any employe).

⁴² *St. Louis &c. R. Co. v. Shackelford*, 42 Ark. 417; *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Sullivan v. Toledo &c. R. Co.*, 58 Ind. 26; *Cassidy v. Maine &c. R. Co.*, 76 Me. 488; *Howland v. Milwaukee &c. R. Co.*, 54 Wis. 226; *Ryan v. Cumberland &c. R. Co.*, 23 Pa. St. 384; *Corona v. Galveston &c. R. Co. (Tex.)*, 17 S. W. Rep. 384 (no off. rep.); *Heine v. Chicago &c. R. Co.*, 58 Wis. 525; s. c. 17 N. W. Rep. 420.

⁴³ *Brown v. Central &c. R. Co.*, 72

Cal. 523 (brakeman); *Congrave v. Southern &c. R. Co.*, 88 Cal. 360; *Chicago &c. R. Co. v. Ross*, 112 U. S. 377; *Moore v. Jones*, 15 Tex. Civ. App. 391 (engineer).

⁴⁴ *Heine v. Chicago &c. R. Co.*, 58 Wis. 525; *Thayer v. St. Louis &c. R. Co.*, 22 Ind. 26; *Louisville &c. R. Co. v. Southwick*, 16 Ind. App. 486; *Robinson v. Houston &c. R. Co.*, 46 Tex. 540.

⁴⁵ *Chicago &c. R. Co. v. Snyder*, 117 Ill. 376; *Miller v. Missouri &c. R. Co.*, 109 Mo. 350; *Dick v. Indianapolis &c. R. Co.*, 38 Ohio St. 389; *Lake Shore &c. R. Co. v. Knittall*, 33 Ohio St. 468; *Lake Shore &c. R. Co. v. Spangler*, 44 Ohio St. 471; *Cleveland &c. R. Co. v. Keary*, 3 Ohio St. 201; *Nebraska &c. R. Co. v. Lundstrom*, 16 Neb. 254; *Burlington &c. R. Co. v. Crockett*, 19 Neb. 138; *Clark v. Hughes*, 51 Neb. 780; *Nashville &c. Co. v. Wheelless*, 10 Lea (Tenn.) 741; *Illinois &c. R. Co. v. Spence*, 93 Tenn. 173; *East Tennessee &c. R. Co. v. Collins*, 85 Tenn. 227.

⁴⁶ *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711; *Louisville &c. R. Co. v. Lahr*, 86 Tenn. 335; *Cowles v. Richmond &c. R. Co.*, 84 N. C. 309; *Patton v. Western &c. R. Co.*, 96 N. C. 455 [in effect disapproving

§ 5016. **Doctrine that Trainmen upon Different Railway-Trains are Fellow Servants of Each Other.**—According to the prevailing view, the trainmen operating different trains upon the same road, being servants of the same company, are fellow servants in the sense that if a man while engaged on one train is injured through the negligence of a man engaged in operating another train, the railway company will not be liable.⁴⁷

Dobbin v. Richmond &c. R. Co., 81 N. C. 446]; Louisville &c. R. Co. v. Collins, 2 Duv. (Ky.) 114; Green v. Louisville &c. R. Co., 94 Ky. 169. ⁴⁷Wheatley v. Philadelphia &c. R. Co., 1 Marv. (Del.) 305; s. c. 30 Atl. Rep. 660 (brakeman on one train, fireman on another train); Terre Haute &c. R. Co. v. Leeper, 60 Ill. App. 194; Illinois &c. R. Co. v. Swisher, 74 Ill. App. 164; s. c. *aff'd sub nom.* Swisher v. Illinois &c. R. Co., 182 Ill. 533; s. c. 55 N. E. Rep. 555 (fireman on a passenger-train and brakeman on a freight-train who turned the switch the wrong way—no recovery); Klees v. Chicago &c. R. Co., 68 Ill. App. 244 (engineer of a switching-crew under temporary employment, and engineer and brakeman of a road-train); Elgin &c. R. Co. v. Malaney, 59 Ill. App. 114 (crews of different switching-engines frequently meeting in the discharge of their duty, running on the same track, and brought into frequent association, are fellow servants, even under the con-association doctrine); Ohio &c. R. Co. v. Robb, 36 Ill. App. 627; s. c. *aff'd*, 52 Ill. App. 111, 643; 60 Ill. App. 200 (two railroad engineers in the same grade of service running over the same track); North Chicago St. R. Co. v. Dudgeon, 69 Ill. App. 57 (conductor on a cable car is a fellow servant of a gripman and another conductor upon another car in the same train); Chicago &c. R. Co. v. Thompson, 99 Ill. App. 277 (fireman on one train and an engineer in charge of another train and engine); Columbus &c. R. Co. v. Arnold, 21 Ind. 174; s. c. 99 Am. Dec. 615; Louisville &c. R. Co. v. Robinson, 4 Bush (Ky.) 507; Wonder v. Baltimore &c. R. Co., 32 Md. 411; s. c. 3 Am. Rep. 143; Peaslee v. Fitchburg R. Co., 152 Mass. 155; s. c. 25 N. E. Rep. 71 (fireman on one engine and en-

gineer on another engine); Jarman v. Chicago &c. R. Co., 98 Mich. 135; s. c. 57 N. W. Rep. 32 (fireman on one train injured by negligence of conductor of a passing freight-train in improperly loading a car); Enright v. Toledo &c. R. Co., 93 Mich. 409; s. c. 53 N. W. Rep. 536 (engineer on a freight-train and conductor of another train); Chicago &c. R. Co. v. Doyle, 60 Miss. 977 (engineer on one train is a fellow servant with engineer on another train); McMaster v. Illinois &c. R. Co., 65 Miss. 264; s. c. 7 Am. St. Rep. 653; 4 South. Rep. 59 (brakeman of freight-train and conductor and trainmen of a passenger-train are fellow servants); Relyea v. Kansas City &c. R. Co., 112 Mo. 86; s. c. 18 L. R. A. 817; 53 Am. & Eng. R. Cas. 578; 20 S. W. Rep. 480 (brakeman on a freight-train and fireman on another train on the same section of the road, where both are under orders of the same train-dispatcher); Schaub v. Hannibal &c. R. Co., 106 Mo. 74; s. c. 16 S. W. Rep. 924; Warner v. Erie R. Co., 39 N. Y. 468; Pleasants v. Raleigh &c. R. Co., 121 N. C. 492; s. c. 28 S. E. Rep. 267; 61 Am. St. Rep. 674 (engineer on one freight-train is a fellow servant with a conductor on another freight-train); Pittsburgh &c. R. Co. v. Devinney, 17 Ohio St. 197 (brakeman on one train, conductor and engineer on another); Cole v. Northern &c. R. Co., 12 Pa. Co. Ct. 573 (fireman on one train and engineer and fireman on another train); Jenkins v. Richmond &c. R. Co., 39 S. C. 507; s. c. 18 S. E. Rep. 182; 39 Am. St. Rep. 750 (employés upon a train are fellow servants of a fireman upon a following train, with respect to the placing of torpedoes or other signals for the purpose of stopping the latter train upon the former breaking in two); Hicks v. Southern R.

§ 5017. Doctrine that Railway Trainmen on Different Trains are Not Fellow Servants of Each Other.—A few courts, on the other hand, adhere to the con-association doctrine already considered,⁴⁸ holding

Co., 63 S. C. 559; s. c. 41 S. E. Rep. 753; rev'g on rehearing s. c. 38 S. E. Rep. 725, 866 (conductor on a train is a fellow servant of a flagman on another train, and a vice-principal as to a flagman on his own train); Sanner v. Atchison &c. R. Co., 17 Tex. Civ. App. 337; s. c. 43 S. W. Rep. 533 (foreman of switching-engine is a fellow servant of a brakeman of a freight-train which is being made up by the switching-engine, at common law); Norfolk &c. R. Co. v. Donnelly, 88 Va. 853; s. c. 14 S. E. Rep. 692; Norfolk &c. R. Co. v. Lindamood (Va.), 14 S. E. Rep. 694 (no off. rep.) (company not liable for the death of an engineer while he was running on schedule time and was entitled to the right of way against all trains coming from the opposite direction, caused by a collision due to the fact that the engineer and conductor on a train running in the latter direction misunderstood or disregarded their right-of-way orders); Norfolk &c. R. Co. v. Houchins, 95 Va. 398; s. c. 3 Va. L. Reg. 807; 8 Am. & Eng. R. Cas. (N. S.) 616; 64 Am. St. Rep. 791; 28 S. E. Rep. 578; MacCarthy v. Whitcomb, 110 Wis. 113; s. c. 85 N. W. Rep. 707 (conductor and brakeman on a freight-train and fireman on another train); Kerlin v. Chicago &c. R. Co., 50 Fed. Rep. 185 (baggage-master on one train is a fellow servant of the conductor having charge of the movements of another train); Howard v. Denver &c. R. Co., 26 Fed. Rep. 837 (fireman on passenger-train is a fellow servant of engineer of another train); Van Avery v. Union Pac. R. Co., 35 Fed. Rep. 40 (locomotive-engineers upon different trains); Randall v. Baltimore &c. R. Co., 109 U. S. 478 (brakeman on one train, while using a switch, is a fellow servant of an engine-man of another train); Beaumont v. Northern Pac. R. Co., 109 Fed. Rep. 532; s. c. 48 C. C. A.

529 (engineer on an extra train and conductor of a work-train); Maher v. Union Pac. &c. R. Co., 106 Fed. Rep. 309; s. c. 45 C. C. A. 301 (fireman on a passenger-train and engineer and conductor on a freight-train); Thom v. Pittard, 62 Fed. Rep. 232; s. c. 10 C. C. A. 352 (trainmen on railroad-train and men operating a hand-car); Northern &c. R. Co. v. Poirier, 67 Fed. Rep. 881 (conductor of a train with which a following train collides is the vice-principal of the railroad company in respect to a brakeman upon the first train, but the conductor of the second train is a fellow servant with such brakeman); St. Louis &c. R. Co. v. Needham, 63 Fed. Rep. 107; s. c. 25 L. R. A. 833; 11 C. C. A. 56 (conductor of a construction-train negligently leaving open a switch, injuring a fireman on a passenger-train); Northern &c. R. Co. v. Mase, 63 Fed. Rep. 114; s. c. 11 C. C. A. 63 (fireman on one train injured by the negligence of a conductor on another train in leaving open a switch); Becker v. Baltimore &c. R. Co., 57 Fed. Rep. 188 (brakeman on freight-train and conductor and conductor of a passenger-train); Oakes v. Mase, 165 U. S. 363; s. c. 41 L. ed. 746; 17 Sup. Ct. Rep. 345 (engineer on one train and conductor of another train); Baltimore &c. R. Co. v. Reynolds, 50 Fed. Rep. 728; s. c. 6 U. S. App. 75; 1 C. C. A. 636; 17 L. R. A. 190 (conductor and engineer on one train, and brakeman on another); Baltimore &c. R. Co. v. Andrews, 50 Fed. Rep. 728 (engineer on one train and brakeman on another); Baltimore Trust &c. Co. v. Atlantic Traction Co., 69 Fed. Rep. 358 (conductor of an electric car is a fellow servant of a conductor on another car on the same line of street and suburban railway); Hutchinson v. York &c. R. Co., 5 Exch. 343; s. c. 6 Eng. R. Cas. 580; 14 Jur. 837; 19 L. J. (Exch.) 296.

⁴⁸ *Ante*, § 4971.

that trainmen engaged upon different trains of the same company upon the same road are not fellow servants of each other.⁴⁹

§ 5018. **Injuries which have been Ascribed to the Negligence of Fellow Servants in Railway Service.**—The following injuries have been ascribed to the negligence of fellow servants in railway service:—An injury to an experienced section-hand engaged with others in relaying a spur-track, during the progress of which it became necessary to move cars, and who, while climbing at the command of the section-

⁴⁹ Chicago &c. R. Co. v. House, 172 Ill. 601; s. c. 50 N. E. Rep. 151; aff'g s. c. 71 Ill. App. 147 (crew of freight-train not fellow servants of crew of passenger-train); Louisville &c. R. Co. v. Rains, 15 Ky. L. Rep. 423; s. c. 23 S. W. Rep. 505 (no off. rep.) (engineer in charge of one train not a fellow servant with trainmen of another train); Goodman v. Delaware &c. Canal Co., 167 Pa. St. 332; s. c. 31 Atl. Rep. 670 (train-master putting an irregular train upon the track is not acting as a fellow servant of a fireman of another train); Freeman v. Illinois Cent. R. Co., 107 Tenn. 340; s. c. 64 S. W. Rep. 1 (member of a bridge-crew killed while loading timbers upon a flat-car, not a fellow servant of the engineer and conductor of the train which backed into it); Galveston &c. R. Co. v. Worthy (Tex. Civ. App.), 32 S. W. Rep. 557 (no off. rep.) (engineer on a *through* freight-train is not, as matter of law, a fellow servant with the engineer and brakeman of a *local* freight-train); San Antonio &c. R. Co. v. Harding, 11 Tex. Civ. App. 497; s. c. 3 Am. & Eng. R. Cas. (N. S.) 389; 33 S. W. Rep. 373 (engineer running a train on a railroad under the supervision of the train-master at one place, not a fellow servant with a yard-engineer in charge of a switch-engine under the supervision of the yard-master at another place, under a statute defining fellow servants as those who are in a common service, working together to a common purpose); Houston &c. R. Co. v. Patterson, 20 Tex. Civ. App. 255; s. c. 48 S. W. Rep. 747 (brakeman and an engineer belonging to different crews operating different trains on the same division of a railroad are not fellow servants); Northern

Pac. R. Co. v. O'Brien, 1 Wash. 599; s. c. 21 Pac. Rep. 32 (conductor and engineer of a "wild" train are not fellow servants of a laborer on a gravel-train); Northern &c. R. Co. v. Mase, 63 Fed. Rep. 114; s. c. 11 C. C. A. 63 (under a *statute* making the master liable for an injury to an employé caused by the negligence of his superior, whether subject to his orders or not,—the conclusion being that a train-conductor is the superior of a fireman on another train, and not his fellow servant); Ragsdale v. Northern &c. R. Co., 42 Fed. Rep. 383 (fireman on one train injured in a collision through the negligence of the conductor and engineer of another train, who are held to represent the master in the control of the train—can recover); Central Trust Co. v. Wabash &c. R. Co., 34 Fed. Rep. 616 (expressman and baggageman of a passenger-train not a fellow servant with conductor and engineer of a freight-train, who are held to represent the master); Madden v. Chesapeake &c. R. Co., 28 W. Va. 610; s. c. 57 Am. Rep. 695 (a conductor is not regarded as a fellow servant of an engineer on a different train, or of a telegraph-operator under whose direction conductor runs his trains, but as a vice-principal); Daniel v. Chesapeake &c. R. Co., 36 W. Va. 397; s. c. 16 L. R. A. 383; 32 Am. St. Rep. 870 (brakeman on one train and conductor on another train not fellow servants, but conductor a vice-principal); Au v. New York &c. R. Co., 29 Fed. Rep. 72 (conductor on one train, and brakeman on another); Ragsdale v. Northern &c. R. Co., 42 Fed. Rep. 383 (conductor on one train and fireman on another).

boss upon one of the cars to set the brakes, was injured by the act of the other hands in violently bumping the car with another;⁵⁰ an injury in consequence of a collision with an empty car which ran down an incline because the brake was not properly set by another employé;⁵¹ an injury produced by the failure of another employé to observe the rules and regulations of the company in regard to the running of trains;⁵² an injury to a brakeman employed on a logging-railroad, caused by a train being derailed by a log which fell from the train because a stake intended to hold the log in place was carelessly inserted in its socket by himself or by a fellow trainman;⁵³ an injury to a railway employé caused by the negligence of a coemployé in running a train with great speed, contrary to the orders of the company, over a short-cut track which was seldom used, and then only for a particular purpose;⁵⁴ the death of an engineer, caused by the negligence of the servants in charge of another train in failing to observe the general rules of the company in connection with a special order, and in running past a station instead of waiting on a side-track for such engineer's train;⁵⁵ an injury to a construction-hand, caused by the negligence of his fellow servants in allowing a rail to drop which they were loading on a car;⁵⁶ an injury to a brakeman, on a car moved by gravitation down an incline, caused by the negligent loading of a stone by his fellow servants, there being no defect in the car or track;⁵⁷ an injury to a section-hand, caused by his being jostled by another section-hand while in the act of unloading rails, so that a rail fell on his

⁵⁰ *Gavigan v. Lake Shore &c. R. Co.*, 110 Mich. 71; s. c. 3 Det. Leg. N. 296; 5 Am. & Eng. R. Cas. (N. S.) 523; 67 N. W. Rep. 1097.

⁵¹ *Hoover v. Carbon County Elec. R. Co.*, 191 Pa. St. 146; s. c. 43 Atl. Rep. 74.

⁵² *Niles v. New York &c. R. Co.*, 14 App. Div. (N. Y.) 58; s. c. 43 N. Y. Supp. 751. Further as to injuries from the failure of the coemployés to observe rules, see *Drake v. New York &c. R. Co.*, 80 Hun (N. Y.) 490; s. c. 62 N. Y. St. Rep. 592; 30 N. Y. Supp. 671; *Bryant v. New York &c. R. Co.*, 80 Hun (N. Y.) 164; s. c. 62 N. Y. St. Rep. 670; 30 N. Y. Supp. 737; *Evansville &c. R. Co. v. Tohill*, 143 Ind. 49; s. c. 41 N. E. Rep. 709; 42 N. E. Rep. 352; *Illinois Cent. R. Co. v. Woolley*, 77 Miss. 927; s. c. 28 South. Rep. 26 (failure to block a car according to the rules of a company, so that it ran

down a siding and collided with a train, causing the death of the engineer); *Lundquist v. Duluth St. R. Co.*, 65 Minn. 387; s. c. 4 Am. & Eng. R. Cas. (N. S.) 506; 67 N. W. Rep. 1006 (negligence of the motorman in disobeying the rule of the company requiring those in charge of its cars to give timely warning of their approach to a crew of track-repairers).

⁵³ *Conger v. Flint &c. R. Co.*, 86 Mich. 76; s. c. 48 N. W. Rep. 695.

⁵⁴ *Stetler v. Chicago &c. R. Co.*, 46 Wis. 497.

⁵⁵ *Evansville &c. R. Co. v. Tohill*, 143 Ind. 49; s. c. 41 N. E. Rep. 709; 42 N. E. Rep. 352.

⁵⁶ *Coyne v. Union &c. R. Co.*, 133 U. S. 370; s. c. 33 L. ed. 651; 7 Rail. & Corp. L. J. 434; 10 Sup. Ct. Rep. 382.

⁵⁷ *Sweeney v. Paige*, 64 Hun (N. Y.) 172; s. c. 46 N. Y. St. Rep. 163; 18 N. Y. Supp. 890.

foot;⁵⁸ an injury to a section-master, caused by the act of a coemployé who was turning the crank of a hand-car, and who was caught in it and hurled against the injured employé;⁵⁹ an injury to a section-hand engaged with others in loading ties from a pile alongside the track upon a hand-car, caused by the act of one of his coemployés, who, without waiting for the usual signal, threw his end of the tie first;⁶⁰ an injury sustained by an employé while attempting to board a pay-car when it was on a moving turn-table, he being pushed off by a fellow employé who was alighting therefrom;⁶¹ an injury to a switchman from the failure of the yard-foreman to transmit from the switchman to the engineer the proper order as to the movement of the engine,—the transmission of such orders being regarded as a precaution adopted by him and his fellow laborers for their mutual protection in the execution of the work;⁶² an injury to a railway employé, caused by the negligence of his coemployé in unhooking a cable from a car before sending it down an incline, or in sending it down the incline with a slack cable and an unset brake, resulting in the breaking of the rope, the cable being sufficient if used in a proper manner;⁶³ an injury to a railway employé upon a hand-car, caused by the act of a fellow employé in starting the car while the hand of the injured servant was in a dangerous position, where no one knew of its position, and the car was started without the direction of the foreman;⁶⁴ an injury to a railway employé, caused by the neglect of a fellow servant to adjust the hooks by which the side of a car was kept in place while the car was in motion, by reason of which failure the car “dumped” while in motion;⁶⁵ an injury to a brakeman, the proximate cause of which was the negligent movement of the train by a fellow servant while the brakeman was attempting to make the coupling;⁶⁶ an injury to a brakeman, who knew that a pile of lumber was near the track, but who, nevertheless, attempted to jump upon a train while moving past the pile,—the act of piling the lumber being regarded as the act of a fellow servant;⁶⁷ an injury to a car-coupler, caused by the pre-

⁵⁸ *International &c. R. Co. v. Tarver*, 72 Tex. 308; s. c. 11 S. W. Rep. 1043.

⁵⁹ *Kenney v. Central R. Co.*, 61 Ga. 590.

⁶⁰ *Timm v. Michigan &c. R. Co.*, 98 Mich. 226; s. c. 57 N. W. Rep. 116.

⁶¹ *St. Louis &c. R. Co. v. Ferguson*, 65 Ark. 126; s. c. 44 S. W. Rep. 1123; 10 Am. & Eng. R. Cas. (N. S.) 634.

⁶² *Garland v. Missouri &c. R. Co.*, 85 Mo. App. 579.

⁶³ *Henning v. Globe Foundry Co.*,

112 Mich. 616; s. c. 4 Det. Leg. N. 126; 71 N. W. Rep. 156.

⁶⁴ *Hamilton v. Chicago &c. R. Co.*, 93 Iowa 46; s. c. 61 N. W. Rep. 415.

⁶⁵ *Soderman v. Kemp*, 145 N. Y. 427; s. c. 65 N. Y. St. Rep. 352; 40 N. E. Rep. 212.

⁶⁶ *Norfolk &c. R. Co. v. Brown*, 91 Va. 668; s. c. 22 S. E. Rep. 496 (no recovery on the ground that the coupling was defective).

⁶⁷ *Gaffney v. New York &c. R. Co.*, 15 R. I. 456; s. c. 4 N. Eng. Rep. 33; 7 Atl. Rep. 284 (doubtful decision).

mature drawing of a coupling-pin by a "pin-puller";⁶⁸ an injury to a railway employé while putting a hose on an engine-tender, caused by the falling of loose coal dislodged by another employé standing on the tender to receive the hose;⁶⁹ an injury to a railway employé, caused by the falling of a pile of lumber, due to the negligence of himself and of his coemployés;⁷⁰ and injuries to railway servants under the circumstances of the cases cited in the margin.⁷¹

ARTICLE II. TRAINMEN AND EMPLOYES NOT WORKING ON TRAINS.

SECTION

5020. Train-despatcher not a fellow servant with other employés.

5021. When a train-despatcher is deemed a fellow servant of other railway employés.

5022. Whether a telegraph-operator is a fellow servant with trainmen.

5023. Brakeman and house-painter.

5024. Bridge foreman and engineer.

SECTION

5025. Bridge-builder or bridge-repairer and trainmen.

5026. Baggage-master or baggage-man and other railway servants.

5027. Engine-wiper and trainmen in charge of standing cars.

5028. Railroad-company porter employed at station, and express-messenger.

§ 5020. Train-Despatcher Not a Fellow Servant with Other Employés.—The servant of a railway company, whether called telegraph-operator, train-despatcher, master mechanic, division superintendent, or by whatever name, who is charged with the duty of sending out trains and prescribing their movements, the stations at which they shall stop, the length of time for which they shall remain at each stopping place, and, generally, the schedule of time upon which they shall

⁶⁸ *Central R. Co. v. Keegan*, 82 Fed. Rep. 174; s. c. 51 U. S. App. 489.

⁶⁹ *Weisel v. Eastern R. Co.*, 79 Minn. 245; s. c. 82 N. W. Rep. 576.

⁷⁰ *Langlois v. Maine &c. R. Co.*, 84 Me. 161; s. c. 24 Atl. Rep. 804.

⁷¹ *Rose v. Gulf &c. R. Co.* (Tex.), 17 S. W. Rep. 789 (no off. rep.); *Evans v. Sabine &c. R. Co.* (Tex.), 18 S. W. Rep. 493 (no off. rep.); *Litchfield v. Buffalo &c. R. Co.*, 73 App. Div. (N. Y.) 1; s. c. 76 N. Y. Supp. 80 (injury to employé while engaged in excavating under track); *Herbert v. Delaware &c. Canal Co.*, 62 Hun (N. Y.) 618; s. c. 41 N. Y. St. Rep. 860; 16 N. Y. Supp. 561; *Keys v. Pennsylvania Co. (Pa.)*, 1 Cent. Rep. 893 (no off.

rep.); *Burke v. Syracuse &c. R. Co.*, 69 Hun (N. Y.) 21; s. c. 52 N. Y. St. Rep. 813; 23 N. Y. Supp. 458; *Coffman v. Louisville &c. R. Co.*, 13 Ky. L. Rep. 886; s. c. 18 S. W. Rep. 1012 (no off. rep.). For a case where negligence in making up a train of dirt-cars on a trestle, of cars without brakes, was the negligence of a fellow servant, and where the negligence of a superintendent who had supervised the work of building the trestle, in failing to have a bumper constructed at the end of the trestle, was the negligence of a fellow servant of the plaintiff,—see *Maryland Clay Co. v. Goodnow*, 95 Md. 331; s. c. 51 Atl. Rep. 292.

run, is deemed not to be a fellow servant of trainmen,¹ or of track-repairers,² or of other servants of the same company who may be injured by his negligence.³

§ 5021. When a Train-Despatcher is Deemed a Fellow Servant of Other Railway Employés.—In a few jurisdictions only the status of

¹ Little Rock &c. R. Co. v. Barry, 58 Ark. 198; s. c. 23 S. W. Rep. 1097; 25 L. R. A. 386 (not a fellow servant of a fireman on a passenger-train); McKune v. California &c. R. Co., 66 Cal. 302; Darrigan v. New York &c. R. Co., 52 Conn. 285; s. c. 52 Am. Rep. 590; Chicago &c. R. Co. v. Young, 26 Ill. App. 115; Chicago &c. R. Co. v. McLallen, 84 Ill. 109; Louisville &c. R. Co. v. Heck, 151 Ind. 292; s. c. 11 Am. & Eng. R. Cas. (N. S.) 382; 50 N. E. Rep. 988 (although he issues his orders in the name of division superintendents) [overruling Robertson v. Terre Haute &c. R. Co., 78 Ind. 77; s. c. 41 Am. Rep. 552]; Missouri &c. R. Co. v. Elliott, 2 Ind. Ter. 407; s. c. 51 S. W. Rep. 1067; 14 Am. & Eng. R. Cas. (N. S.) 587 (fireman not a fellow servant of a train-despatcher); Hannibal &c. R. Co. v. Kanaley, 39 Kan. 1; McLeod v. Ginther, 80 Ky. 399; Lasky v. Canadian &c. R. Co., 83 Me. 461; Smith v. Wabash &c. R. Co., 92 Me. 359; Hunn v. Michigan &c. R. Co., 78 Mich. 513; s. c. 44 N. W. Rep. 502; 41 Am. & Eng. R. Cas. 452; 7 L. R. A. 500; Smith v. Wabash &c. R. Co., 92 Mo. 359; Hankins v. New York &c. R. Co., 142 N. Y. 416; s. c. 25 L. R. A. 396; 59 N. Y. St. Rep. 802; 37 N. E. Rep. 466 (in sending special telegraph-orders for the movements of trains, which are entirely controlled by such orders because they are behind time, is not a fellow servant of the fireman on one of such trains); Sheehan v. New York &c. R. Co., 91 N. Y. 332; Dana v. New York &c. R. Co., 92 N. Y. 639; McChesney v. Panama R. Co., 66 Hun (N. Y.) 627; s. c. 49 N. Y. St. Rep. 148; 21 N. Y. Supp. 207; s. c. aff'd, 74 Hun (N. Y.) 150; 56 N. Y. St. Rep. 415; 26 N. Y. Supp. 245; s. c. aff'd, 148 N. Y. 729; 42 N. E. Rep. 1062 (railroad company is liable for personal injuries to an en-

gineer, caused by the instructions and the lack of full instructions of a train-despatcher); Booth v. Boston &c. R. Co., 73 N. Y. 38; s. c. 67 N. Y. 593; Little Miami R. Co. v. Stevens, 20 Ohio 415; Cleveland &c. R. Co. v. Keary, 3 Ohio St. 201; Lewis v. Seifert, 116 Pa. St. 628; s. c. 11 Atl. Rep. 514; 20 W. N. C. (Pa.) 145; Hogan v. Missouri &c. R. Co., 88 Tex. 679; s. c. 32 S. W. Rep. 1035 (engineer is not a fellow servant of the train-despatcher and telegraph-operator giving orders for the movement of his train); Galveston &c. R. Co. v. Arispe, 5 Tex. Civ. App. 611; s. c. 23 S. W. Rep. 928; rehearing denied, 5 Tex. Civ. App. 617; s. c. 24 S. W. Rep. 33 (division superintendent and train-despatcher not a fellow servant of an employé upon a work-train); Phillips v. Chicago &c. R. Co., 64 Wis. 475; Cincinnati &c. R. Co. v. Clark, 16 U. S. App. 17; s. c. 57 Fed. Rep. 125; 6 C. C. A. 281; Chicago &c. R. Co. v. Ross, 112 U. S. 377; s. c. 28 L. ed. 787; Oregon Short Line &c. R. Co. v. Frost, 44 U. S. App. 606; s. c. 74 Fed. Rep. 965; 21 C. C. A. 186; Baltimore &c. R. Co. v. Camp, 31 U. S. App. 213; s. c. 65 Fed. Rep. 952; 13 C. C. A. 233; Crew v. St. Louis &c. R. Co., 20 Fed. Rep. 87; Northern R. Co. v. Poirier, 67 Fed. Rep. 881; Clyde v. Richmond &c. R. Co., 69 Fed. Rep. 673; Felton v. Harbeson, 44 C. C. A. 188; s. c. 104 Fed. Rep. 737; Missouri &c. R. Co. v. Elliott, 42 C. C. A. 188; s. c. 102 Fed. Rep. 96.

² McKune v. California &c. R. Co., 66 Cal. 302; Flike v. Boston &c. R. Co., 53 N. Y. 550.

³ Booth v. Boston &c. R. Co., 73 N. Y. 38 (employé injured through negligence of train-despatcher in not supplying train with sufficient number of brakemen). See an extended note on this subject in 25 L. R. A. 386.

a fellow servant is ascribed to a train-despatcher.⁴ One court has held that a train-despatcher who possesses the power to employ and discharge flagmen and brakemen, and who has general charge of the trainmen of one division of the road and of the movement of trains thereon, but who has no power to employ enginemen and firemen,—is the fellow servant of an engineman who is injured in consequence of the negligence of the train-despatcher in sending out incompetent or unfit brakemen with the train; so that, if an injury proceed from such negligence, there can be no recovery against the railway company.⁵ Another court has held that the so-called “fellow-servant rule” will prevent a recovery from a railroad company of damages for an injury proceeding from the negligence of a train-despatcher to one who, at the time, is acting with the permission of the company as fireman, without compensation, for the purpose of learning the business.⁶

§ 5022. Whether a Telegraph-Operator is a Fellow Servant with Trainmen.—Whether a telegraph-operator employed at a railway-station to give information to the conductors or engineers of passing trains and to direct other movements so as to avoid collisions, is a fellow servant of such conductors, engineers, and other trainmen employed on their trains, is a question upon which there is an unfortunate difference of judicial opinion.⁷ A rule of a preceding paragraph which

⁴Robertson v. Terre Haute &c. R. Co., 78 Ind. 77; s. c. 41 Am. St. Rep. 552 (brakeman and train-despatcher are fellow servants) [overruled in Louisville &c. R. Co. v. Heck, 151 Ind. 292; s. c. 11 Am. & Eng. R. Cas. (N. S.) 382; 50 N. E. Rep. 988]; Evans v. Atlantic &c. R. Co., 62 Mo. 49 (station-master having charge of freight-trains on a division, and engineer of such a train. Station-master went on track on his own private business, and was run over. Though neglecting his business at the time, he did not thereby acquire the rights of a stranger); Blessing v. St. Louis &c. R. Co., 77 Mo. 410 (*prima facie*, where engineer is killed by the negligence of the train-despatcher, both are fellow servants, and the contrary must be proved in order to recovery—plaintiff failed to show that it was train-despatcher’s duty to give notice of location of another train, it not being his duty as matter of law); Houston &c. R. Co. v. Stewart, 92 Tex. 540; s. c. 50 S. W. Rep. 333; rev’g s. c. *sub*

nom. Houston &c. R. Co. v. Stuart (Tex. Civ. App.), 48 S. W. Rep. 799 (same holding); Conway v. Belfast &c. R. Co., 1 I. R. 9 C. L. 498 (general traffic-manager and a “milesman” employed under the orders of a “ganger,” or track-inspector).

⁵Norfolk &c. R. Co. v. Hoover, 79 Md. 253; s. c. 25 L. R. A. 710; 29 At. Rep. 994.

⁶Millsaps v. Louisville &c. R. Co., 69 Miss. 423; s. c. 13 South. Rep. 696. The conclusion would seem to be different since the Mississippi Constitution of 1890, § 193, as to which, see *post*, § 5300.

⁷This will be seen by the fact that a decision that a telegraph-operator employed at a railway-station, by whose negligence an engineer was killed, was a fellow servant, and that therefore his administrator could not recover damages for his death, was affirmed in the Supreme Court of the United States by an equally divided court: Price v. Detroit &c. R. Co., 145 U. S. 651 (*mem.*).

ascribes the status of a vice-principal to a train-despatcher, would ascribe the same status to a telegraph-operator at a railway-station who performs the same duties, since the name by which the agent is known cannot make any difference; and we find that quite a number of decisions so hold.⁸ Some of these decisions proceed on the ground that the telegraph-operator is engaged in a different department of the service from that of the trainmen, and that he is also in a certain sense the superior of the conductor or other servant of the company in charge of a train.⁹ Other courts take the opposite view, that the servant who directs the movements of a train or who gives to its conductor or engineer the information by which they are to guide its movements, is engaged in a common employment and in the same general department of the service of the master with the servants employed on such train; that they are consequently fellow servants within the meaning of the rule under consideration.¹⁰

⁸ *East Tennessee &c. R. Co. v. De Armond*, 86 Tenn. 73; s. c. 6 Am. St. Rep. 816; 5 S. W. Rep. 600 (not a fellow servant of the conductor; company liable for damages caused by a collision which would not have happened if its telegraph-operator at its way station had delivered to the conductor of the train a message despatched to him to hold his train at that station until another train had passed); *Madden v. Chesapeake &c. R. Co.*, 28 W. Va. 610; s. c. 57 Am. Rep. 695 (engineer and telegraph-operator); *Flanagan v. Chesapeake &c. R. Co.*, 40 W. Va. 436; s. c. 21 S. E. Rep. 1028 (telegraph-operator in charge of a signal-station, who controls by signal-orders the running of trains over a block section of a railroad, not the fellow servant of a brakeman injured on such section by the operator's negligent management of the running of trains); *Frost v. Oregon &c. R. Co.*, 69 Fed. Rep. 936 (holding that in the matter of giving notice to an engineer of a change of running-time, the telegraph-operator performs one of the primary or absolute duties of the company which cannot be delegated); *Hall v. Galveston &c. R. Co.*, 39 Fed. Rep. 18 (telegraph-operator is not the fellow servant of a brakeman).

⁹ *East Tennessee &c. R. Co. v. De Armond*, 86 Tenn. 73; s. c. 6 Am. St. Rep. 816; 5 S. W. Rep. 600.

¹⁰ *Monaghan v. New York &c. R. Co.*, 9 N. Y. St. Rep. 672; s. c. 45 Hun (N. Y.) 113; *Dana v. New York &c. R. Co.*, 23 Hun (N. Y.) 473 (held to be a coemployé of a locomotive-engineer); *Dealey v. Philadelphia R. Co. (Pa.)*, 3 Cent. Rep. 112 (no off. rep.); *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38; *Baltimore &c. R. Co. v. Camp*, 65 Fed. Rep. 952; s. c. 13 C. C. A. 233 (not a superior servant as regards an engineer within the meaning of a statute, when communicating to the engineer the orders of the train-despatcher); *McKaig v. Northern &c. R. Co.*, 42 Fed. Rep. 288; *Oregon &c. R. Co. v. Frost*, 74 Fed. Rep. 965; s. c. 21 C. C. A. 186; 44 U. S. App. 606 (local telegraph-operator receiving and delivering orders of a train-despatcher to the person in charge of a train in respect to a change in the schedule, is a fellow servant of the latter); *Illinois Cent. R. Co. v. Bentz*, 40 C. C. A. 56; s. c. 99 Fed. Rep. 657 (company is not liable for the death of an engineer in a collision, due to the negligence of an operator in failing to report the passing of a train at his station); *Cincinnati &c. R. Co. v. Clark*, 6 C. C. A. 281; s. c. 57 Fed. Rep. 125 (telegraph-operator and fireman upon a passing train injured by the failure of the operator to display the proper signal).

§ 5023. **Brakeman and House-Painter.**—A railway brakeman and a man employed to paint a house belonging to the railway company are not fellow servants, since they are engaged in different departments of service; therefore the company will be liable for injuries to the house-painter caused by the negligence of the brakeman in failing to stop a car after seeing that the painter is in a perilous position.¹¹

§ 5024. **Bridge Foreman and Engineer.**—A railway "bridge foreman" is a fellow servant of a locomotive-engineer of the same company, so as to prevent a recovery by the former from the company for injuries sustained in consequence of a collision between a boarding-car in which he lives and the train managed by the engineer.¹²

§ 5025. **Bridge-BUILDER or Bridge-Repairer and Trainmen.**—The servants of a railway company who are employed in building or in repairing its bridges are not fellow servants of the trainmen for two reasons: they are employed in different departments of the service;^{12a} and the bridge-builders and bridge-repairers are engaged in discharging a primary or absolute duty of the railway company; hence, so far as the discharge of that duty is concerned, they are its vice-principals.¹³ So, it has been held that a foreman of a squad of bridge-carpenters in the employ of a railroad company, in riding to his work, belongs to the train and is in the train department, in such a sense as to render the conductor in charge of the train a vice-principal of the company rather than his fellow servant,—and this, although, in going upon the train, such bridge foreman acts under the orders of his own immediate superior.¹⁴ Opposed to the foregoing is a decision to the effect that such a bridge-builder and repairer is a fellow servant of the employes in charge of a train of the company to which he and his assistants may attach their own car for the purpose of being transported with their tools from place to place in the discharge of their duties; so that he cannot recover damages

¹¹ *Missouri &c. R. Co. v. Collins*, 15 Tex. Civ. App. 21; s. c. 39 S. W. Rep. 150.

¹² *St. Louis &c. R. Co. v. Henson*, 61 Ark. 302; s. c. 32 S. W. Rep. 1079 (boarding-car was being moved, and was placed next to the engine, in violation of company's rules, which required it to be attached to the caboose).

^{12a} *Missouri &c. R. Co. v. Hines* (Tex. Civ. App.), 40 S. W. Rep. 152 (no off. rep.).

¹³ *Davis v. Central Vermont &c. R. Co.*, 55 Vt. 84; s. c. 45 Am. Rep. 590; *Chicago &c. R. Co. v. Pontius*, 157 U. S. 209; s. c. 15 Sup. Ct. Rep. 585; 39 L. ed. 675 (under a statute making railroad companies liable for all damages to their employes from the negligence or mismanagement of their agents or other employes).

¹⁴ *Northern &c. R. Co. v. Beaton*, 64 Fed. Rep. 563; s. c. 12 C. C. A. 301.

from the company for injuries received through the negligence of such trainmen while being so transported in the usual manner.¹⁵ Another court has held that the foreman of a bridge-gang, while asleep on a side-track, in a car provided for that purpose, who is liable to be called at any moment to go out with his gang upon the road, is on duty in such a sense as to make him a fellow servant of the man operating a freight-train by whose negligence he is injured.¹⁶

§ 5026. Baggage-Master or Baggage-Man and Other Railway Servants.—We will start with a decision that holds that a baggage-master on a passenger-train is the fellow servant of a switch-tender, by whose negligence the baggage-master is injured,¹⁷ and pass on to one which holds that a baggage-man and the engineer of the same train are not, as matter of law, fellow servants, simply because they co-operate in the transportation of passengers and their baggage;¹⁸ but it must be remembered that in Illinois the so-called “con-association doctrine” prevails.¹⁹

§ 5027. Engine-Wiper and Trainmen in Charge of Standing Cars.—An engine-wiper who, while on his way to work, is jammed between standing cars, left open to enable employes of the company to pass, is deemed a fellow servant of the trainmen in charge of the cars.²⁰

§ 5028. Railroad-Company Porter Employed at Station and Express-Messenger.—A porter employed by a railroad company at one of its stations, is a fellow servant of an express-messenger with whom he is working to unload express matter and baggage from the cars of the company, under a joint arrangement between the employers.²¹

¹⁵ *Tomlinson v. Chicago & C. R. Co.*, 97 Fed. Rep. 252; s. c. 38 C. C. A. 148 (holding that he is also a fellow servant with the employes on such train, even while engaged in the work of building or repairing bridges).

¹⁶ *St. Louis & C. Co. v. Welch*, 72 Tex. 298; s. c. 2 L. R. A. 839; 5 Rail. & Corp. L. J. 403; 10 S. W. Rep. 529.

¹⁷ *Roberts v. Chicago & C. R. Co.*, 33 Minn. 218.

¹⁸ *Chicago & C. R. Co. v. Swan*, 176 Ill. 424; s. c. 4 Chic. L. J. Wkly. 132; 12 Am. & Eng. R. Cas. (N.

S.) 674; 52 N. E. Rep. 916; aff'g s. c. 70 Ill. App. 331; 2 Chic. L. J. Wkly. 419. Compare *Abend v. Terre Haute & C. R. Co.*, 111 Ill. 202; s. c. 53 Am. Rep. 616, which is cited as overruled in effect; and *Leeper v. Terre Haute & C. R. Co.*, 162 Ill. 215; *Chicago & C. R. Co. v. Kneirim*, 152 Ill. 458, which are distinguished.

¹⁹ *Ante*, § 4971.

²⁰ *Ewald v. Chicago & C. R. Co.*, 70 Wis. 420; s. c. 36 N. W. Rep. 12.

²¹ *San Antonio & C. R. Co. v. Taylor* (Tex. Civ. App.), 35 S. W. Rep. 855 (no off. rep.).

ARTICLE III. CONDUCTOR.

SECTION

5030. Conductor, status of, as vice-principal.

5031. Generally deemed a fellow servant of the other trainmen.

5032. Conductor and engineer on the same train—negligence of conductor.

SECTION

5033. Conductor and engineer of a construction-train and laborers on such train.

5034. Conductor and car-repairer working in the same yard.

5035. Conductor of train and track-repairers.

5036. Conductor and yardman.

5037. Conductor and fireman on same train.

§ 5030. **Conductor, Status of, as Vice-Principal.**—The conductor of a railway-train is the *master of the train*, in the same sense in which the captain of a ship at sea is master of the ship. With respect to those measures which are necessary for the safety of the persons on board the train, he wields the whole power of the railway company, except in so far as those powers have been specially committed to the engineer or to other servants. The better view, therefore, ascribes to him the status and authority of a vice-principal of the railway company, so as to render it liable for his negligence resulting in injury to its subordinate servants upon the same train.¹

¹ Spencer v. Brooks, 97 Ga. 681; s. c. 5 Am. & Eng. R. Cas. (N. S.) 202; 25 S. E. Rep. 480 (not, when in the discharge of his usual and ordinary duties, a fellow servant of an engineer, fireman, or brakeman working under his orders); Walker v. Gillett, 59 Kan. 214; s. c. 10 Am. & Eng. R. Cas. (N. S.) 140; 52 Pac. Rep. 442 (company liable to brakeman injured while repairing coupling under orders of conductor, who negligently fails to notify brakeman of the approach of an engine and cars); Newport News & C. R. Co. v. Carroll, 17 Ky. L. Rep. 374; s. c. 31 S. W. Rep. 132 (no off. rep.) (company liable for injuries to a minor received while attempting to couple cars under the orders or request of the conductor); Newport News & C. R. Co. v. Dentzel, 91 Ky. 42; s. c. 12 Ky. L. Rep. 626; 14 S. W. Rep. 958 (negligent failure of conductor to discover train had parted and to apply brakes on rear section, whereby brakeman on front section was killed in ensuing collision); Chicago & C. R. Co. v. Lundstrum, 16

Neb. 254; s. c. 20 N. W. Rep. 198; 49 Am. Rep. 718 (conductor of construction-train); Purcell v. Southern R. Co., 119 N. C. 728; s. c. 26 S. E. Rep. 161 (vice-principal of a brakeman on his train); Mason v. Richmond & C. R. Co., 114 N. C. 718; s. c. 19 S. E. Rep. 362 (is a vice-principal with respect to a brakeman on his train, who is not negligent in exposing himself to danger under conductor's orders); Cowles v. Richmond & C. R. Co., 84 N. C. 309; s. c. 37 Am. Rep. 620; Lake Shore & C. R. Co. v. Spangler, 44 Ohio St. 471 (company cannot contract with brakeman for non-liability for negligence of conductor) Boatwright v. Northeastern R. Co., 25 S. C. 128; Illinois & C. R. Co. v. Spence, 93 Tenn. 173 (vice-principal over fireman); Culpepper v. International & C. R. Co., 90 Tex. 627; s. c. 40 S. W. Rep. 386; aff'g s. c. 38 S. W. Rep. 818 (not a fellow servant with engineer subject to his orders under Texas statute); Openshaw v. Utah & C. R. Co., 6 Utah 132; Richmond & C. R. Co. v. Williams,

Many of the decisions, for example, ascribe to the conductor the status of vice-principal with respect to a brakeman on the same train.²

§ 5031. **Generally Deemed a Fellow Servant of the Other Trainmen.**—In most jurisdictions the conductor of a railway-train is, however, regarded as a mere fellow servant of the other trainmen working under his orders on the same train;³ for example, of a brake-

86 Va. 165; s. c. 9 S. E. Rep. 990; 17 Wash. L. Rep. 554; 13 Va. L. J. 583; 39 Am. & Eng. R. Cas. 326; Ayers v. Richmond & C. R. Co., 84 Va. 679; s. c. 5 S. E. Rep. 582 (railroad company is responsible for injuries inflicted upon a brakeman through the negligence of the conductor thereof); Johnson v. Richmond & C. R. Co., 84 Va. 713; s. c. 5 S. E. Rep. 707 (same holding); Norfolk & C. R. Co. v. Ampey, 93 Va. 108; s. c. 2 Va. L. Rep. 284; 25 S. E. Rep. 226 (vice-principal of a brakeman on his train in the matter of seeing that the couplings are in good order, where such duty has been delegated to him); Moon v. Richmond & C. R. Co., 78 Va. 745; s. c. 49 Am. Rep. 401; Richmond & C. R. Co. v. Brown, 89 Va. 749; Haney v. Pittsburg & C. R. Co., 38 W. Va. 570; s. c. 18 S. E. Rep. 748; Canadian Pac. R. Co. v. Johnston, 61 Fed. Rep. 738; s. c. 9 C. C. A. 587; Chicago & C. R. Co. v. Ross, 112 U. S. 377; s. c. 28 L. ed. 787.

²Georgia & C. R. Co. v. Propst, 83 Ala. 518; Louisville & C. R. Co. v. Mitchell, 87 Ky. 327; Louisville & C. R. Co. v. Moore, 83 Ky. 675; Illinois & C. R. Co. v. Harris (Miss.), 29 South. Rep. 760 (no off. rep.) (under law of Louisiana); Clark v. Hughes, 51 Neb. 780; s. c. 71 N. W. Rep. 776; Haltom v. Southern R. Co., 127 N. C. 255; s. c. 37 S. E. Rep. 262 (where the conductor had power to discharge the brakeman for disobeying his orders); Purcell v. Southern R. Co., 119 N. C. 728; s. c. 26 S. E. Rep. 161 (conductor of independent train is a vice-principal as toward a brakeman on such train; and where the company would be liable for an act directed to be performed by the conductor, it is liable for such act if performed by the conductor himself); Cleveland & C. R. Co. v. Keary, 3 Ohio St. 201; Boatwright v. North-

eastern R. Co., 25 S. C. 128; Railroad Co. v. Kenley, 92 Tenn. 207; Galveston & C. R. Co. v. Robinett (Tex. Civ. App.), 54 S. W. Rep. 263 (no off. rep.); Richmond & C. R. Co. v. Brown, 89 Va. 749; s. c. 17 Va. L. J. 203; 17 S. E. Rep. 132 (conductor of a freight-train not a fellow servant of a brakeman in regard to injuries sustained by the latter, while obeying the former's orders to carry goods across the track, through negligence of conductor); Richmond & C. R. Co. v. Williams, 86 Va. 165; s. c. 9 S. E. Rep. 990; 17 Wash. L. Rep. 554; 13 Va. L. J. 583; 39 Am. & Eng. R. Cas. 326; Daniel v. Chesapeake & C. R. Co., 36 W. Va. 397; s. c. 16 L. R. A. 383; 15 S. E. Rep. 162 (and a yardmaster in command of a train is in law a conductor); Canadian & C. R. Co. v. Johnston, 61 Fed. Rep. 738; s. c. 26 U. S. App. 85; 9 C. C. A. 587; 25 L. R. A. 470. Where a conductor uncoupled cars without notifying the brakeman whose duty it was to make the uncoupling that he had done so, and the brakeman, in the course of his duties, went between such cars to uncouple them, and the conductor signalled the engineer to go ahead, causing such cars to separate and injure the brakeman,—it was held that the company was liable: Purcell v. Southern R. Co., 119 N. C. 728; s. c. 26 S. E. Rep. 161.

³Brown v. Central Pac. R. Co., 72 Cal. 523; s. c. 14 Pac. Rep. 138; Congrave v. Southern & C. R. Co., 88 Cal. 360; s. c. 26 Pac. Rep. 175; Illinois & C. R. Co. v. Meyer, 65 Ill. App. 531; Louisville & C. R. Co. v. Southwick, 16 Ind. App. 486; s. c. 44 N. E. Rep. 263 (negligence of a conductor of a freight-train while engaged in unloading freight, causing an injury to a brakeman assisting him, is that of a fellow servant); Dow v. Kansas Pac. R. Co., 8 Kan. 642 (conductor and brake-

man;⁴ and also with respect to an engineer;⁵ in much the same manner as a foreman of work is regarded as a fellow servant of the men working under him.⁶

§ 5032. Conductor and Engineer on the Same Train—Negligence of Conductor.^{6a}—An engineer and conductor on the same train, re-

man); *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270 (conductor and brakeman); *La Pierre v. Chicago & c. R. Co.*, 99 Mich. 212; s. c. 58 N. W. Rep. 60; *Sherman v. Rochester & c. R. Co.*, 17 N. Y. 153 (conductor and brakeman); *Miller v. Southern Pac. R. Co.*, 20 Or. 285; s. c. 43 Alb. L. J. 354; 26 Pac. Rep. 70 (a rule providing that conductors will be held responsible for the proper adjustment of switches does not make a conductor the vice-principal of the company); *Guthrie v. Southern Pac. R. Co. (Or.)*, 26 Pac. Rep. 76 (no off. rep.); *Campbell v. Cook*, 86 Tex. 630; s. c. 26 S. W. Rep. 486; rev'g s. c. (Tex. Civ. App.), 24 S. W. Rep. 977 (brakeman and conductor in the employ of a *receiver* are fellow servants); *Norfolk & c. R. Co. v. Houchins*, 95 Va. 398; s. c. 3 Va. L. Reg. 807; 64 Am. St. Rep. 791; 8 Am. & Eng. R. Cas. (N. S.) 616; 28 S. E. Rep. 578; *Jackson v. Norfolk & c. R. Co.*, 43 W. Va. 380; s. c. 46 L. R. A. 337, and note; *New England R. Co. v. Conroy*, 175 U. S. 323; s. c. 20 Sup. Ct. Rep. 85 (conductor of a freight-train is not a vice-principal, unless special and unusual powers have been conferred upon him, but is a fellow servant of the engineer and brakeman). See also, and specially examine, *Baltimore & c. R. Co. v. Baugh*, 149 U. S. 368; s. c. 37 L. ed. 772. An employé engaged in towing cars with a horse could not recover for an injury received in coupling a car under the direction of the conductor, where the only authority exercised by the latter was in directing the plaintiff to couple the cars, and at the time of the injury they were actually co-operating in the particular work: *Blah v. West Chicago St. R. Co.*, 100 Ill. App. 393.

⁴ *Brown v. Central & c. R. Co.*, 72 Cal. 523; s. c. 14 Pac. Rep. 138; *Congrave v. Southern Pac. R. Co.*, 88 Cal. 360; s. c. 26 Pac. Rep. 175; *La Pierre v. Chicago & c. R. Co.*, 99 Mich. 212; s. c. 58 N. W. Rep. 60;

Ott v. Lake Shore & c. R. Co., 18 Ohio C. C. 395; s. c. 10 Ohio C. D. 85 (conductor cannot be said to represent the master in providing a place for the brakeman on such train, even if the placing of a car may be said to constitute providing a place, under the law of Michigan); *Herrington v. Lake Shore & c. R. Co.*, 83 Hun (N. Y.) 365; s. c. 64 N. Y. St. Rep. 647; 31 N. Y. Supp. 910; *Wooden v. Western & c. R. Co.*, 147 N. Y. 508; s. c. 70 N. Y. St. Rep. 83; 42 N. E. Rep. 199; rev'g s. c. 5 Misc. (N. Y.) 537; s. c. on first trial, 43 N. Y. St. Rep. 218; 16 N. Y. Supp. 840; 46 N. Y. St. Rep. 77; 18 N. Y. Supp. 768 (a fellow servant with a brakeman in determining not to apply for more brakemen, or not to set off cars from his train, before proceeding down a steep grade, even where the matter is left to his discretion); *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362; s. c. 26 Atl. Rep. 315 (conductor and engineer on the one hand and a brakeman on the other); *Johnston v. Pittsburgh & c. R. Co.*, 114 Pa. St. 443 (though the conductor was sick and tired out); *Campbell v. Cook*, 86 Tex. 630; s. c. 26 S. W. Rep. 486; rev'g s. c. (Tex. Civ. App.), 24 S. W. Rep. 977 (when employed by a *receiver*, although the conductor has control and superintendence over the brakeman, if he has no authority to employ or discharge brakemen under his control on the same train); *Jackson v. Norfolk & c. R. Co.*, 43 W. Va. 380; s. c. 2 Chic. L. J. Wkly. 300; 27 S. E. Rep. 278; 6 Am. & Eng. R. Cas. (N. S.) 455; 46 L. R. A. 337; *Pease v. Chicago & c. R. Co.*, 61 Wis. 163 (conductor caused train to start while brakeman was under it); *Northern & c. R. Co. v. Hogan*, 63 Fed. Rep. 102; s. c. 11 C. C. A. 51.

⁵ *Van Amburg v. Vicksburg & c. R. Co.*, 37 La. An. 650; s. c. 55 Am. Rep. 517; *Little Miami R. Co. v. Stevens*, 20 Ohio St. 415.

⁶ *Ante*, § 4939.

^{6a} Compare *post*, § 5042, where

ceiving the same orders from a train-despatcher, which each is required to compare with that received by the other, are held to be fellow servants.⁷ This doctrine has not received universal assent; and in a very important case, possibly overruled, at least disregarded, by the court in which the decision was rendered, it was held (three justices dissenting) that a conductor who has charge of a train and who commands its movements is not a fellow servant of the engineer so as to preclude a recovery of damages by the engineer from the company for an injury resulting from the negligence of the conductor.⁸

§ 5033. **Conductor and Engineer of a Construction Train and Laborers on such Train.**—These have been generally regarded as fellow servants,⁹ but this view has not received universal assent. The con-

this subject is considered from the standpoint of the engineer.

⁷Edmonson v. Kentucky &c. R. Co., 105 Ky. 479; s. c. 20 Ky. L. Rep. 1296; 49 S. W. Rep. 200, 448; withdrawing opinion in 46 S. W. Rep. 679; Grattis v. Kansas City &c. R. Co., 153 Mo. 380; s. c. 55 S. W. Rep. 108; 48 L. R. A. 399 (conductor is a fellow servant of the engineer and also of the fireman who was injured by the negligent acts of the conductor in making the signal and the engineer in obeying it); Ragsdale v. Memphis &c. R. Co., 59 Tenn. 426.

⁸Chicago &c. R. Co. v. Ross, 112 U. S. 377. See also, Ross v. Chicago &c. R. Co., 2 McCrary (U. S.) 235; Galveston &c. R. Co. v. Brown (Tex. Civ. App.), 59 S. W. Rep. 930 (no off. rep.); s. c. rev'd on other grounds, 95 Tex. 2; 63 S. W. Rep. 305 (when not deemed fellow servants with respect to an injury received by the engineer because of the act of the engineer in starting the train in pursuance of the conductor's orders); Terre Haute &c. R. Co. v. Chicago &c. R. Co., 53 Ill. App. 41 (the fact that the train-despatcher directs his orders to both does not make them fellow servants).

⁹St. Louis &c. R. Co. v. Shackelford, 42 Ark. 417; Chicago &c. R. Co. v. Keefe, 47 Ill. 108; Chicago &c. R. Co. v. McDonald, 21 Ill. App. 409; Ohio &c. R. Co. v. Tindall, 13 Ind. 366 (engineer and shovellers on gravel-train) [distinguishing Fitzpatrick v. New Albany &c. R.

Co., 7 Ind. 436]; O'Connell v. Baltimore &c. R. Co., 20 Md. 212 (conductor of "dump" or gravel train, and laborer thereon); Cumberland Coal &c. Co. v. Scally, 27 Md. 589 (coal miner, detailed to repair break in railway owned by his master, and conductor of construction train on which he was working); Cassidy v. Maine &c. R. Co., 76 Me. 488; McGowan v. St. Louis &c. R. Co., 61 Mo. 528 (in the absence of proof that the conductor was in fact a vice-principal); Knahtla v. Oregon &c. R. Co., 21 Or. 136; s. c. 27 Pac. Rep. 91 (engineer and conductor of a train in use for patrolling and repairing a railroad-track are fellow servants with a section-hand upon the train employed to make repairs when defects are found, although he has no duties to perform upon the train); Ryan v. Cumberland Valley &c. R. Co., 23 Pa. St. 384; Corona v. Galveston &c. R. Co. (Tex.), 17 S. W. Rep. 384 (no off. rep.); Northern Pac. R. Co. v. Smith, 59 Fed. Rep. 993; s. c. 8 C. C. A. 663 (where the *roadmaster* is in charge of such train, directing its movements, and has control of all persons employed upon it, including the conductor and engineer); Martin v. Atchison &c. R. Co., 166 U. S. 399; s. c. 41 L. ed. 1051; 17 Sup. Ct. Rep. 603 (conductor and hands on a work-train, and a section-foreman in charge of a hand-car, are fellow servants of a laborer on the hand-car under the orders of such foreman).

ductor of a material-train has been regarded, not as a fellow servant of a laborer on the train, but as the vice-principal of the master, with respect to the duty of readjusting a switch;¹⁰ and a recovery was allowed a laborer upon a gravel-train for an injury received through the negligence of the conductor of the train, who had control, with power to hire and discharge;¹¹ and so where the foreman of a construction-train negligently caused the train to be moved back without waiting for a signal from a switchman who was making a coupling, to the latter's injury;^{11a} and where the conductor himself was killed through the negligence of the members of a bridge-gang while unloading a car, and the conductor had nothing to do with the loading or unloading of the cars or the work of building bridges, a recovery was allowed on the ground that the bridge-gang and the conductor were engaged in different departments of service, although the conductor was, at the time, trying to prevent one of the gang from injuring the back of the car.¹²

§ 5034. Conductor and Car-Repairer Working in the Same Yard.—A conductor of a freight-train is not a superior officer or vice-principal with respect to a car-repairer working in the same yard, but they are fellow servants.¹³

§ 5035. Conductor of Train and Track-Repairers.^{13a}—Whether a train-conductor and a section-foreman or section-men are to be deemed fellow servants is a question which may be answered differently according to the relation of the parties in each particular case. The relation of fellow servants between train-conductors and track-workmen has been affirmed in the case of a section-man working under the direction of the conductor of a delayed train in removing an obstruction from the track, although the rules of the company put him under the orders of the conductor;¹⁴ in the case of a man employed to shovel gravel upon a gravel-train, with respect to the conductor of the same train;¹⁵ with respect to a shoveller of snow, going upon a train engaged in removing snow from the track, and the con-

¹⁰ *Coleman v. Wilmington & C. R. Co.*, 25 S. C. 446; s. c. 60 Am. Rep. 516.

¹¹ *Chicago & C. R. Co. v. Blank*, 24 Ill. App. 438.

^{11a} *Louisville & C. R. Co. v. Wallingford*, 15 Ky. L. Rep. 170; s. c. 22 S. W. Rep. 439 (no off. rep.).

¹² *Missouri & C. R. Co. v. Hines*

(Tex. Civ. App.), 40 S. W. Rep. 152 (no off. rep.).

¹³ *Johnson v. Cleveland & C. R. Co.*, 11 Ohio C. C. 553; s. c. 1 Ohio C. D. 290.

^{13a} Compare *post*, § 5103, *et seq.*

¹⁴ *Slavens v. Northern Pac. R. Co.*, 97 Fed. Rep. 255; s. c. 38 C. C. A. 151.

¹⁵ *Heine v. Chicago & C. R. Co.*, 58 Wis. 525.

ductor of such train, who, by bucking the snow too hard, overturned the car in which the shoveller rode;¹⁶ in the case of a conductor and engineer of a work-train engaged in repairing the road, on the one hand, and an employé upon a hand-car, also engaged in making such repairs.¹⁷ The contrary conclusion has been reached in the case of the conductor of a material-train, having control of the train and its movements, and the foreman of a gang of men engaged in repairing the track, having power to direct them what to do and when to do it,—both being deemed vice-principals;¹⁸ in the case of a conductor who, in disregard of signals which were displayed at a station, ran into a car standing on the side-track having section-hands on board, with respect to such section-hands;¹⁹ by a strained course of reasoning, in the case of a section-hand engaged in repairing the track on a curve in a city, and a conductor who ran his train upon him without warning while racing,—on the ground that the jury might possibly have found that the race was authorized by the company.²⁰

§ 5036. Conductor and Yardman.—It has been held that a conductor who is injured by a collision between his train and a fugitive freight-car, caused by a failure to set the brakes or block the wheels of such car upon placing it upon a side-track, is a fellow servant of the yardman who put the car on the siding.²¹

§ 5037. Conductor and Fireman on Same Train.—The conductor of a train and a fireman upon the engine of the same train are generally regarded as fellow servants within the rule under consideration;²² but not in all jurisdictions.²³

¹⁶ *Howland v. Milwaukee &c. R. Co.*, 54 Wis. 226.

¹⁷ *Atchison &c. R. Co. v. Martin*, 7 N. Mex. 158; s. c. 34 Pac. Rep. 536.

¹⁸ *Miller v. Missouri &c. R. Co.*, 109 Mo. 350; s. c. 19 S. W. 58.

¹⁹ *Haney v. Pittsburgh &c. R. Co.*, 38 W. Va. 570; s. c. 18 S. E. Rep. 748.

²⁰ *Dick v. Railroad Co.*, 38 Ohio St. 389. See also, *Chicago &c. R. Co. v. Lundstrom*, 16 Neb. 254; s. c. 49 Am. Rep. 718 (conductor of a construction-train is not a fellow

servant with a gang of day-laborers employed to work on the road, though under his immediate orders).

²¹ *Harvey v. New York &c. R. Co.*, 57 Hun (N. Y.) 589; s. c. 32 N. Y. St. Rep. 817; 10 N. Y. Supp. 645.

²² *Meyer v. Illinois &c. R. Co.*, 177 Ill. 591; s. c. 5 Am. Neg. Rep. 558; 4 Chic. L. J. Wkly. 131; 12 Am. & Eng. R. Cas. (N. S.) 694; 52 N. E. Rep. 848; aff'g s. c. 65 Ill. App. 531.

²³ *Illinois &c. R. Co. v. Spence*, 93 Tenn. 173; s. c. 23 S. W. Rep. 211.

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§ 5039. **Engineer and Brakeman on Same Train.**—A locomotive-engineer and a brakeman on the same train are generally deemed fellow servants.¹ But the engineer has sometimes been deemed the

¹Summerhays v. Kansas Pac. R. Co., 2 Colo. 484; South Florida R. Co. v. Price, 32 Fla. 46; s. c. 13 South. Rep. 638 (prior to the statute of 1887); Chicago &c. R. Co. v. Brandau, 65 Ill. App. 150; St. Louis &c. R. Co. v. Britz, 72 Ill. 256; Brewster v. Chicago &c. R. Co., 114 Iowa 144; s. c. 86 N. W. Rep. 221 (in a jurisdiction where the common-law rule had not been abolished); Wallis v. Morgan's &c. R. &c. Co., 38 La. An. 156; Bell v. Globe Lumber Co., 107 La. 725; s. c. 31 South. Rep. 994; Warrington v. Atchison &c. R. Co., 46 Mo. App. 159 (brakeman with a switch-gang is a fellow servant with the engineer in charge of the switch-engine); Dysart v. Kansas City &c. R. Co., 145 Mo. 83; s. c. 46 S. W. Rep. 751; Keegan v. New York &c. R. Co., 45 App. Div. (N. Y.) 629; s. c. 64 N. Y. Supp. 595; Sherman v. Rochester &c. R. Co., 17 N. Y. 153; Railway Co. v. Ranney, 37

Ohio St. 665 [approving Pittsburgh &c. R. Co. v. Lewis, 33 Ohio St. 196]; Chaddick v. Lindsay, 5 Okla. 616; s. c. 49 Pac. Rep. 940; Evans v. Chamberlain, 40 S. C. 104; s. c. 18 S. E. Rep. 213 (engineer and brakeman engaged in coupling cars); Boatwright v. Northeastern R. Co., 25 S. C. 128; Louisville &c. R. Co. v. Martin, 87 Tenn. 398; s. c. 10 S. W. Rep. 772 (although, the forward end of the train having been uncoupled, the right to command had devolved upon the engineer, but he had not exercised the right) [compare East Tennessee &c. R. Co. v. Collins, 85 Tenn. 227; s. c. 1 S. W. Rep. 883 (engineer in charge of train)]; East Tennessee &c. R. Co. v. Smith, 89 Tenn. 114; s. c. 14 S. W. Rep. 1077 (the conductor being in charge of the train); Nashville &c. R. Co. v. Wheelless, 10 Lea (Tenn.) 741; s. c. 43 Am. Rep. 317; Texas &c. R. Co. v. Berry, 67 Tex. 238; International &c. R. Co. v. Moore, 16 Tex.

vice-principal of the company,—as, for instance, in the case of a train breaking in two, the conductor being left on the rear portion, in which case the engineer becomes the *superior officer* in command of the forward portion, and the company is liable in such a case for injuries resulting from his failure to send back a flagman.²

§ 5040. Jurisdictions in which Engineer and Brakeman on Same Train Not Deemed Fellow Servants.—In jurisdictions which do not regard a *superior servant*, ordering and controlling an inferior servant, as a fellow servant of the latter, a locomotive-engineer is frequently regarded as not being a fellow servant of a brakeman in such a sense that, if the brakeman is killed or injured by reason of the engineer's negligence, the railway company will escape liability.³

§ 5041. Engineer and Other Trainmen on Same Train.—A locomotive-engineer is generally deemed the fellow servant of other trainmen on the same train.⁴

§ 5042. Engineer and Conductor on the Same Train—Negligence of Engineer.—Viewing the question from the standpoint of the engineer,⁵ and recollecting that the engineer is not, with respect to the

Civ. App. 51; s. c. 41 S. W. Rep. 70 (circumstances under which engineer, instructing head brakeman as to his duties, was not a vice-principal as toward the latter); *Eckles v. Norfolk & C. R. Co.*, 96 Va. 69; s. c. 25 S. E. Rep. 545 (engineer injured freight-conductor while latter was acting as a brakeman); *McDonald v. Norfolk & C. R. Co.*, 95 Va. 98; s. c. 27 S. E. Rep. 821; 8 Am. & Eng. R. Cas. (N. S.) 552; *Fowler v. Chicago & C. R. Co.*, 61 Wis. 159; *Newport News & C. R. Co. v. Howe*, 6 U. S. App. 172; s. c. 3 C. C. A. 121; 52 Fed. Rep. 362 (train broke apart—brakeman sent forward to signal forward portion, which was under the control of the engineer); *Richmond & C. R. Co. v. Finley*, 63 Fed. Rep. 228; s. c. 25 U. S. App. 16; 12 C. C. A. 595; rev'g s. c. *sub nom.* *Finley v. Richmond & C. R. Co.*, 59 Fed. Rep. 419 (engineer temporarily in charge of a train cannot waive a standing rule of the company requiring coupling to be done with a stick, so as to render it liable to a brakeman injured while between the cars for the

purpose, with full knowledge of such rule); *Missouri Pac. R. Co. v. Texas & C. R. Co.*, 31 Fed. Rep. 527; *Central Trust Co. v. East Tennessee & C. R. Co.*, 69 Fed. Rep. 357.

² *Southern R. Co. v. Barr*, 21 Ky. L. Rep. 1615; s. c. 55 S. W. Rep. 900 (no off. rep.). See *post*, § 5054.

³ *Newport News & C. R. Co. v. Elfort*, 15 Ky. L. Rep. 600; s. c. 49 Alb. L. J. 289 (no off. rep.); *Means v. Carolina & C. R. Co.*, 126 N. C. 424; s. c. 35 S. E. Rep. 813 (was both engineer and conductor, and had the right to employ or discharge any of the crew); *East Tennessee & C. R. Co. v. Collins*, 85 Tenn. 227; s. c. 1 S. W. Rep. 883; *Ragsdale v. Northern & C. R. Co.*, 42 Fed. Rep. 383 (engineer is a vice-principal in respect to such movements of a train as are wholly under his control). But see *Baltimore & C. R. Co. v. Baugh*, 149 U. S. 368.

⁴ *Watts v. Hart*, 7 Wash. 178; s. c. 34 Pac. Rep. 423, 771.

⁵ See *ante*, § 5032, where it is viewed from the standpoint of the conductor.

conductor, a vice-principal of the master, but is either an inferior servant or a fellow servant of the conductor,—it follows that if the conductor is killed or injured through the negligence of the engineer, there can be no recovery of damages.⁶

§ 5043. Engineer of Construction-Train and Laborers Employed Thereon.—These are generally regarded as fellow servants.⁷

§ 5044. Engineer and Fireman on Same Train.—The engineer and fireman on the same locomotive-engine are generally classified as fellow servants, although the engineer is the superior servant with respect to the fireman, and is vested with authority to control him and to superintend his work.⁸

§ 5045. Engineer of One Train and Brakeman on Another Train.—Whether these will be deemed fellow servants depends upon constructions already adverted to.⁹ It has been held that an engineer of a “wild engine” not attached to a train is a fellow servant, and not a vice-principal, of a brakeman upon another train with which the engine collides by reason of such engineer’s negligence;¹⁰ and that a brakeman on a freight-train is a fellow servant with an engineer on a passenger-train of the same company;¹¹ but that an engineer in charge of an engine on the main track is not, as a matter of law, a fellow servant of a brakeman at the rear of a train on a side-track, who signals the engineer to go ahead.¹² Nor was such an engineer a fellow servant with a brakeman on a freight-train standing on a side-track, who negligently left a switch open, whereby a collision resulted in which the engineer was injured,—such brakeman being deemed the agent of the company to see that the switch was closed.¹³

⁶ *Linck v. Louisville &c. R. Co.*, 107 Ky. 370; s. c. 21 Ky. L. Rep. 1097; 54 S. W. Rep. 184 (though conductor was acting as brakeman); *Moore v. Jones*, 15 Tex. Civ. App. 391; s. c. 39 S. W. Rep. 593 (under different sections of the same statute).

⁷ *Chicago &c. R. Co. v. McDonald*, 21 Ill. App. 409; *Miller v. Ohio &c. R. Co.*, 24 Ill. App. 326.

⁸ *Chicago &c. R. Co. v. Brandau*, 65 Ill. App. 150.

⁹ *Ante*, § 5014, *et seq.*

¹⁰ *Healey v. New York &c. R. Co.*, 20 R. I. 136; s. c. 37 Atl. Rep. 676; 3 Am. Neg. Rep. 98.

¹¹ *Louisville &c. R. Co. v. Robin-*

son, 4 Bush (Ky.) 507. See also, *Pittsburgh &c. R. Co. v. Devinney*, 17 Ohio St. 197; *Wright v. New York &c. R. Co.*, 25 N. Y. 562.

¹² *Chicago &c. R. Co. v. Flynn*, 54 Ill. App. 387; s. c. aff’d, 154 Ill. 448; 40 N. E. Rep. 332. See also, *Houston &c. R. Co. v. Patterson*, 20 Tex. Civ. App. 255; s. c. 48 S. W. Rep. 747 (brakeman and engineer belonging to different crews operating different trains on same division are not fellow servants).

¹³ *St. Louis &c. R. Co. v. Kelton*, 28 Tex. Civ. App. 137; s. c. 66 S. W. Rep. 887. See *post*, § 5085.

§ 5046. Engineers of Two Different Engines Drawing the Same Train.—If two engines are coupled together and drawing the same train, and a collision is caused by the negligence of the engineer in charge of the first engine, whereby the engineer in charge of the second engine is injured, he will not be entitled to recover damages from the company, because the two engineers are fellow servants.¹⁴

§ 5047. Engineer and Engine-Wiper.—An engineer in charge of an engine is a fellow servant of an engine-wiper, engaged in cleaning it, who is injured by the act of a hostler who gets upon it and opens the throttle for the purpose of moving it, in violation of a rule of the company.¹⁵ An engine-wiper employed in the yard of a railroad company, who fires up the engines before leaving-time, is a fellow servant with an engineer in the yard through whose negligence in doing the necessary shifting and making up of trains preparatory to leaving he is injured, although they are under different bosses and he has been told to go to the engineer for instruction if his boss is absent.¹⁶

§ 5048. Engineer and Member of Fence-Gang.—A member of a railway fencing-gang is not, as matter of law, a fellow servant with the locomotive-engineer of a freight-train, although at the time of being injured the member of the fence-gang is attempting to get upon a car for the purpose of unloading posts from it,—the reason being that they are not in “con-association” under the Illinois rule, but are engaged in different departments of service.¹⁷

§ 5049. Engineer and Shovellers on Gravel-Train.—One who is employed by a railroad company to assist in loading and unloading gravel used in ballasting the road is, while riding from the gravel-pit to the place of unloading, a fellow servant of the engineer in charge of the locomotive, and the company is not liable for the killing of the gravel-shoveller through the negligence of the engineer.¹⁸

¹⁴ *Cincinnati &c. R. Co. v. Roberts*, 110 Ky. 856; s. c. 23 Ky. L. Rep. 264; 62 S. W. Rep. 901.

¹⁵ *Louisville &c. R. Co. v. Richardson*, 100 Ala. 232; s. c. 14 South. Rep. 209.

¹⁶ *South Florida R. Co. v. Weese*, 32 Fla. 212; s. c. 13 South. Rep. 436.

¹⁷ *Louisville &c. R. Co. v. Haw-*

thorn, 147 Ill. 226; s. c. 35 N. E. Rep. 534; aff'g s. c. 45 Ill. App. 635.

¹⁸ *Kumler v. Junction R. Co.*, 33 Ohio St. 150; *Ohio &c. R. Co. v. Tindall*, 13 Ind. 366 [distinguishing *Fitzpatrick v. New Albany &c. R. Co.*, 7 Ind. 436]; *St. Louis &c. R. Co. v. Britz*, 72 Ill. 256 (engineer, brakeman, and shoveller are fellow servants).

§ 5050. **Engineer and Switchman.**—An engineer and switchman brought into con-association in the discharge of their respective duties are fellow servants.¹⁹

§ 5051. **Engineer of Construction-Train and Section-Hand on such Train.**—These are fellow servants where both are in the employ of the same company.²⁰

§ 5052. **Engineer and Flagman at a Crossing.**—These are fellow servants; so that the negligence of the engineer in running his engine with an unlighted headlight, because it is defective, instead of obeying the rules, which require him to examine the engine, and, in case of defects discovered therein, to take it to the repair-shop, by which negligence a flagman at a crossing is killed, does not render the company liable.²¹

§ 5053. **Engineer and Torpedo-Man.**—The engineer of a train and an employé of the company whose duty it is to display danger-signals upon the track to such train, which is following, are fellow servants; so that if the latter is injured by the negligence of the engineer, the company is not liable.²²

§ 5054. **Engineer Acting in the Place of Conductor.**—A rule of a railway company that, "in case an engine is run over any portion of the road unaccompanied by a conductor, the engineer must perform the duties and make the reports of a conductor, in addition to his own," does not have the effect of modifying the rule which makes

¹⁹ *Creswell v. Wilmington &c. R. Co.*, 2 Pen. (Del.) 210; s. c. 43 Atl. Rep. 629; 14 Am. & Eng. R. Cas. (N. S.) 625 (engineer of a locomotive engaged in shifting cars is a fellow servant of one of the shifting-crew, killed while attempting to make a coupling); *Wilson v. Madison &c. R. Co.*, 81 Ind. 226 (servant at a particular station, part of whose duties consisted in coupling and uncoupling trains, and the engineer and conductor of any train that might come along and need his services in switching cars, were fellow servants); *Chicago &c. R. Co. v. Toughy*, 26 Ill. App. 99 (locomotive-engineer and switchman engaged in coupling cars); *Chicago &c. R. Co. v. Henry*, 7 Ill. App. 322 (engineer running a switch-engine and a switch-tender are engaged in

a common employment); *Satterly v. Morgan*, 35 La. An. 1166; *Rutledge v. Missouri Pac. R. Co.*, 123 Mo. 121; s. c. 24 S. W. Rep. 1053; 27 S. W. Rep. 327 (switchman injured while attempting to uncouple a car in a railroad-yard is a fellow servant with the engineer in charge of the train and with an employé on the train who gives a signal for its movement); *Naylor v. New York &c. R. Co.*, 33 Fed. Rep. 801.

²⁰ *Houston &c. R. Co. v. Rider*, 62 Tex. 267.

²¹ *McDonald v. New York &c. R. Co.*, 63 Hun (N. Y.) 587; s. c. 45 N. Y. St. Rep. 711; 18 N. Y. Supp. 609.

²² *East Tennessee &c. R. Co. v. Rush*, 15 Lea (Tenn.) 145.

the engineer a fellow servant of subordinate employés of the company.²³ It has been held that an engineer temporarily in charge of a train cannot waive a standing rule requiring coupling to be done with a stick, so as to render the company liable to a brakeman who is injured while attempting to couple cars in such manner, with full knowledge of the rule.²⁴

§ 5055. **Engineer and Cook.**—A locomotive-engineer is not a fellow servant of a woman who acts as a cook on a car attached to a construction-train, for her husband, who has a contract with the company to board the railroad men, his compensation being retained by the company out of their wages.²⁵

§ 5056. **Engineer and Employé Riding as Passenger.**—These are generally regarded as fellow servants.²⁶ One court has stated the rule broadly by saying that where one accepts employment from a railroad company, involving his transportation from place to place, injury by the negligence of any employé connected with the transportation of trains over its road, is within the risk ordinarily incident to the service undertaken.²⁷ But a railway employé, while riding in the car of his employer from one place to another, in obedience to orders, is not a fellow servant of the engineer of the train, under a statute providing that all persons engaged in the common service of a railroad company, and who are in the same grade of employment and are working together, are fellow servants.²⁸

§ 5057. **Engineer and Section-Master.**—In one jurisdiction a locomotive-engineer is not deemed the fellow servant of a section-master, whose duty it is to look out for the condition of the road, and to make suitable repair, because it is the personal duty of the master to

²³ *Stephani v. Southern &c. R. Co.*, 19 Utah 196; s. c. 6 Am. Neg. Rep. 22; 14 Am. & Eng. R. Cas. (N. S.) 575; 57 Pac. Rep. 34. See *ante*, § 5039.

²⁴ *Richmond &c. R. Co. v. Finley*, 63 Fed. Rep. 228; s. c. 25 U. S. App. 16; 12 C. C. A. 595; rev'g s. c. *sub nom.* *Finley v. Richmond &c. R. Co.*, 59 Fed. Rep. 419.

²⁵ *Brown v. Sullivan*, 71 Tex. 470; s. c. 10 S. W. Rep. 288. But a cook on a steam-tug has been held to be a fellow servant of the engineer, on the sole ground that they were employed by a common master: *Grimsley v. Hankins*, 46 Fed. Rep. 400.

²⁶ *Evansville &c. R. Co. v. Henderson*, 134 Ind. 636; s. c. 33 N. E. Rep. 1021; *Railey v. Garbutt*, 112 Ga. 288; s. c. 37 S. E. Rep. 360 (wood-cutter and a locomotive-engineer).

²⁷ *Benignia v. Pennsylvania R. Co.*, 197 Pa. St. 384; s. c. 47 Atl. Rep. 359.

²⁸ *Galveston &c. R. Co. v. Norris* (Tex. Civ. App.), 29 S. W. Rép. 950 (no off. rep.); *Galveston &c. R. Co. v. Leonard* (Tex. Civ. App.), 29 S. W. Rep. 955 (no off. rep.); *Galveston &c. R. Co. v. Crawford*, 9 Tex. Civ. App. 245; s. c. 27 S. W. Rep. 822; 29 S. W. Rep. 958.

provide and maintain a safe road-bed, and the section-master, in so doing, is a vice-principal.²⁹

§ 5058. **Engineer and Foreman of Water-Supply.**—The foreman of the water-supply arrangements on a division of a railroad, whose duty it is to supervise the tanks and pumping-machinery at water-stations and to keep them in repair, and who, in the performance of his duties, is required to ride over the road from station to station on a pass which is furnished him, which is good on all trains, is deemed a fellow servant of an engineer on whose engine he is riding to a station where his services are required; so that, if he is injured in a collision brought about by the negligence of the engineer, he cannot recover damages from the company.³⁰

ARTICLE V. SWITCHMEN, YARDMEN, ROUNDHOUSE-MEN, ETC.

SECTION	SECTION
5062. Foreman of yard-engines and switchmen or yardmen.	5074. Yardmen and roundhouse-man.
5063. Foreman of switch-crew and member of crew.	5075. Yard-clerk and switching-crew.
5064. Foreman of roundhouse and brakeman.	5076. Yard-clerk and engineer of freight-train.
5065. Hostler at roundhouse and his helper.	5077. Carpenter in switch-yard and engineer.
5066. Employé of outside foreman and employé of inside roundhouse-foreman.	5078. Yard conductor and fireman.
5067. Switchman and trainmen.	5079. Yardmaster and yard-foreman.
5068. Switchmen on different engines.	5080. Yardman and trainman.
5069. Members of different switching-crews.	5081. Yardmaster or yard-foreman, and yard-helper or yard-hand.
5070. Foreman of one switching-crew and members of another switching-crew.	5082. Yard-superintendent and foreman of yard-engines.
5071. Switchman and switchmen.	5083. Car-inspector and yardmaster over him.
5072. Night-watcher and foreman of yard-crew.	5084. Engine-repairer and yardman assisting him.
5073. Yardmaster and switchman.	5085. Switch-tender and other employés.

§ 5062. **Foreman of Yard-Engines and Switchmen or Yardmen.**—These, when engaged in the same yard in switching cars, are deemed

²⁹ Calvo v. Charlotte &c. R. Co., 23 S. C. 526; s. c. 55 Am. Rep. 28.

³⁰ Louisville &c. R. Co. v. Stuber, 108 Fed. Rep. 934; s. c. 48 C. C. A.

149; rev'g s. c. *sub nom.* Stuber v. Louisville &c. R. Co., 102 Fed. Rep. 421.

fellow servants.¹ This is so under the "con-association doctrine" which obtains in Illinois; so that two engine-crews engaged in switching cars in the yards of a company, each of which has a foreman who gives orders to his own crew, while both crews are under the command of a common yardmaster and are associated together in the business of switching cars in the company's yards, are fellow servants.² It is so under a statute of Texas, defining fellow servants to be persons engaged in the common service of a railway company in the same grade of employment, without any superintendence or control over their fellow employés, or authority to direct any other employé in performing his duties, working together at the same place and to a common purpose.³

§ 5063. Foreman of Switch-Crew and Member of Crew.—In some jurisdictions, it is held that a foreman of a switch-crew is not a fellow servant with a member of the crew under him,—as where the plaintiff, under the orders of his foreman, was making a coupling, and the foreman negligently sent a second cut of cars into the switch, injuring the plaintiff.⁴ So, where an employé was injured by the negligence of his foreman, while making a running switch under the foreman's orders; and it appeared that the foreman of the crew, who received his orders from the yardmaster, in carrying out such orders had control and directed the movements of the switch-crew,—the jury were warranted in finding that such foreman was not a fellow servant when exercising command over the crew.⁵

§ 5064. Foreman of Roundhouse and Brakeman.—A brakeman on a freight-train is not a fellow servant with the foreman of a roundhouse whose duty it is to keep the engines in repair; so that if the brakeman is injured by the negligence of the foreman in suffering an engine to go out in a bad state of repair, it is not the negligence of a fellow servant, but that of the master, since it is a failure to perform one of the primary or absolute duties of the master.⁶

¹ *Harley v. Louisville & C. R. Co.*, 57 Fed. Rep. 144.

² *O'Leary v. Wabash R. Co.*, 52 Ill. App. 641.

³ *Gulf & C. Co. v. Warner*, 89 Tex. 475; s. c. 35 S. W. Rep. 364. To the same effect, see *Texas & C. R. Co. v. Tatman*, 10 Tex. Civ. App. 434; s. c. 31 S. W. Rep. 333 (foremen of two yard-engines).

⁴ *Terre Haute & C. R. Co. v. Rit-*

tenhouse, 28 Ind. App. 633; s. c. 62 N. E. Rep. 295 (under Employers' Liability Act).

⁵ *Illinois Cent. R. Co. v. Johnson*, 95 Ill. App. 54; s. c. aff'd, 191 Ill. 594; 61 N. E. Rep. 334; *Taylor v. Missouri Pac. R. Co. (Mo.)*, 16 S. W. Rep. 206 (no off. rep.).

⁶ *Ohio & C. R. Co. v. Stein*, 140 Ind. 61; s. c. 39 N. E. Rep. 246.

§ 5065. **Hostler at Roundhouse and his Helper.**—A hostler at a roundhouse and his helper, in the duty of caring for locomotives, are fellow servants with respect to an injury which the helper may receive while working with the hostler, where the injury is not due to any improper exercise of authority by the hostler over the helper.⁷ It has been held that the head hostler of a roundhouse is a fellow servant, and not the vice-principal, of a locomotive-fireman and of a “wiper” or “fire-puller” employed in the roundhouse; and hence his knowledge of the incompetency of the latter employé is not chargeable to the company so as to render it liable for personal injuries to the fireman resulting from such incompetency, where the roundhouse is in charge of a foreman and master mechanic, who alone has the power to hire and discharge servants.⁸

§ 5066. **Employé of Outside Foreman and Employé of Inside Roundhouse-Foreman.**—An employé was injured through a collision between an engine standing over a cinder-pit in a roundhouse, on which engine the employé was engaged under orders of the inside roundhouse-foreman, and an engine which was run in from the outside under orders from the outside foreman. It was held that the injured employé and the employé acting under the orders of the outside foreman were not fellow servants.⁹

§ 5067. **Switchman and Trainmen.**—A switchman is ¹⁰ or is not ¹¹ a fellow servant of other trainmen according to the supreme thought of the hour or of the court.

⁷ Chicago &c. R. Co. v. Massig, 50 Ill. App. 666; Clay v. Chicago &c. R. Co., 56 Ill. App. 235.

⁸ Smith v. St. Louis &c. R. Co., 151 Mo. 391; s. c. 14 Am. & Eng. R. Cas. (N. S.) 609; 52 S. W. Rep. 378.

⁹ Texas &c. R. Co. v. Scruggs, 23 Tex. Civ. App. 712; s. c. 58 S. W. Rep. 186.

¹⁰ St. Louis &c. R. Co. v. Brown, 67 Ark. 295; s. c. 54 S. W. Rep. 865 (coupling-link on foreign car broke through negligence of switchman, whose duty it was to put only sound links and pins in the cars composing the train; fireman injured—no recovery); Miller v. Southern Pac. R. Co., 20 Or. 285; s. c. 43 Alb. L. J. 354; 26 Pac. Rep. 70; Guthrie v. Southern Pac. R. Co. (Or.), 26 Pac. Rep. 76 (no off. rep.) (switchman failing properly

to close a switch or to report that it is out of repair; trainman injured—no liability); Hudson v. Charleston &c. R. Co., 55 Fed. Rep. 248 (fireman and switchman engaged in coupling or uncoupling cars).

¹¹ Louisville &c. R. Co. v. Sheets, 11 Ky. L. Rep. 781; s. c. 13 S. W. Rep. 248; 41 Am. & Eng. R. Cas. 470 (no off. rep.) (not a fellow servant of a locomotive-engineer, under a statute); Lake Shore &c. R. Co. v. Feller, 21 Ohio C. C. 605; s. c. 11 Ohio C. D. 799 (not a fellow servant of a brakeman where division yardmaster had delegated to him the duty to warn an approaching train of danger); Lake Shore &c. R. Co. v. Pero, 22 Ohio C. C. 130; s. c. 12 Ohio C. D. 25 (switch-tender not a fellow servant of train-conductor under a statute); Lake Shore &c. R. Co. v. Mau,

§ 5068. **Switchmen on Different Engines.**—In Texas a switchman on one engine is not deemed a fellow servant of a switchman on another engine.¹²

§ 5069. **Members of Different Switching-Crews.**—Two switching-crews of the same railroad company are fellow servants, so that the company is not liable for an injury to a member of one crew caused by negligence on the part of the other crew, or of a member of it.¹³

§ 5070. **Foreman of One Switching-Crew and Members of Another Switching-Crew.**—There is a decision to the effect that the foreman of one of two crews in a switch-yard, all being employes of the railroad company, while being a vice-principal with respect to the members of his own crew, is yet a fellow servant with respect to the members of the other crew; so that the company is not liable for injury inflicted through the negligence of such foreman upon a member of the other crew, where all are under the control and direction of the same yardmaster, and the foreman has no control or direction over the members of the other crew.¹⁴

§ 5071. **Switchman and Switchmen.**—Switchmen working together in the same squad or in the same yard are, of course, fellow servants.¹⁵

§ 5072. **Night-Watcher and Foreman of Yard-Crew.**—A night-watcher employed by a railroad company to note and report upon the conduct of a foreman of a night crew, whose duty it is to make up trains, is a fellow servant of the foreman.¹⁶

§ 5073. **Yardmaster and Switchman.**—A yardmaster, with power to hire and discharge men, to assign them to their duties, and to direct them in the performance thereof, is not a fellow servant of a switchman employed in the yard, but is the vice-principal of the railway company.¹⁷

9 Ohio C. C. 173 (railroad company liable to a switchman riding home as customary upon an engine, due to the negligence of a brakeman and the conductor).

¹² Galveston &c. R. Co. v. Master-son, 91 Tex. 385; s. c. 51 S. W. Rep. 1091 (citing as overruled, Texas &c. R. Co. v. Tatman, 10 Tex. Civ. App. 434; s. c. 31 S. W. Rep. 333).

¹³ Chicago &c. R. Co. v. Hartley, 90 Ill. App. 284; Chicago &c. R. Co.

v. Driscoll, 176 Ill. 330; s. c. 4 Chic. L. J. Wkly. 130; 12 Am. & Eng. R. Cas. (N. S.) 644; 52 N. E. Rep. 921; rev'g s. c. 70 Ill. App. 91.

¹⁴ Missouri Pac. R. Co. v. Lyons, 54 Neb. 633; s. c. 75 N. W. Rep. 31.

¹⁵ Illinois Cent. R. Co. v. Stewart, — Ky. —; s. c. 23 Ky. L. Rep. 637; 63 S. W. Rep. 596.

¹⁶ Chicago &c. R. Co. v. Geary, 110 Ill. 383.

¹⁷ Lytle v. Chicago &c. R. Co., 84

§ 5074. **Yardmen and Roundhouse-Man.**—It has been held that a roundhouse employé, subject to the control of the foreman of the roundhouse, is not a fellow servant of employés of the yardmaster, so as to relieve the company from liability for an injury to him from the negligence of the employés of the yardmaster in leaving a coal-car too near the work-track to allow clearance, where it was the duty of the yardmaster's employés to place the coal-cars in proximity to the engines, and the duty of the roundhouse foreman's employés to take coal from such cars for the engines.¹⁸

§ 5075. **Yard-Clerk and Switching-Crew.**—A clerk whose duty it is to take the numbers of cars delivered to a railroad company in its yard, under instructions to keep out of the way of the switching-crew therein, assumes, as one of the ordinary hazards of the service, the risk of injury from the negligence of the switching-crew.¹⁹

§ 5076. **Yard-Clerk and Engineer of Freight-Train.**—It has been held that a "yard-clerk," whose duty it is to take a record of the seals of the cars in the yard, is, while so engaged, a fellow servant of an engineer of a freight-train backing into the yard.²⁰ So, one whose duties are to take the number of each car coming into a station is a fellow servant with the engineer, since, though engaged in different kinds of work, their duties bring them into constant association.²¹ But a car accountant employed by a terminal railway company to check up the cars that come into the common yard is not a fellow servant of a locomotive-engineer of one of the companies using the yard under an arrangement with the terminal company, where, in taking an account of the cars, he is not acting for the railroad company but is acting for the terminal company, and there is no common superior having control of all persons engaged

Mich. 289; s. c. 47 N. W. Rep. 571. See also, *Taylor v. Missouri Pac. R. Co.* (Mo.), 16 S. W. Rep. 206 (no off. rep.) (yardmaster with general charge of a railway-yard not a fellow servant of a member of a switching crew employed in the yard). On the other hand, where a "foreign car" was retained in the yards of a railway company, after it had been ordered to be returned as defective, by the yardmaster, or by crews in the yard, this was deemed an act of a fellow servant of a switchman injured while attempting to couple such car to

another car for the purpose of removing it from the yard: *Atchison & C. R. Co. v. Meyers*, 76 Fed. Rep. 443; s. c. 46 U. S. App. 226; 22 C. C. A. 268.

¹⁸ *Houston & C. R. Co. v. Talley*, 15 Tex. Civ. App. 115; s. c. 39 S. W. Rep. 206.

¹⁹ *East St. Louis & C. R. Co. v. O'Hara*, 59 Ill. App. 649.

²⁰ *New York & C. R. Co. v. Hyde*, 56 Fed. Rep. 188; s. c. 5 C. C. A. 461.

²¹ *Beuhring v. Chesapeake & C. R. Co.*, 37 W. Va. 502; s. c. 16 S. E. Rep. 435.

about the yards,—the reason being that he and the engineer are servants of different masters.²²

§ 5077. **Carpenter in Switch-Yard and Engineer.**—A carpenter employed in a railway switch-yard is not a fellow servant of a locomotive-engineer.²³

§ 5078. **Yard Conductor and Fireman.**—A yard conductor whose duty it is to take care of a switch in the railway-yard is a fellow servant of a fireman on a train who is injured by the negligence of the yard conductor in leaving the switch open.²⁴

§ 5079. **Yardmaster and Yard-Foreman.**—It has been held (but the view is believed to be untenable) that a railway yardmaster, who is made responsible for the condition of the yards at the terminus of a division of the road, who directs the incoming and the starting of trains, who is authorized to employ and discharge men, but who, at the same time, is subject to the orders of the superintendent and trainmaster,—is but a fellow servant of the foreman of a switching-gang employed in the yard under him.²⁵

§ 5080. **Yardman and Trainmen.**—A yardman engaged in sweeping snow from the tracks in the yard, and an engineer and brakeman engaged in the yard in switching cars, are fellow servants, so that if the yardman is injured by the negligence of the engineer or brakeman, he cannot recover damages from the company.²⁶

§ 5081. **Yardmaster or Yard-Foreman, and Yard-Helper or Yard-Hand.**—These are generally regarded as fellow servants when working together in a railway yard, so that if the inferior servant is injured

²² Northern Pac. R. Co. v. Craft, 69 Fed. Rep. 124; s. c. 16 C. C. A. 175; 29 U. S. App. 687.

²³ Egmann v. East St. Louis & C. Co., 65 Ill. App. 345; s. c. on former appeal, *sub nom.* East St. Louis & C. R. Co. v. Eggmann, 58 Ill. App. 69.

²⁴ Parker v. New York & C. R. Co., 18 R. I. 773; s. c. 30 Atl. Rep. 849.

²⁵ Thomas v. Cincinnati & C. R. Co., 97 Fed. Rep. 245. To the same effect, see Cincinnati & C. R. Co. v. Gray, 41 C. C. A. 535; s. c. 101 Fed. Rep. 623; 50 L. R. A. 47 (general yardmaster and a yard-foreman are fellow servants).

²⁶ Corcoran v. New York & C. R. Co., 46 App. Div. (N. Y.) 201; s. c. 61 N. Y. Supp. 672. But an engineer in charge of a road-engine which is temporarily in a railroad-yard for the purpose of taking out a train, is not a fellow servant of the foreman and members of the yard-crew under him, under Tex. Rev. Stat. 1895, art. 4560g: Missouri & C. R. Co. v. Whitelock, 16 Tex. Civ. App. 176; s. c. 41 S. W. Rep. 407. Compare Texas & C. R. Co. v. Harrington, 62 Tex. 597 (where a contrary conclusion is reached, but at common law).

through the negligence of the superior one, there can be no recovery from the company.²⁷

§ 5082. **Yard-Superintendent and Foreman of Yard-Engines.**—In Texas a yard-superintendent is not a fellow servant with the foreman of yard-engines engaged in switching cars about the yard.²⁸

§ 5083. **Car-Inspector and Yardmaster Over Him.**—It has been held that a yardmaster, and an employé under him charged with the duty of inspecting cars in the yard to ascertain if they are in condition to move, are not fellow servants; so that if, before such employé has finished his inspection, the yardmaster negligently orders the train on which the inspector is engaged to move out, by reason of which the inspector is killed, the railroad company is liable.²⁹

§ 5084. **Engine-Repairer and Yardman Assisting Him.**—A yardman who was injured while assisting an engine-repairer to remove a heavy piece of machinery from an engine, through the breaking of a plank which the engine-repairer had placed in position and on which they were both standing, could not recover damages from the master, he and the engine-repairer being fellow servants, and the defect in the plank not being patent or known to the company.³⁰

§ 5085. **Switch-Tender and Other Employés.**—It has been held that the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal, absolute, or unalienable duties of the master.³¹ Thus, a switch-tender is a fellow servant with a locomotive-engineer;³² and with a person employed by a railroad

²⁷ *Moody v. Hamilton Man. Co.*, 159 Mass. 70; s. c. 34 N. E. Rep. 185; *Fraker v. St. Paul & C. R. Co.*, 32 Minn. 54 (yard-foreman who is subject to the orders of a yardmaster is a fellow servant of one employed in a yard in moving cars). See also, *Chicago & C. R. Co. v. Scheuring*, 4 Ill. App. 533. Compare *North Chicago Rolling Mills Co. v. Monka*, 4 Ill. App. 664; *Farquhar v. Alabama & C. R. Co.*, 78 Miss. 193; s. c. 28 South. Rep. 850 (yardmaster riding on a flat-car attached to a switching-engine is a fellow servant of the engineer). But in one jurisdiction, a yard-foreman is held not to be a fellow servant of his helper, who is subject to his orders, so as to preclude a recovery by the helper

of damages from the company for the negligence of the foreman in permitting cars to be backed with great force against other cars which the helper is engaged in coupling in the night-time: *Armstrong v. Oregon & C. R. Co.*, 8 Utah 420; s. c. 32 Pac. Rep. 693.

²⁸ *Texas & C. R. Co. v. Tatman*, 10 Tex. Civ. App. 434; s. c. 31 S. W. Rep. 333.

²⁹ *Driscoll v. Chicago & C. R. Co.*, 97 Ill. App. 668.

³⁰ *Chicago & C. R. Co. v. Scheuring*, 4 Ill. App. 533.

³¹ *St. Louis & C. R. Co. v. Needham*, 63 Fed. Rep. 107; s. c. 25 L. R. A. 833; 11 C. C. A. 56.

³² *Farwell v. Boston & C. R. Co.*, 4 Metc. (Mass.) 49; s. c. 2 Thomp. Neg. (1st ed.), p. 924.

company to tend a chain across a street for the purpose of preventing travel over the track when trains are about to pass, but who occasionally signals trains with his flag.³³ For like reasons, a fireman on an engine engaged in hauling freight-cars into the yard of a railroad company has been held to be in the same general business with another servant of the company whose duties were usually confined to the roundhouse of the company within the yard, but who occasionally acted as a *substitute for the switch-tender*.³⁴ A similar conclusion was reached where a brakeman was injured by the negligence of a section-boss whose duty it was to tend the switch at a particular station.³⁵ In some jurisdictions, however, it is considered that the person whose duty it is to tend a switch, even though the duty be temporary,—as in the case of a brakeman whose duty it is to throw a switch to admit his train to a side-track, and to close the switch after the train is on the side-track,—is the agent of the company in that respect.³⁶

ARTICLE VI. INSPECTORS AND REPAIRERS OF CARS AND LOCOMOTIVES.

SECTION	SECTION
5089. Car-inspector not a fellow servant of trainmen, yardmen, etc.	5093. Brakeman and car-inspector.
5090. Contrary doctrine that a car-inspector is a fellow servant of trainmen.	5094. Inspector of locomotive-boilers and other employés.
5091. Car-repairers are fellow servants of trainmen, yardmen, etc.	5095. Inspector of "foreign" cars and other employés.
5092. Car-repairer and foreman.	5096. Station-agent and car-repairer or inspector.
	5097. Car-builder and car-repairer.
	5098. Street-railway conductor and inspector of trolley-cars.

§ 5089. **Car-Inspector Not a Fellow Servant of Trainmen, Yardmen, etc.**—On principle, a railway employé, by whatever name designated, whose duty it is to inspect the cars or engines of the company for the purpose of ascertaining whether they are in a safe and proper condition for service, performs a primary or absolute duty of the company, within the meaning of a principle already considered;¹

³³ *Sammon v. New York &c. R. Co.*, 62 N. Y. 251.

³⁴ *Tinney v. Boston &c. R. Co.*, 52 N. Y. 632; aff'g s. c. 62 Barb. (N. Y.) 218.

³⁵ *Slattery v. Toledo &c. R. Co.*, 23 Ind. 81.

³⁶ *St. Louis &c. R. Co. v. Kelton*, 28 Tex. Civ. App. 137; s. c. 66 S. W. Rep. 887; *Coleman v. Wilmington &c. R. Co.*, 25 S. C. 446; s. c. 60 Am. Rep. 516 (conductor of material-train).

¹ *Ante*, § 4923, *et seq.*

so that, if he is negligent in the performance of such duty, whereby another employé of the company is killed or injured, such negligence will be, in law, the negligence of the company, and will give a right of action against the company.² In conformity with this principle, it has been held that inspectors of *foreign* cars received for transportation over their employer's road are not the fellow servants of employés operating the train in which such cars are placed, although all are employed by the same company.³

² *Illinois &c. R. Co. v. Hilliard*, 99 Ky. 684; s. c. 18 Ky. L. Rep. 505; s. c. 37 S. W. Rep. 75 (conductor of a freight-train not a fellow servant of a car-inspector by whose negligence in failing to inspect the ladder of one of the cars the conductor is injured); *Cincinnati &c. R. Co. v. McMullen*, 117 Ind. 439 (car-inspector, in regard to inspecting the company's cars, not a fellow servant of a brakeman).

³ *Louisville &c. R. Co. v. Bates*, 146 Ind. 564; s. c. 45 N. E. Rep. 108; *Ohio &c. R. Co. v. Percy*, 128 Ind. 197; s. c. 27 N. E. Rep. 479 (car-inspector is not fellow servant of brakeman); *Chicago &c. R. Co. v. Hoyt*, 122 Ill. 369; s. c. 9 West. Rep. 785; 12 N. E. Rep. 225 (engineer and inspector are not fellow servants engaged in a common service); *Chicago &c. R. Co. v. Kneirim*, 48 Ill. App. 243 (car-inspector and yard switchman not fellow servants); *Brann v. Chicago &c. R. Co.*, 53 Iowa 595; s. c. 36 Am. Rep. 243; *Dewey v. Detroit &c. R. Co.*, 97 Mich. 329; s. c. 16 L. R. A. 342; 12 Rail. & Corp. L. J. 154; 52 N. W. Rep. 942 (car loaded so that lumber projected over the end, increasing the danger of making a coupling); *Tierney v. Minneapolis &c. R. Co.*, 33 Minn. 311; s. c. 53 Am. Rep. 35 (car-inspector and a car-coupler not fellow servants); *Long v. Pacific R. Co.*, 65 Mo. 225; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567 (not a fellow servant of a brakeman); *Columbus &c. R. Co. v. Erick*, 51 Ohio St. 146; s. c. 31 Ohio L. J. 260; 37 N. E. Rep. 128 (chief inspector of cars, having other inspectors under him, is not a fellow servant of a brakeman, under Ohio statute); *International &c. R. Co. v. Kernan*, 78 Tex. 294; s. c. 9 L. R. A. 703; *St. Louis &c. R. Co. v. Putnam*, 1 Tex. Civ. App. 142; s. c. 20 S. W. Rep.

1002 (car-inspector not a fellow servant with a brakeman); *Daniels v. Union &c. R. Co.*, 6 Utah 357; s. c. 23 Pac. Rep. 762 (not a fellow servant with a brakeman); *Richmond &c. R. Co. v. Norment*, 84 Va. 167; s. c. 4 S. E. Rep. 211 (engineer not a fellow servant with an "overhauler of cars"); *Cooper v. Pittsburgh &c. R. Co.*, 24 W. Va. 37; *Little Rock &c. R. Co. v. Mosely*, 6 C. C. A. 225; s. c. 56 Fed. Rep. 1009 (car-inspector not fellow servant with a switchman in a railroad freight-yard so as to prevent the switchman from recovering for injuries occasioned by the negligence of the former in failing properly to inspect a coupling-link); *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; s. c. 17 Wash. L. Rep. 630; 6 Rail. & Corp. L. J. 327 (not a fellow servant with a brakeman). A car-inspector was not deemed a fellow servant with a switchman in the employ of an association composed of the company whose servant the inspector was, and two others, which jointly occupied a depot, tracks, and yards in a city, although the switchman, at the time of the injury to the inspector, was engaged in the business of the company by which the inspector was employed; nor did the car-inspector assume the risk of injury from the negligence of such switchman: *Kastl v. Wabash R. Co.*, 114 Mich. 43; s. c. 4 Det. Leg. N. 475; 72 N. W. Rep. 28. The servant of a contractor engaged in inspecting and repairing the railroad-cars of the defendant, who was injured by the negligent starting of the train to which the car he was working on was attached, was entitled to a recovery against the defendant for his injuries, because he and the employés in charge of the train were found by a jury, under conflicting

§ 5090. **Contrary Doctrine that a Car-Inspector is a Fellow Servant of Trainmen.**—An opposing doctrine, and one not supported on sound principle, is that the car-inspector is a fellow servant of the men employed in operating the cars which he inspects, so that if they are injured in consequence of the negligent performance or non-performance of his duty, there can be no recovery of damages from the railway company.* The doctrine of these cases seems to be opposed to sound principle, since a car-inspector is plainly employed by the railway company to perform one of the primary or absolute duties of a master,—that of providing safe appliances with which his servants are to work.⁵ The rule of this section works against the car-inspector, as well as in favor of the company. If he is injured while in the discharge of his duties by having cars “kicked” against the train on which he is at work, this will be ascribed to the negligence of fellow servants, and the company will not be liable.⁶

evidence, to be servants of different masters: *Sherman v. Delaware &c. Canal Co.*, 71 Vt. 325; s. c. 45 Atl. Rep. 227. Where a car-inspector went between cars to uncouple them, and *not to inspect* them, and was killed through the negligence of the engineer in pushing his engine against such cars, the negligence was held to be that of a fellow servant: *Devoe v. New York &c. R. Co.*, 70 App. Div. (N. Y.) 495; s. c. 75 N. Y. Supp. 136. There is an absolutely unsound decision to the effect that a mining company fulfills its duties to its servants with respect to the inspection of cars, not its own, furnished by it for their temporary use, to be loaded, when it supplies competent and skillful inspectors who are subject to proper instructions, so that the negligence of non-inspection in such a case is not the negligence of a vice-principal, for which the company is liable; the theory of the court being that “the cars came, not as instruments of the service supplied by the master, but as incidents of its business”: *Neutz v. Jackson Hill Coal &c. Co.*, 139 Ind. 411; s. c. 38 N. E. Rep. 324; 39 N. E. Rep. 147; approving *Cincinnati &c. R. Co. v. McMullen*, 117 Ind. 439 (holding that as to *foreign* cars, competent inspectors, under proper instructions, are fellow servants with servants using the cars). These decisions abolish the rule of *respondet superior* as between the master and

the servant by whom the master performs one of his primary or absolute duties, and consequently ought not to be cited or followed.

St. Louis &c. R. Co. v. Rice, 51 Ark. 467; s. c. 4 L. R. A. 173; 11 S. W. Rep. 699 (yard foreman and car-inspector are fellow servants, so that the former cannot recover damages from the company for the negligence of the latter); *St. Louis &c. R. Co. v. Gaines*, 46 Ark. 555 (no recovery for an injury sustained by a brakeman from a drawhead which the car-inspector should have discovered to be defective); *Wonder v. Baltimore &c. R. Co.*, 32 Md. 418; *Whitmore v. Boston &c. R. Co.*, 150 Mass. 477 (fellow servant of conductor); *Gibson v. Northern Cent. R. Co.*, 22 Hun (N. Y.) 289 (yard switchman is a fellow servant of car-inspector); *Potter v. New York &c. R. Co.*, 136 N. Y. 77 (fellow servant of brakeman); *Easton v. New York &c. R. Co.*, 14 App. Div. (N. Y.) 20; s. c. 43 N. Y. Supp. 666 (no recovery for an injury due to a defect in a brake which the inspector negligently failed to discover, where it was the brakeman's duty to inspect the brakes at every stop); *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318 (car-inspectors are fellow servants of brakemen).

* *Ante*, § 3986, *et seq.*

⁶ *Whitmore v. Boston &c. R. Co.*, 150 Mass. 477; s. c. 23 N. E. Rep. 220; *Potter v. New York &c. R. Co.*,

§ 5091. **Car-Repairers are Fellow Servants of Trainmen, Yardmen, etc.**—Whatever may be the rule as to car-inspectors,⁷ the general view is that a car-repairer, by which designation is understood a servant of a railway company whose duty it is to go under the cars when a train stops, and to examine them, oil them, etc., is a common servant with the men in charge of the train, and with yardmen, switchmen, and other employes engaged in similar duties; so that if the car-repairer is injured while in the performance of his duty by such other servants, the injury will be ascribed to the negligence of fellow servants, and will not afford a basis of recovery against the railway company.⁸

136 N. Y. 77; s. c. 48 N. Y. St. Rep. 843; 32 N. E. Rep. 603. In a jurisdiction where a car-inspector is not generally deemed to be a fellow servant of trainmen, because there is no co-association between them (*ante*, § 4971), yet an instruction which treated of all "servants whose duty it is to examine cars" as not being fellow servants of a brakeman, was held erroneous: *Chicago & C. R. Co. v. Bragonier*, 11 Ill. App. 516.

⁷ *Ante*, §§ 5089, 5090.

⁸ *St. Louis & C. R. Co. v. Triplett*, 54 Ark. 289; s. c. 15 S. W. Rep. 831; 16 S. W. Rep. 266; *Chicago & C. R. Co. v. Murphy*, 53 Ill. 336 (car-repairer and engineer of switching-engine at same station, though under different foremen); *Valtez v. Ohio & C. R. Co.*, 85 Ill. 500 (similar state of facts); *Spencer v. Ohio & C. R. Co.*, 130 Ind. 181; s. c. 29 N. E. Rep. 915 (employé cleaning an engine in a roundhouse, who is injured by its being started through the negligence of the engineer, is a co-employé with the engineer and with the person who orders him to work under the engine); *Renfro v. Chicago & C. R. Co.*, 86 Mo. 302; *Sheridan v. Long Island R. Co.*, 27 App. Div. (N. Y.) 10; s. c. 50 N. Y. Supp. 215 (car-repairer injured while at work under car, by engine backing against it, due to the failure of one working with him to display the proper signal for his protection); *Corcoran v. Delaware & C. R. Co.*, 126 N. Y. 673; s. c. 38 N. Y. St. Rep. 251 (car-repairer injured through negligence of assistant yardmaster—no recovery); *Moeller v. Delaware & C. R. Co.*, 13 App. Div. (N.

Y.) 467; s. c. 43 N. Y. Supp. 603 (car-repairer working under car injured through failure of his helper to display a red flag, as rules required); *Besel v. New York & C. R. Co.*, 70 N. Y. 171; rev'g s. c. 9 Hun (N. Y.) 457 (car-repairer and head brakeman and yardmaster at particular yard); *Kirk v. Atlanta & C. R. Co.*, 94 N. C. 625; s. c. 55 Am. Rep. 621 (fellow servant of the yardmaster having the general management of making up, switching, and receiving trains); *San Antonio & C. R. Co. v. Reynolds* (Tex. Civ. App.), 30 S. W. Rep. 846 (no off. rep.) (unless one has the control of the other, with power to discharge him); *Texas & C. R. Co. v. Campbell*, 16 Tex. Civ. App. 665; s. c. 39 S. W. Rep. 1105; *Missouri & C. R. Co. v. Whitaker*, 11 Tex. Civ. App. 668; s. c. 33 S. W. Rep. 716 (boiler-washer and a hostler employed by and working under a roundhouse foreman are fellow servants under Texas statute; but compare *San Antonio & C. R. Co. v. Keller*, 11 Tex. Civ. App. 569; s. c. 32 S. W. Rep. 847); *Unfried v. Baltimore & C. R. Co.*, 34 W. Va. 260; s. c. 12 S. E. Rep. 512 (carpenter in the employ of a railroad company in repairing cars standing upon the track, deemed the fellow servant of an engineer engaged in the same yard, though they were working in different capacities and under different foremen); *Smith v. Chicago & C. R. Co.*, 91 Wis. 503; s. c. 65 N. W. Rep. 183; *Grady v. Southern R. Co.*, 92 Fed. Rep. 491; s. c. 34 C. C. A. 494 (foreman of freight-car repair-sheds of a railroad company is a fellow servant of a

§ 5092. **Car-Repairer and Foreman.**—The failure of the foreman of car-repairers to place a flag in front of a car upon the repair-track on which a car-repairer was at work, by reason of which a train coupled on to such car and injured the car-repairer, was held to be the negligence of a fellow servant; and, there being no claim that the foreman was incompetent, the railroad company was not liable.⁹ So, a car-repairer is a fellow servant with a car-inspector who directs his labor as a mere foreman.¹⁰

car-repairer). Two or three exceptional and out-of-line decisions must be noted. In one of them a railway employé went under a car which was standing on the repair-track, by order of his foreman, to repair it, and was there injured by the starting of the car by an advancing train. The track was usually protected, but there was *no proof of any precautions* to protect it having been taken on this occasion, for which reason it was held that the company was liable: *Luebke v. Chicago & C. R. Co.*, 59 Wis. 127; s. c. 48 Am. Rep. 483. Unless this case can be supported on the view that the foreman, being a vice-principal of the master, was negligent in ordering him into a dangerous position (*ante*, §§ 3814, 3815), then it cannot be supported at all, and two able judges (Cassoday and Taylor) dissented. On a subsequent trial of the same case it was proved that a watchman *had been provided* to warn the car-repairer, and his failure to give warning was held to be the negligence of a fellow servant: *Luebke v. Chicago & C. R. Co.*, 63 Wis. 91; s. c. 53 Am. Rep. 266. In another case it was held that a car-repairer who, at the time of the collision in which he was injured, was on the car, under orders to go to the scene of a wreck to repair cars, was not working to a common purpose with a "hostler" employed to run a locomotive to and from a roundhouse, and a switchman whose negligence caused the injury, within the rule as to fellow servants: *San Antonio & C. R. Co. v. Keller*, 11 Tex. Civ. App. 569; s. c. 32 S. W. Rep. 847. In still another case it was held that a railway company is liable to a car-repairer for personal in-

juries received by him while making repairs, where a brakeman to whom the company has entrusted the duty of notifying the workmen that a switch-engine is about to enter upon the track fails to give such notice, if a rule of the company requires it to be given, and does not require the repairer to take any steps for his own protection: *Evansville & C. R. Co. v. Holcomb*, 9 Ind. App. 198; s. c. 36 N. E. Rep. 39. The decision proceeds partly on the ground that the duty to warn was an absolute one, and partly on the theory that the company had failed to adopt sufficient means to enforce the rule—doubtful decision. A court whose discrimination has made a car-inspector a fellow servant with one operating the car which he negligently inspects (*ante*, § 5090), has veered so far in the other direction as to hold that a yardmaster who is charged with the duty of personally supervising men under his control, to see that cars are not run in upon a repair-track where a car-repairer is engaged in repairing a car, is not merely a collaborer with the latter, but is performing a duty of the master: *Railway Co. v. Triplett*, 54 Ark. 289; s. c. 11 L. R. A. 773; 15 S. W. Rep. 831; 16 S. W. Rep. 266. In another case it was held that a car-repairer employed to work in the shop, and occasionally to make small repairs in the yard, is not a fellow servant with a switchman acting under orders from a yardmaster: *Pool v. Southern Pac. R. Co.*, 7 Utah 303; s. c. 26 Pac. Rep. 654.

⁹*Peterson v. Chicago & C. R. Co.*, 67 Mich. 102; s. c. 10 West. Rep. 870; 34 N. W. Rep. 260.

¹⁰*Fordyce v. Briney*, 58 Ark. 206; s. c. 24 S. W. Rep. 250.

§ 5093. **Brakeman and Car-Inspector.**—A brakeman has been held not to be a fellow servant of a car-inspector, since the latter is charged with one of the primary or absolute duties of the railway company and is, hence, its vice-principal.¹¹

§ 5094. **Inspector of Locomotive-Boilers and Other Employés.**—An inspector of locomotive-boilers is not a fellow servant of other employés engaged about a locomotive, so as to relieve the company from liability for failure of the inspector to exercise reasonable care and skill to discover defects in the boiler, since, as already seen,¹² he discharges one of the primary or absolute duties of the master.¹³

§ 5095. **Inspector of "Foreign" Cars and Other Employés.**—A railway servant charged with the duty of inspecting cars which come upon the railroad from other roads, is not a fellow servant of other employés of the company whose servant he is, so as to relieve the company from liability for injuries caused by his negligence,—the reason being that he is appointed to discharge one of the primary or absolute duties of the master.¹⁴

§ 5096. **Station-Agent and Car-Repairer or Inspector.**—A station-agent is not a fellow servant of a car-repairer or car-inspector, whose duty it is to examine the brakes of cars; so that, where the agent is required to set the brakes of such cars as are left at his station, if the car-inspector is negligent with respect to his duty of inspecting a brake, in failing to discover a defect therein, in consequence of which negligence the station-agent is injured, the company will be liable,—the negligence of the inspector being deemed that of a vice-principal.¹⁵

§ 5097. **Car-Builder and Car-Repairer.**—A master car-builder is not a fellow servant of a car-repairer in a jurisdiction where the "con-association doctrine" prevails. Nor does the fact that a master car-builder is under a general foreman, to whom he refers all questions relating to the employment and discharge of workmen, make him such, where the car-repairer is bound to obey his orders or be

¹¹ *Ante*, § 5089; *Missouri &c. R. Co. v. Dwyer*, 36 Kan. 58.

¹² *Ante*, § 5089.

¹³ *Texas &c. R. Co. v. Thompson*, 70 Fed. Rep. 944; s. c. 71 Fed. Rep. 531; 30 U. S. App. 549; 17 C. C. A. 524.

¹⁴ *Ante*, § 5089; *Felton v. Bullard*,

94 Fed. Rep. 781; s. c. 37 C. C. A. 1; 42 Ohio L. J. 218; 14 Am. & Eng. R. Cas. (N. S.) 547.

¹⁵ *Chicago &c. R. Co. v. Kellogg*, 54 Neb. 127; s. c. 74 N. W. Rep. 454; modified on rehearing in 76 N. W. Rep. 462.

discharged either by the master builder or by the foreman placed over the master builder.¹⁶

§ 5098. **Street-Railway Conductor and Inspector of Trolley-Cars.**—Any negligence of an inspector of the electrical apparatus of a trolley-car, who, after inspecting it for efficiency, and not for the purpose of determining its safety, said: "All right; put your pole on," acting on which the conductor put the trolley on, and the car ran over him by reason of the controller being open, was held to be that of a fellow servant.¹⁷

ARTICLE VII. SECTION-MASTER, SECTION-FOREMAN, SECTION-BOSS, SECTION-MEN.

SECTION	SECTION
5101. Section - master, section - foreman or section-boss, and section-men deemed fellow servants.	5106. Track-repairer, fireman and coal-loader.
5102. Contrary doctrine that section-master, section-foreman or section-boss is the vice-principal of the company with respect to section-men.	5107. Track-repairer and switchman.
5103. Section - master, section - foreman, or section-boss, and trainmen.	5108. "Wreckmaster" and section-hand or laborer.
5104. Section-hands, track-repairers or track-laborers, and trainmen.	5109. Section-hands and servants in charge of a construction-train.
5105. Track-walker and trainmen.	5110. Section-foreman and water-boy.
	5111. Motorman and track-repairer.
	5112. Foreman of track-repairers in a steel-mill and men working there.

§ 5101. **Section-Master, Section-Foreman or Section-Boss, and Section-Men Deemed Fellow Servants.**—The foreman of a squad of hands whose duty it is to keep in repair sections of a railway-track, variously designated as section-master, section-foreman or section-boss, is generally deemed a fellow servant with the men working under him, commonly called section-men or track-repairers.¹

¹⁶ St. Louis &c. R. Co. v. Holman, 53 Ill. App. 617; s. c. aff'd, 155 Ill. 21; 39 N. E. Rep. 573.

¹⁷ Shugard v. Union Traction Co., 201 Pa. St. 562; s. c. 51 Atl. Rep. 325.

¹ Daves v. Southern Pac. Co., 98 Cal. 19 (but this depends upon the character of the act in doing which

the foreman is negligent); Sullivan v. New York &c. R. Co., 62 Conn. 209; s. c. 25 Atl. Rep. 711 (foreman of a gang of laborers in blasting upon a railroad-track, whose duty it is to prepare, care for after it is prepared, distribute, and direct the explosion of the dynamite used, is a fellow servant with

§ 5102. Contrary Doctrine that Section-Master, Section-Foreman or Section-Boss is the Vice-Principal of the Company with Respect to Section-Men.—We discover here the same difference of judicial opinion

one of such laborers); Kenney v. Central R. Co., 61 Ga. 590 (section-master thrown from a hand-car and injured, because a co-employé, who was turning the crank, was caught in it and hurled against him,—no recovery); Chicago &c. R. Co. v. Goltz, 71 Ill. App. 414; Thacker v. Chicago &c. R. Co., 159 Ind. 82; s. c. 64 N. E. Rep. 605 (not a vice-principal while transporting crew on hand-cars nor in giving order to stop); Foley v. Chicago &c. R. Co., 64 Iowa 644 (had no authority except to direct the men about their work); Clifford v. Old Colony R. Co., 141 Mass. 564 (collision with hand-car caused by negligence of section-boss and engineer—no recovery); Shepard v. Boston &c. R. Co., 158 Mass. 174 (circumstances under which defendant could not be held liable for the consequences of a "wild" train and a hand-car colliding on the ground that the conduct of the hand-car was governed by the section-foreman, that he was a person entrusted with and exercising superintendence, and that the accident was due to his negligence while superintending); Peterson v. Chicago &c. R. Co., 67 Mich. 102; s. c. 10 West. Rep. 870; 34 N. W. Rep. 260; Gavigan v. Lake Shore &c. R. Co., 110 Mich. 71; s. c. 3 Det. Leg. N. 296; 5 Am. & Eng. R. Cas. (N. S.) 523; 67 N. W. Rep. 1097; Olson v. St. Paul &c. R. Co., 38 Minn. 117; s. c. 35 N. W. Rep. 866; Lagrone v. Mobile &c. R. Co., 67 Miss. 592; s. c. 7 South. Rep. 432; Goodwell v. Montana &c. R. Co., 18 Mont. 293; s. c. 45 Pac. Rep. 210; 4 Am. & Eng. R. Cas. (N. S.) 419 (foreman in charge of an extra gang of railroad section-hands is not a chief or superintendent of a separate and distinct branch of business of the company so as to make him a vice-principal); Hastings v. Montana &c. R. Co., 18 Mont. 493; s. c. 46 Pac. Rep. 264 (injury to section-hand while carrying hand-car across track under orders of the foreman, who negligently failed to warn him of approach of a train—no recovery); Atchison &c.

R. Co. v. Martin, 7 N. Mex. 158; s. c. 34 Pac. Rep. 536 (although he hires the men and directs where they shall work upon the section, where he has nothing to do with paying them and works in the same way they do); Barringer v. Delaware &c. Canal Co., 19 Hun (N. Y.) 216 (section-boss knew of a defect in a hand-car, but failed to report it to the track-master to be repaired, and section-hand was injured—company not liable because they were fellow servants); Ell v. Northern Pac. R. Co., 1 N. D. 336; s. c. 12 L. R. A. 97 (the sole test is the character of the act performed); Spancake v. Philadelphia &c. R. Co., 148 Pa. St. 184; s. c. 1 Pa. Adv. Rep. 485; 23 Atl. Rep. 1006; Kinney v. Corbin, 132 Pa. St. 341 (negligence of the foreman of a gang of railroad laborers in requiring them to use a chain which he knows is defective, is that of a fellow servant); Weger v. Pennsylvania R. Co., 55 Pa. St. 460; Northern Pac. R. Co. v. Charless, 162 U. S. 359; s. c. 40 L. ed. 999; 16 Sup. Ct. Rep. 848 (negligence of a section-boss or foreman in running a hand-car at too high a rate of speed while carrying his gang of men is not the neglect of any duty which the master is bound to perform, but is that of a fellow servant of the member of the gang); Coyne v. Union Pac. R. Co., 133 U. S. 370; s. c. 33 L. ed. 651; 7 Rail. & Corp. L. J. 434; 10 Sup. Ct. Rep. 382; Wright v. Southern R. Co., 80 Fed. Rep. 260 (act of section-foreman in directing a hand to endeavor to save a hand-car from being struck by a rapidly approaching train is that of a fellow servant); Northern Pac. R. Co. v. Peterson, 162 U. S. 346; s. c. 16 Sup. Ct. Rep. 843; 40 L. ed. 994 (boss of a small gang of ten or fifteen men engaged in making repairs upon a railroad over a distance of three sections, aiding the regular gang upon each section as occasion demands, is a fellow servant of another member of the gang, and not a superintendent of a separate department); Lochbaum

which we discovered when treating of other foremen and superintendents. It will be futile to attempt to reconcile the decisions, because they do not divide upon any consistent line of thought or doctrine. Many courts hold that a railway section-master, section-foreman, or section-boss, is, with respect to the men working under him, the vice-principal or *alter ego* of the railway company, so that if one of the section-hands is killed or injured through the negligence of such section-master, section-foreman, or section-boss, the company will be liable to pay damages.² Some of the decisions put it on the mere ground that he is the superior servant, with power to command the control.³ Others lay stress on the fact that the superior servant possesses the power to employ men,⁴ or to employ and discharge men,⁵ as

v. Oregon R. & Co., 104 Fed. Rep. 852; s. c. 44 C. C. A. 220; Deavers v. Spencer, 70 Fed. Rep. 480; s. c. 25 U. S. App. 411; 17 C. C. A. 215 (track-foreman wholly subordinated to a superior, without power permanently to discharge or employ workmen without the supervisor's consent, and who works with the hands under him, is a fellow servant with a track-hand in working a jack for raising the track, although he is in supervision of the gang when he is with it carrying out the supervisor's instructions).

² Bloyd v. St. Louis & C. Co., 58 Ark. 66; Justice v. Pennsylvania Co., 130 Ind. 321; Russ v. Wabash & C. R. Co., 112 Mo. 45; s. c. 18 L. R. A. 823; Claybaugh v. Kansas City & C. R. Co., 56 Mo. App. 630; McDermott v. Hannibal & C. R. Co., 87 Mo. 285; Rowland v. Missouri & C. R. Co., 20 Mo. App. 463; Hutson v. Missouri & C. R. Co., 50 Mo. App. 300; Clowers v. Wabash & C. R. Co., 21 Mo. App. 213; Banks v. Wabash & C. R. Co., 40 Mo. App. 457; Halloworth v. Kansas City & C. R. Co., 94 Mo. App. 215; s. c. 68 S. W. Rep. 111 (under Arkansas statute); Allison v. Southern R. Co., 129 N. C. 336; s. c. 40 S. E. Rep. 91 (foreman knew that train was late, and failed to send flagman forward to protect hand-car, and ordered the plaintiff back to get the hand-car off the track after he had jumped to save himself); Patton v. Western & C. R. Co., 96 N. C. 455; Louisville & C. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866; Sweeney v. Gulf & C. R. Co., 84 Tex. 433.

³ Atchison & C. R. Co. v. Vincent,

56 Kan. 344; s. c. 43 Pac. Rep. 251 (company liable for negligence of foreman in giving the word to throw down a rail, which was being carried, before the injured section-man had stepped to a place of safety); McDermott v. Hannibal & C. R. Co., 87 Mo. 285; Stephens v. Hannibal & C. R. Co., 96 Mo. 207; s. c. 9 S. W. Rep. 589; Union Pac. R. Co. v. Doyle, 50 Neb. 555; s. c. 70 N. W. Rep. 43 (notwithstanding that he had no authority to employ or discharge hands, and that the section-hand in question was hired by the section-boss, likewise subject to the orders of the foreman in respect to work on the gravel-train); Patton v. Western & C. R. Co., 96 N. C. 455 (if the section-boss has power to command, discharge and employ laborers, the master is liable for his negligence in the exercise of such authority); Chattanooga Elec. R. Co. v. Lawson, 101 Tenn. 406; s. c. 12 Am. & Eng. R. Cas. (N. S.) 669; 47 S. W. Rep. 489 (the negligence of a track-foreman who was acting as motorman of an electric car, in failing to stop the same in time to prevent an accident to a track-hand who had attempted, pursuant to his direction, to board the same while in motion, and was in a perilous position, was *official*, and *not personal*).

⁴ Claybaugh v. Kansas City & C. R. Co., 56 Mo. App. 630; Clowers v. Wabash & C. R. Co., 21 Mo. App. 213; Northern Pac. R. Co. v. Peterson, 4 U. S. App. 574; s. c. 2 C. C. A. 157; 32 Am. L. Reg. 340; 51 Fed. Rep. 183.

⁵ Russ v. Wabash & C. R. Co., 112

well as to direct their operations;⁶ and others, pursuing a principle already referred to,⁷ consider the nature of the act or omission, and whether it was one within the scope of the authority of the superior servant to direct and supervise as the representative of the master;⁸ and others so hold under the requirements of statutes.⁹ And clearly, in so far as the section-master performs a primary or absolute duty of the master,¹⁰ or a part of such duty, in supervising the railway-tracks to the end of promoting the safety of the employés, the railway company is liable for his negligence.¹¹

§ 5103. **Section-Master, Section-Foreman, or Section-Boss, and Trainmen.**^{11a}—Whether the person in command of gangs of track-repairers is a fellow servant of men employed in running trains over the track must depend, to some extent, upon the point of view from which the question is approached. Recurring to a former distinction,¹²

Mo. 45; s. c. 18 L. R. A. 823; 20 S. W. Rep. 472; *Logan v. North Carolina R. Co.*, 116 N. C. 940; s. c. 21 S. E. Rep. 959; *Johnson v. Southern R. Co.*, 122 N. C. 955; s. c. 29 S. E. Rep. 784; *Gulf & C. R. Co. v. Wells (Tex.)*, 16 S. W. Rep. 1025 (no off. rep.); s. c. rev'd on rehearing, on other grounds, 81 Tex. 685; 17 S. W. Rep. 511; *Sweeney v. Gulf & C. R. Co.*, 84 Tex. 433; s. c. 19 S. W. Rep. 555.

⁶ *Patton v. Western & C. R. Co.*, 96 N. C. 455 (power to command, employ and discharge).

⁷ *Ante*, § 4918.

⁸ *Dayharsh v. Hannibal & C. R. Co.*, 103 Mo. 570; s. c. 15 S. W. Rep. 554; *Illinois Cent. R. Co. v. Josey*, 110 Ky. 342; s. c. 22 Ky. L. Rep. 1795; 61 S. W. Rep. 703; 54 L. R. A. 78 (section-foreman, whose duty it was, in going over the road with his men, to control the brakes on the hand-car, was, in performing that duty, the superior of the men on the car, and not their fellow servant). For example, it has been held that a section-foreman, who has the power to employ and discharge section-hands, is a vice-principal for that purpose; but, in transporting the men to and from their work, he and the men are fellow servants; so that the master is not liable for an injury to one of the men through the foreman's negligence while thus employed: *Justice v. Pennsylvania Co.*, 130 Ind.

321; s. c. 11 Rail. & Corp. L. J. 221; 30 N. E. Rep. 303. The Circuit Court of the United States has held that a section-foreman is a fellow servant of one of the section-crew of which he is in charge: *Kansas & C. R. Co. v. Waters*, 70 Fed. Rep. 28; s. c. 36 U. S. App. 31; 16 C. C. A. 609. The Supreme Court of the United States has held that the fact that a section-foreman gives an order to a laborer who is with him on a hand-car, that he shall not look back to watch for a train, and assurance that the foreman himself will watch and give warning of any danger, does not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for the train: *Martin v. Atchison & C. R. Co.*, 166 U. S. 399; s. c. 41 L. ed. 1057; 17 Sup. Ct. Rep. 603.

⁹ *St. Louis & C. R. Co. v. Rickman*, 65 Ark. 138; s. c. 45 S. W. Rep. 56; *post*, § 5278, *et seq.*

¹⁰ *Ante*, § 4923.

¹¹ *Babcock v. Old Colony R. Co.*, 150 Mass. 467; s. c. 23 N. E. Rep. 325. Another case holds that the foreman of a section-gang, in charge of a hand-car, is not, in respect to the condition of a wooden handle to the car, a fellow servant with those under him: *Banks v. Wabash & C. R. Co.*, 40 Mo. App. 458.

^{11a} See *ante*, § 5035.

¹² *Ante*, § 4923, *et seq.*

it must be concluded that in so far as the section-foreman is negligent in the performance of his duty of keeping the track in suitable repair and free from dangerous obstructions, he represents the railway company, because that is a primary or absolute duty of the master; so that, if a trainman is killed or injured through his negligent failure to perform this duty, the railway company will be liable.¹³ On the other hand, if an injury is inflicted upon a section-foreman through the negligence of a trainman, or of the trainmen, then the question will rest upon different constructions and will present more difficulty. Those engaged in the mere operation of a railway-train, or, in fact, of any department of the business of a master, are often regarded as fellow servants of those with whom such operatives come in contact. Nevertheless, in the case of trainmen on the one hand and track-repairers on the other hand, there is no "con-association";¹⁴ they are not brought into contact with each other in such a sense that they can observe each other's conduct and habits, and report them to the common master; nor have they a ready opportunity of checking each other's negligence or correcting each other's faults. The rule which makes the master liable for an injury inflicted by one of his servants in one distinct department of service, upon another of his servants engaged in another and distinct department of such service, operates, in the theory of some of the courts at least, in favor of a right of action in such a case.¹⁵ Other courts—in some cases without regard to prin-

¹³ *Kansas City &c. R. Co. v. Webb*, 97 Ala. 157; s. c. 11 South. Rep. 888 (failure to discover and remedy a defect in a switch; train derailed; engineer injured—company liable); *St. Louis &c. R. Co. v. Weaver*, 35 Kan. 412; *Clifford v. Old Colony &c. R. Co.*, 141 Mass. 564; *Drymala v. Thompson*, 26 Minn. 40 (company liable for negligence of a section-foreman in taking up a rail without setting proper signals to warn an approaching train, whereby a trainman is injured); *Lewis v. St. Louis &c. R. Co.*, 59 Mo. 495; s. c. 21 Am. Rep. 385; *Hall v. Missouri &c. R. Co.*, 74 Mo. 298 (company liable to switchman for injuries received from loose iron rail negligently left by section-foreman in path used by switchmen in the discharge of their duties); *Wright v. Southern R. Co.*, 123 N. C. 280; s. c. 12 Am. & Eng. R. Cas. (N. S.) 717; 31 S. E. Rep. 652; *Fisher v. Oregon &c. R. Co.*, 22 Or. 533; s. c. 16 L. R. A. 519; 12 Rail. & Corp. L. J. 139; 30 Pac. Rep. 425; *Well-*

man v. Oregon &c. R. Co., 21 Or. 530; s. c. 23 Pac. Rep. 625 (section-foreman a vice-principal with respect to the duty of giving notice of a dangerous obstruction on the track to those engaged on a repair-train); *Bateman v. Peninsular R. Co.*, 20 Wash. 133; s. c. 12 Am. & Eng. R. Cas. (N. S.) 678; 54 Pac. Rep. 996 [disapproving *Chicago &c. R. Co. v. Murphy*, 53 Ill. 336; s. c. 5 Am. Neg. Rep. 48]; *Hulehan v. Green Bay &c. R. Co.*, 64 Wis. 520; s. c. 32 N. W. Rep. 529 (company liable for injury to its brakeman from obstructions on the tracks, caused by the negligence of its section-boss). Circumstances under which an accident to a brakeman, due to a defect in the track, was ascribed to the negligence of the assistant roadmaster, and not to that of the section-foreman: *Anderson v. Michigan &c. R. Co.*, 107 Mich. 591; s. c. 2 Det. Leg. N. 725; 65 N. W. Rep. 585.

¹⁴ *Ante*, § 4971.

¹⁵ *Peoria &c. R. Co. v. Rice*, 144

ciple—take a different view.^{15a} Under a principle already stated,¹⁶ the trainmen may become vice-principals of the company with respect to the duty of repairing a car, the failure to perform which duty results in the death of a section-foreman.¹⁷ Again, it is plain that the two classes of employes may be temporarily thrown into such con-association as will, on principle, make them fellow servants of each other. Thus, it has been held that a section-master and a trackman are fellow servants of a trainman, where all three are engaged in looking after and in removing obstructions from the track created by a storm.¹⁸ And there are decisions which ascribe the relation of fellow servants to a section-foreman and the conductor of a passing train through whose

Ill. 227; s. c. 33 N. E. Rep. 951 (section-foreman, injured by negligence of locomotive-engineer in failing to observe a signal-flag placed on a bridge on which the foreman was working, was not a fellow servant of such engineer, since they were employed in different departments and wholly separate and disconnected from each other); Dobson v. New Orleans &c. R. Co., 52 La. An. 1127; s. c. 27 South. Rep. 670 (foreman of a gang of laborers hauling dirt with a train of flat-cars is not a fellow servant of the conductor of the train); Omaha &c. R. Co. v. Krayenbuhl, 48 Neb. 553; s. c. 4 Am. & Eng. R. Cas. (N. S.) 483; 67 N. W. Rep. 447; Union Pac. R. Co. v. Callaghan, 6 C. C. A. 205; s. c. 56 Fed. Rep. 988 (foreman of a repair-gang riding upon a repair-train is not a fellow servant of the conductor of such train, so as to prevent recovery for injuries caused by the conductor's failure to stop the train to receive orders respecting a defective bridge). The fact that a section-foreman, who sustained injuries on a bridge owing to the negligence of a locomotive-engineer in failing to observe a flag placed on a bridge, had a right to flag the train, and that it was the duty of the engineer to obey the signal, was not regarded as tending to establish the relation of fellow servants between the section-foreman and the engineer: Peoria &c. R. Co. v. Rice, 144 Ill. 227; s. c. 33 N. E. Rep. 951.

^{15a} Card v. Eddy, 129 Mo. 510; s. c. 28 S. W. Rep. 979 (fireman on a running train is a fellow servant of a section-foreman in delivering from the train as it passes

a message for the foreman tied around a piece of coal). Compare Card v. Eddy (Mo.), 24 S. W. Rep. 746 (no off. rep.); and see *contra*, Chicago &c. R. Co. v. Moranda, 93 Ill. 302.

¹⁶ *Ante*, § 4923, *et seq.*

¹⁷ The proposition affirmed by an authoritative court on this point is that where trainmen noticed and endeavored to repair a freight-car door, which was hanging by one top corner only, and failed to repair it, but continued to use the car without reporting its condition, the railway company is responsible for their negligence, resulting in the death of a section-foreman, who was struck by the door swinging outward with the motion of the train in passing him, though the condition of the car was not communicated to any employe of the company occupying the position of master or vice-principal: Chicago &c. R. Co. v. Cullen, 187 Ill. 523; s. c. 58 N. E. Rep. 455; aff'g s. c. 87 Ill. App. 374.

¹⁸ Wellman v. Oregon &c. R. Co., 21 Or. 530; s. c. 28 Pac. Rep. 625. On this principle, a section-foreman has been regarded as a fellow servant of trainmen while being transported on a train to or from his work. Section-master so riding is a fellow servant of the engineer, and, if injured by the engineer's negligence, cannot recover: Wright v. Northampton &c. R. Co., 122 N. C. 852; s. c. 10 Am. & Eng. R. Cas. (N. S.) 151; 29 S. E. Rep. 100 [but compare Union Pac. R. Co. v. Callaghan, 6 C. C. A. 205; s. c. 56 Fed. Rep. 988]; Southern Pac. Co. v. McGill (Ariz.), 44 Pac. Rep. 302 (no off. rep.).

negligence the foreman is injured.¹⁹ So, the men who have been engaged in repairing a switch may be regarded as discharging a primary or absolute duty of the railway company, within the meaning of a rule already considered,²⁰ so as not to be deemed fellow servants of a brakeman who is injured by reason of his foot being caught in a hole left by them while digging around a switch.²¹

§ 5104. **Section-Hands, Track-Repairers or Track-Laborers, and Trainmen.**^{21a}—What has been said with respect to the relation subsisting between section-master, section-foreman, or section-boss, on the one hand, and trainmen on the other, will equally apply in the case of section-men or track-laborers,—that is to say, persons engaged in repairing the track,—on the one hand, and trainmen on the other; and we shall find a similar difficulty in reconciling all the decisions. They are²² or they are not²³ fellow servants of each other; and you

¹⁹ *Elliott v. Chicago &c. R. Co.*, 5 Dak. 523; s. c. 3 L. R. A. 363; 41 N. W. Rep. 758; *Palko v. Central R. Co.*, 9 Kulp (Pa.) 550.

²⁰ *Ante*, § 4923, *et seq.*

²¹ *Vautrain v. St. Louis &c. R. Co.*, 8 Mo. App. 538.

^{21a} See *ante*, § 5035.

²² *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97; s. c. 3 L. R. A. 824;

²³ *Chicago &c. R. Co. v. Shannon*, 43 Ill. App. 540 (no "con-association"); *Chicago &c. R. Co. v. Moranda*, 93 Ill. 302 (track-repairer not a fellow servant of fireman who injures him by throwing a lump of coal from the tender of the engine); *Peoria &c. R. Co. v. Johns*, 43 Ill. App. 83; *Chicago &c. R. Co. v. Eaton*, 96 Ill. App. 570; s. c. *aff'd*, 194 Ill. 441; 62 N. E. Rep. 784 (do not coöperate in same line of employment, and trackman performs one of the absolute duties of master); *Union Pac. R. Co. v. Geary*, 52 Kan. 308; s. c. 34 Pac. Rep. 887 (track-repairer killed by being thrown from a car loaded with ties by the sudden starting of the train without any signal or warning—company liable); *Chesapeake &c. R. Co. v. Venable*, 111 Ky. 41; s. c. 23 Ky. L. Rep. 427; 63 S. W. Rep. 35; *Swadley v. Missouri Pac. R. Co.*, 118 Mo. 268; s. c. 24 S. W. Rep. 140 (not a fellow servant of those in charge of the regular freight and passenger trains); *McKenna v. Missouri Pac. R. Co.*, 54 Mo. App. 161; *Schlereth v. Missouri &c. R. Co.*, 115 Mo. 87; s. c. 19 S. W. Rep. 1134; *Parker v. Hannibal &c. R. Co.*, 109 Mo. 362; s. c. 18 L. R. A. 802; 50 Am. & Eng. R. Cas. 521; 19 S. W. Rep. 1119; 35

Cent. L. J. 187; 46 Alb. L. J. 286 (reversing a judgment for plaintiff and granting a new trial; three judges holding that section-men engaged in ballasting the track *are* in a common employment with trainmen on a train which hauls the ballast, and who unload it; three judges holding that they *are not* in a common employment; and the deciding vote for reversal and a new trial being cast upon the ground that the evidence, though tending to show that the gangs were independent and under separate foremen, and hence *not* fellow servants,—did not show it clearly); *New York &c. R. Co. v. Lambright*, 5 Ohio C. C. 433; *Southern Pac. Co. v. Ryan* (Tex. Civ. App.), 29 S. W. Rep. 527 (no *off. rep.*); *Missouri &c. R. Co. v. Bond*, 2 Tex. Civ. App. 104; *Torian v. Richmond &c. R. Co.*, 84 Va. 192; s. c. 4 S. E. Rep. 339; *Howard v. Delaware &c. Canal Co.*, 40 Fed. Rep. 195; s. c. 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473; *Northern Pac. R. Co. v. Charless*, 51 Fed. Rep. 562; s. c. 3 C. C. A. 380; 51 Am. & Eng. R. Cas. 198 (not a fellow servant of trainmen running a special train at an unusual rate of speed around a curve); *Garrahy v. Kansas City &c. R. Co.*, 25 Fed. Rep. 258.

can take your choice. It has been held that a railroad employé engaged in making repairs on a pit between the tracks, who negligently leaves it uncovered, by reason of which another employé, in attempting to uncouple cars, falls into it and is injured, is a fellow servant of the latter, who cannot recover against the company for such negligence.²⁴

21 Pac. Rep. 437; Gormley v. Ohio &c. R. Co., 72 Ind. 31 (hand-car run over by freight-train, through negligence of engineer, killing laborer thereon—no recovery); Ohio &c. R. Co. v. Collarn, 73 Ind. 261; s. c. 38 Am. Rep. 134; 8 Cent. L. J. 12; 7 Repr. 143; Clifford v. Old Colony &c. R. Co., 141 Mass. 564; Pennsylvania R. Co. v. Wachter, 60 Md. 395 (injury to trackman by failure of competent and carefully-selected trainmen to expose headlight on a foggy morning); Harrison v. Detroit &c. R. Co., 79 Mich. 409; s. c. 44 N. W. Rep. 1034; 7 L. R. A. 623; 41 Am. & Eng. R. Cas. 398; Connelly v. Minneapolis &c. R. Co., 38 Minn. 80; s. c. 35 N. W. Rep. 582 (injury to trackman by negligence of engineer and brakeman); Collins v. St. Paul &c. R. Co., 30 Minn. 31; Foster v. Minnesota &c. R. Co., 14 Minn. 360; Parker v. Hannibal &c. R. Co., 109 Mo. 362; s. c. 18 L. R. A. 802; 50 Am. & Eng. R. Cas. 521; 19 S. W. Rep. 1119; 35 Cent. L. J. 187; 46 Alb. L. J. 286 (reversing a judgment for plaintiff and granting a new trial; three judges holding that section-men engaged in ballasting the track *are* in a common employment with the trainmen on a train which hauls the ballast, and who unload it; three judges holding that they *are not* in a common employment; and the deciding vote for reversal and a new trial being cast upon the ground that the evidence, though tending to do so, did not show plainly that the gangs were independent and under separate foremen, proof of which state of facts would justify a verdict for plaintiff); Corbett v. St. Louis &c. R. Co., 26 Mo. App. 621; Hastings v. Montana &c. R. Co., 18 Mont. 493; s. c. 46 Pac. Rep. 264 (section-hand and locomotive-engineer); Filbert v. Delaware &c. Canal Co., 121 N. Y. 207 (employé repairing pit between tracks negligently left it uncovered, and another employé was injured thereby while coupling cars); Mele

v. Delaware &c. Co., 39 N. Y. St. Rep. 153; s. c. 14 N. Y. Supp. 630; Boldt v. New York &c. R. Co., 18 N. Y. 432; Coon v. Syracuse &c. R. Co., 5 N. Y. 492; Whaalan v. Mad River &c. R. Co., 8 Ohio St. 249; Burrell v. Gowen, 134 Pa. St. 527; Norfolk &c. R. Co. v. Nuckols, 91 Va. 193; s. c. 21 S. E. Rep. 342; Northern Pac. R. Co. v. Charles, 162 U. S. 359; s. c. 40 L. ed. 999; 16 Sup. Ct. Rep. 848 (the negligence of employés on a train in failing to give a signal of its approach, whereby a track-laborer on a hand-car is injured, is the negligence of co-servants, for which the master is not liable); Northern Pac. R. Co. v. Hambly, 154 U. S. 349; s. c. 38 L. ed. 1009; 14 Sup. Ct. Rep. 983 (track-laborer injured by a passenger-train deemed a fellow servant of the engineer and conductor operating the same); Van Winkle v. Manhattan R. Co., 32 Fed. Rep. 278; McPeck v. Central Vt. R. Co., 79 Fed. Rep. 590; s. c. 50 U. S. App. 27; Wright v. Southern R. Co., 80 Fed. Rep. 260; Van Wickle v. Manhattan R. Co., 32 Fed. Rep. 278 (engineer and track-repairer of an *elevated railroad* are fellow servants).

²⁴ Filbert v. Delaware &c. Canal Co., 121 N. Y. 207; s. c. 23 N. E. Rep. 1104; 30 N. Y. St. Rep. 494. So, it has been held that the manager of a locomotive used locally by a lumber company in transporting its lumber and supplies, and another servant employed by the company to keep its track in proper condition and repair, and who is daily transported on such locomotive to and from his work, are fellow servants, and such track-repairer cannot recover for injuries inflicted on him by the negligence of the manager of the locomotive; since the statute changing the fellow-servant rule in Georgia applies only to *railway* companies; Ellington v. Beaver Dam Lumber Co., 93 Ga. 53; s. c. 19 S. E. Rep. 21. See *post*, § 5293.

§ 5105. **Track-Walker and Trainmen.**—Decisions are met with holding that a track-walker, whose duty it is to pass to and fro over a given section of the track to see that it is in a safe condition and free from obstructions, is a fellow servant with trainmen on passing trains; so that neither can recover damages from the master for injuries sustained through the negligence of the other.²⁵ Thus, it has been held that a track-walker, engaged in travelling on a railroad velocipede for the purpose of summoning a section-crew to assist in clearing away a wreck, is, under the common-law rule, a fellow servant of an engineer in charge of an engine travelling over the same road, in the same direction, for the purpose of reaching the nearest turntable, so as to turn his engine and return to assist at the wreck;²⁶ that a track-walker, injured by a lump of coal falling from a carelessly loaded tender, is a fellow servant with the coal-heaver and fireman who load the tender;²⁷ and that a “ganger” on an English railway, whose duty it is to inspect the track and see that decayed tree-nails are renewed, is a fellow servant with a guard on a train.²⁸ The general view, however, is that a track-walker is not a fellow servant of trainmen upon passing trains, so as to excuse the company from liability if they negligently run *him* down.²⁹ Nor will the company be excused from liability for injuries to *trainmen* on passing trains, resulting from the negligent performance of his duties by a track-walker.³⁰

§ 5106. **Track-Repairer, Fireman and Coal-Loader.**—A track-repairer has been held not to be a fellow servant of a fireman or of one employed to load the tenders with coal.³¹

§ 5107. **Track-Repairer and Switchman.**—A track-repairer, in the discharge of his duty of keeping the track in repair, discharges a primary, absolute and unassignable duty of the company, and if he neglects to discharge it, or discharges it in a negligent manner,

²⁵ Coon v. Syracuse &c. R. Co., 5 N. Y. 492.

²⁶ Stephani v. Southern &c. R. Co., 19 Utah 196; s. c. 6 Am. Neg. Rep. 222; 14 Am. & Eng. R. Cas. (N. S.) 575; 57 Pac. Rep. 34.

²⁷ Schultz v. Chicago &c. R. Co., 67 Wis. 616; s. c. 58 Am. Rep. 881.

²⁸ Waller v. South-Eastern R. Co., 2 Hurl. & Colt. 102; s. c. 7 Jur. (N. S.) 501; 32 L. J. (Exch.) 205; 11 Wkly. Rep. 731; 8 L. T. (N. S.) 325.

²⁹ Schlereth v. Missouri Pac. R. Co., 115 Mo. 87; s. c. 21 S. W. Rep. 1110 (track-walker was walking along track to his place of work); Sullivan v. Missouri &c. R. Co., 97 Mo. 113; s. c. 10 S. W. Rep. 852.

³⁰ Bean v. Western &c. R. Co., 107 N. C. 731; s. c. 12 S. E. Rep. 600; Smith v. Erie R. Co., 67 N. J. L. 636; s. c. 52 Atl. Rep. 634.

³¹ Union Pac. R. Co. v. Erickson, 41 Neb. 1; s. c. 29 L. R. A. 137; 59 N. W. Rep. 347.

whereby a switchman is killed or injured, damages for the wrong can be recovered from the company.³²

§ 5108. "Wreckmaster" and Section-Hand or Laborer.—This official is generally charged with the duty of visiting wrecks, of taking command of all persons engaged in clearing away the same, including such general officers as the roadmaster, and of removing the wrecked cars to a car-shop for repairs. He is deemed the vice-principal of the company with respect to section-hands engaged under him in the work of clearing away a wreck.³³

§ 5109. Section-Hands and Servants in Charge of a Construction-Train.—It has been held that a railroad section-hand is not a fellow servant with men in charge of a construction train, unless they are coöperating in furthering a particular business of the common master. Thus, it was held that the coöperation of section-hands and the crew of a construction-train in placing ballast upon the road-bed, ceased when they returned to their former and separate duties; so that a section-hand who had resumed his labor as such in loading iron on a car on a side-track, and was struck and killed by the construction-train while he was so engaged, was not a fellow servant with the crew of such train.³⁴ Another case holds that the men engaged upon a railroad work-train, and section-hands engaged upon a hand-car, in keeping the road-bed in order, are fellow servants although under separate foremen.³⁵

³² *Southerland v. Northern Pac. R. Co.*, 43 Fed. Rep. 646 (section-foreman left a pile of ashes between the rails in a yard where the injured switchman worked); *Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104; s. c. 20 S. W. Rep. 930 (switchman killed by stepping on a pile of cinders negligently left by a track-foreman near the track); *Louisville & C. R. Co. v. Ward*, 10 C. C. A. 166; s. c. 61 Fed. Rep. 927 (trackmen in ballasting the track negligently left a dangerous hole, into which a switchman stepped to his hurt). Opposed to the foregoing doctrine is a holding to the effect that section-men whose duty it is to remove pieces of coal and obstructions from a railroad-track are

fellow servants of a switchman injured by stumbling upon such coal while coupling cars: *Cincinnati & C. R. Co. v. Mealer*, 50 Fed. Rep. 725.

³³ *Wabash & C. R. Co. v. Hawk*, 121 Ill. 259; s. c. 10 West. Rep. 137; 12 N. E. Rep. 253; *Nail v. Louisville & C. R. Co.*, 129 Ind. 260; s. c. 28 N. E. Rep. 183; 44 Alb. L. J. 230 (foreman of crew engaged in clearing away debris from bridge); *Borgman v. Omaha & C. R. Co.*, 41 Fed. Rep. 667. Compare *Beilfus v. Lake Shore & C. R. Co.*, 29 Hun (N. Y.) 556, where the contrary was held.

³⁴ *Chicago & C. R. Co. v. Kelly*, 28 Ill. App. 655; s. c. aff'd, 127 Ill. 637; 21 N. E. Rep. 203.

³⁵ *Thom v. Pittard*, 62 Fed. Rep. 232; s. c. 10 C. C. A. 352.

§ 5110. **Section-Foreman and Water-Boy.**—A water-boy is not, it has been held, a fellow servant with a section-foreman, within the meaning of the law governing the negligence of employes.³⁶

§ 5111. **Motorman and Track-Repairer.**—A motorman of an electric car and a track foreman have been held to be fellow servants, so that for an injury to the motorman due to such foreman's negligent failure to keep the track in repair, there can be no recovery.³⁷

§ 5112. **Foreman of Track-Repairers in a Steel-Mill and Men Working There.**—A foreman of a gang of men engaged in repairing the car-tracks in the works of a steel converting mill, and the employes engaged in the mill in making steel from iron, are not fellow servants where their duties never bring them together, and where the "con-association doctrine" prevails.³⁸

ARTICLE VIII. STATION-AGENTS.

SECTION

5115. Station-agent and trainmen.

5116. Section-foreman on the one

hand, and station-agent,

SECTION

train-conductor and brakeman on the other.

5117. Station-agent and section-hand.

§ 5115. **Station-Agent and Trainmen.**—With respect to the question whether a railway station-agent is to be deemed a fellow servant with men employed in running the trains of the same company, we find the same difference of opinion that we have found with respect to telegraph-operators, who, indeed, are in most cases at way stations, the station-agents. In some jurisdictions it is held that such a station-agent is a fellow servant with trainmen;¹ while in other jurisdictions it is held that he is not.²

³⁶ *Wilson v. Banner Lumber Co.*, 108 La. 590; s. c. 32 South. Rep. 460.

³⁷ *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544; s. c. 26 S. E. Rep. 922.

³⁸ *Joliet Steel Co. v. Shields*, 146 Ill. 603; s. c. 34 N. E. Rep. 1108; aff'g s. c. 45 Ill. App. 453.

¹ *Brown v. Minneapolis & C. R. Co.*, 31 Minn. 553 (is a fellow servant with an engineer running a locomotive on the tracks in and about the station); *Toner v. Chicago & C. R. Co.*, 69 Wis. 188; s. c. 31 N. W. Rep. 104; 33 N. W. Rep. 433 (is a fellow

servant of a brakeman); *Galveston & C. R. Co. v. Farmer*, 73 Tex. 85; s. c. 11 S. W. Rep. 156 (is a fellow servant of a brakeman on a freight-train—case where station-agent negligently allowed improperly-loaded car to be put in train—no recovery).

² *Atchison & C. R. Co. v. Seeley*, 54 Kan. 21; s. c. 37 Pac. Rep. 104 (with respect to the duty of loading cars, station-agent held not to be a fellow servant with a brakeman on such cars); *Louisville & C. R. Co. v. Jackson*, 106 Tenn. 438; s. c. 61 S. W. Rep. 771 (not a fel-

§ 5116. **Section-Foreman on the One Hand, and Station-Agent, Train-Conductor and Brakeman on the Other.**—These have been held to be fellow servants; so that, where the section-foreman is injured through the negligence of the others, there can be no recovery.³

§ 5117. **Station-Agent and Section-Hand.**—A station-agent, in discharging his duty of placing cars upon side-tracks, is not a fellow servant of a section-hand upon a work-train who is injured while the train is passing such station in consequence of the negligence of the agent in leaving a car upon a side-track so near the main track as to result in a collision.⁴

ARTICLE IX. MASTER MECHANIC, DIVISION SUPERINTENDENT, ROADMASTER, ETC.

SECTION

5119. Master mechanic and other employés.

5120. Division superintendent and other railway employés.

SECTION

5121. Roadmaster, and engineers and trainmen of trains.

5122. Roadmaster and section-hand.

5123. Roadmaster and member of wrecking-gang.

§ 5119. **Master Mechanic and Other Employés.**—These are generally deemed not to be fellow servants,¹ especially where the master mechanic has general superintendence and charge, with power to employ and discharge men;² but in a few cases they are held to be fellow servants.³

low servant with the conductor of a freight-train so as to prevent his recovering damages from the company for injuries caused by the negligence of the agent in leaving a "pinch-bar" lying on the track); Gulf &c. R. Co. v. Calvert, 11 Tex. Civ. App. 297; s. c. 32 S. W. Rep. 246 (under a statute defining who are and who are not fellow servants, station-agent not a fellow servant of the members of a train-crew employed at the station in coupling cars on their train).

¹ Miller v. Michigan &c. R. Co., 123 Mich. 374; s. c. 82 N. W. Rep. 58.

² St. Louis &c. R. Co. v. Biggs, 53 Ill. App. 550.

³ St. Louis &c. R. Co. v. Harper, 44 Ark. 524 (master mechanic and foreman of railway-shops not a fellow servant of a watchman injured by negligence of the master mechanic); Tabler v. Hannibal &c. R. Co., 93 Mo. 79; s. c. 11 West. Rep.

458; 5 S. W. Rep. 810 (master mechanic travelling on a wrecking-train with full control of the men thereon, not a fellow servant of the men, although a conductor has supervision of the train); Cooper v. Pittsburgh &c. R. Co., 24 W. Va. 37 (master mechanic and brakeman on a freight-train).

² Taylor v. Evansville &c. R. Co., 121 Ind. 124; s. c. 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Am. & Eng. R. Cas. 437; 7 Rail. & Corp. L. J. 125; 41 Alb. L. J. 173 (had entire control, with full authority to employ and discharge and to select and change machinery); Missouri Pac. R. Co. v. Sasse (Tex. Civ. App.), 22 S. W. Rep. 187 (no off. rep.) (master mechanic in charge of a roundhouse chargeable with knowledge of a defect in an appliance, causing injury to a workman, who is not his fellow servant).

³ Columbus &c. R. Co. v. Arnold, 31 Ind. 174 [overruling Fitzpatrick

§ 5120. Division Superintendent and Other Railway Employés.—

A division superintendent of a railroad company who has general charge and supervision of the company's entire business over his division, including the control of the movement of all trains, is a *vice-principal* of the company, and it is chargeable with his negligence.*

§ 5121. Roadmaster, and Engineers and Trainmen of Trains.—

A roadmaster or a division roadmaster of a railway company, sometimes called a master mechanic, represents the company in the performance of his duties of inspecting the road, and the rolling-stock employed thereon, and in keeping the same in suitable repair. If, therefore, he is negligent in the discharge of this duty, whereby another employé of the company is killed or injured, the company will be liable,⁵—as where a trainman is injured by a switch defectively constructed under the supervision of the roadmaster;⁶ or where he negligently removes the staffs from the brakes of freight-cars, whereby an engineer is killed.⁷ But it has been held that he is the fellow servant of an engineer and fireman who are injured by his negligence in misplacing a switch.⁸ So, a roadmaster has been deemed a fellow servant of the engineer and conductor of a train upon which he rides in the performance of his duties, and the company is not liable to him for an injury caused by their negligence.⁹

§ 5122. Roadmaster and Section-Hand.—A roadmaster (or an assistant roadmaster) is, with respect to his duties of superintending, commanding and controlling, generally regarded as the vice-principal of the railway company and not as the fellow servant of section-men, especially where they work under their own proper foreman, and the roadmaster possesses the power to employ and discharge.¹⁰

v. New Albany &c. R. Co., 7 Ind. 436]; Hard v. Vermont &c. R. Co., 32 Vt. 473 (master mechanic and locomotive-engineer).

* Louisville &c. R. Co. v. Heck, 151 Ind. 292; s. c. 50 N. E. Rep. 988.

⁵ Atchison &c. R. Co. v. Moore, 31 Kan. 197.

⁶ Rouse v. Downs, 5 Kan. App. 549; s. c. 47 Pac. Rep. 982.

⁷ Browning v. Wabash &c. R. Co., 124 Mo. 55; s. c. 27 S. W. Rep. 644.

⁸ Walker v. Boston &c. R. Co., 128 Mass. 8. The opinion in this case does not state *why* they were fellow servants.

⁹ Gulf &c. R. Co. v. Ryan, 69 Tex. 665; s. c. 7 S. W. Rep. 83.

¹⁰ Palmer v. Michigan &c. R. Co., 93 Mich. 363; s. c. 53 N. W. Rep. 397; 17 L. R. A. 636; Harrison v. Detroit &c. R. Co., 79 Mich. 409; s. c. 44 N. W. Rep. 1034; 7 L. R. A. 623; 41 Am. & Eng. R. Cas. 398 (section-man was injured by the negligence of the roadmaster in ordering him to continue work while an engine was approaching, thus throwing him off his guard); Galveston &c. R. Co. v. Delahunty, 53 Tex. 206 (section-man, in assisting in getting a car on the track, injured by the breaking of an old and worn rope used by direction of the roadmaster).

It is, perhaps, to be regretted that the decisions are not unanimous on this point. One of them holds that a roadmaster having control of the movements of a work-train and of the trainmen thereon, with power to employ and discharge them, is, with respect to the movements of the train, a fellow servant of a section-hand on the train who is injured through a collision.¹¹ Another assimilates the status of a roadmaster to that of a mere superior servant or overseer, and, consequently, makes him the fellow servant of a section-hand.¹²

§ 5123. **Roadmaster and Member of Wrecking-Gang.**—It was held by one court that a roadmaster of a railway company, who had superintendence of the "road department," was not a vice-principal of the company in such a sense as to render it liable for his negligence while he was acting as a mere "boss" or foreman of a wrecking-gang,—his negligence consisting in giving a wrong signal to the engineer of the wrecking-train, whereby a member of the gang was injured;¹³ but this decision was reversed on the ground that his duties were generally those of superintendence and not of manual work, and that the injury to the laborer proceeded from an act which he performed by virtue of his authority or superintendence, and not merely as a fellow workman.¹⁴ So, where the trainmaster and roadmaster were superintending the work of clearing away a wreck, and an employé was injured from the negligent manner in which a derrick-chain was fastened to a car, it was held that the negligence was that of the trainmaster and roadmaster, as vice-principals, and not that of the fellow servant who fastened the chain.¹⁵

ARTICLE X. VARIOUS OTHER ILLUSTRATIONS, ALPHABETICALLY ARRANGED.

SECTION	SECTION
5125. Brakemen and other trainmen.	5131. Employés constructing, and employés using a semaphore.
5126. Brakeman and engineer.	
5127. Brakeman and fireman.	5132. Expressmen employed by express-company, and servants of railway company.
5128. Bridge-tender and section-man.	5133. Express-messenger and railway-train employés.
5129. Car-loader and car-couplers.	
5130. Car-loader and switchmen.	

¹¹ Galveston &c. R. Co. v. Smith, 76 Tex. 611; s. c. 13 S. W. Rep. 562.

¹² Brown v. Winona &c. R. Co., 27 Minn. 162; s. c. 38 Am. St. Rep. 285.

¹³ Hoke v. St. Louis &c. R. Co., 11 Mo. App. 574.

¹⁴ Hoke v. St. Louis &c. R. Co., 88 Mo. 360.

¹⁵ Reed v. Missouri &c. R. Co., 94 Mo. App. 371; s. c. 68 S. W. Rep. 364.

SECTION

5134. Fireman and brakeman.
 5135. Fireman and other trainmen.
 5136. Gripman of cable-car and crew of wrecking-train.
 5137. Guard against train-robbers, and express-messenger.
 5138. Maker-up of trains, and brakeman and driller.
 5139. Porter of palace-car and trainmen of railway company.
 5140. Quarryman and trainmen.
 5141. Sand-man and other trainmen.

SECTION

5142. Signal-man on street-railway and gripman.
 5143. Street-railway conductor and motorman.
 5144. Telegraph-operator and track-repairers.
 5145. Track-laborer, train-conductor and track-walker.
 5146. Trainmen and other employés who are being hauled to and from their work.
 5147. Watchman and conductor or engineer.

§ 5125. **Brakemen and Other Trainmen.**—Brakemen and other men employed on the same train are fellow servants within the rule under consideration.¹

§ 5126. **Brakeman and Engineer.**—A brakeman is a fellow servant of the engineer in such a sense that if the brakeman inflicts a negligent injury upon the engineer there can be no recovery of damages from the company.²

§ 5127. **Brakeman and Fireman.**—A brakeman and a fireman, the latter being engaged in the discharge of his ordinary duty of receiving signals from the brakeman and repeating them to the engineer, are co-equal fellow servants, and the railway company is not liable for an injury to the brakeman, either from the ordinary or the gross negligence of the fireman.³ So, a brakeman engaged in coupling cars is a fellow servant with a fireman who dumps ashes upon the track; but there may be some difficulty in agreeing to the conclusion that he is also a fellow servant with the sectionmen whose duty it is to remove the ashes,⁴ since the keeping of the track in a safe condition is a primary duty of the master.

¹Casey v. Louisville &c. R. Co., 84 Ky. 79 (laborers at work on a railroad in transporting dirt on a small truck to the cars a short distance away, alternately acting as brakemen); Hayes v. Western R. Corp., 3 Cush. (Mass.) 270 (brakeman and another brakeman, together with conductor); Greenwald v. Marquette &c. R. Co., 49 Mich. 197 (brakeman and fireman); Chicago &c. R. Co. v. Howard, 45 Neb. 570; s. c. 63 N. W. Rep. 872; Ward v. Chesapeake &c. R. Co., 39 W. Va.

46; s. c. 19 S. E. Rep. 389; Whitwam v. Wisconsin &c. R. Co., 58 Wis. 408.

²Whalen v. Michigan &c. R. Co., 114 Mich. 512; s. c. 4 Det. Leg. N. 653; 72 N. W. Rep. 323.

³Southern R. Co. v. Clifford, 110 Ky. 727; s. c. 23 Ky. L. Rep. 111; 62 S. W. Rep. 514 (in Kentucky, where the doctrine respecting "gross negligence" prevails).

⁴Loranger v. Lake Shore &c. R. Co., 104 Mich. 80; s. c. 62 N. W. Rep. 137.

§ 5128. **Bridge-Tender and Sectionman.**—The tender of a railroad drawbridge, whose duty it is to open the draw to allow boats to pass, and close it so that trains can pass over the bridge, is a fellow servant of a section-hand who is injured, while riding on a hand-car, by the negligence of the bridge-tender in leaving the lever of the drawbridge in such a position that it strikes the car.⁵

§ 5129. **Car-Loader and Car-Couplers.**—The servants of a railway company who load its cars and the brakemen who couple and uncouple them are fellow servants; so that the company will not be liable for the negligence of its car-loaders in so loading a car with timbers that the timbers project over the end of a car so as to cause the death of a brakeman while attempting to couple the cars.⁶

§ 5130. **Car-Loader and Switchmen.**—Under the “con-association doctrine” which obtains in Illinois, switchmen at work in a coal-yard, engaged in switching cars from place to place, are not in such direct co-operation with other employés of the same company engaged in loading the cars with coal as to create the relation of fellow servant between them, so as to relieve the employer from liability for an injury to a car-loader caused by the negligence of one of the switchmen.⁷

§ 5131. **Employés Constructing, and Employés Using a Semaphore.**—Employés of a railway company who construct for the company a semaphore are discharging a primary or absolute duty of the master, under a principle already considered,⁸ and are, hence, not fellow servants of employés who use the semaphore after it has been constructed; for example, of an employé who is required to climb upon it, in order to operate it, and is injured through a defect in its construction.⁹

§ 5132. **Expressman Employed by Express Company, and Servants of Railway Company.**—A man employed and paid by an express company, who also takes care of the baggage-car in which the express matter is transported, and who acts as baggagemaster in handling the baggage, the express company not charging the railway company therefor, is not a fellow servant of the trainmen of the railway company in charge of the train on which he is riding, because they are servants of different masters.¹⁰

⁵ Illinois &c. R. Co. v. Bishop, 76 Miss. 758; s. c. 25 South. Rep. 867.

⁶ Bailey v. Delaware &c. Canal Co., 27 App. Div. (N. Y.) 305; s. c. 50 N. Y. Supp. 87.

⁷ Winona Coal Co. v. Holmquist, 51 Ill. App. 507.

⁸ *Ante*, § 4923, *et seq.*

⁹ Welty v. Lake Superior Terminal &c. Co., 100 Wis. 128; s. c. 75 N. W. Rep. 1022.

¹⁰ Cobb v. St. Louis &c. R. Co., 149 Mo. 609; s. c. 13 Am. & Eng. R. Cas. (N. S.) 632; 50 S. W. Rep. 894.

§ 5133. **Express-Messenger and Railway-Train Employés.**—It has been held that an express-messenger employed solely by an express company to transfer express-packages over a railroad, is not a fellow servant of the railway employés, although he also acts as baggageman under an agreement with the express company and the railway company, which defines his baggage duty, and although a rule of the railway company provides that express-messengers while with its trains are employés of the railway company in all matters connected with the movements and government of trains, and must conform to the directions of the conductor thereof.¹¹

§ 5134. **Fireman and Brakeman.**—A fireman and brakeman on the same train are fellow servants.¹²

§ 5135. **Fireman and Other Trainmen.**—A fireman of a locomotive-engine and other men employed on the same train are generally classified as fellow servants.¹³

§ 5136. **Gripman of Cable-Car and Crew of Wrecking-Train.**—These have been held not to be fellow servants.¹⁴

§ 5137. **Guard against Train-Robbers, and Express-Messenger.**—A guard employed to ride on an express-car and protect it from robbers has been held to be a fellow servant with the express-messenger, for whose negligence resulting in injury to the guard there can be no recovery.¹⁵

§ 5138. **Maker-up of Trains, and Brakeman and Driller.**—A train-master who orders a car to be taken out of a train without giving notice to a brakeman who is engaged in making a coupling, is held to act as a fellow servant of the brakeman.¹⁶ Where a maker-up of trains ordered a driller and another driller to fasten a car, whose

¹¹ Union Pac. R. Co. v. Kelley, 4 Colo. App. 325; s. c. 35 Pac. Rep. 923.

¹² Galveston &c. R. Co. v. Faber, 63 Tex. 344; Kersey v. Kansas City &c. R. Co., 79 Mo. 362.

¹³ Eckles v. Norfolk &c. R. Co., 96 Va. 69; s. c. 25 S. E. Rep. 545 (fireman and freight-conductor acting as brakemen); Watts v. Hart, 7 Wash. 178; s. c. 34 Pac. Rep. 423, 771 (fireman injured another employé engaged in moving cars by means of a stake placed between the cars and the engine on another track).

¹⁴ West Chicago St. R. Co. v. Dwyer, 57 Ill. App. 440.

¹⁵ Wells, Fargo & Co. v. Page, 29 Tex. Civ. App. 489; s. c. 68 S. W. Rep. 528. It is said that by accepting employment such an employé assumes the risk of injury resulting from the negligence of fellow servants in the usual course of the company's business: Wells, Fargo & Co. v. Page, *supra*.

¹⁶ Martin v. Chicago &c. R. Co., 65 Fed. Rep. 384.

bumper was broken, with a chain, to the nearest of four cars that were standing on the same track, and, while they were so engaged, signalled to an engineer to back his train, which was done without any signal or warning, causing the death of the driller, it was held that the company was not liable, by reason of the fact that, as to such work, the maker-up of trains and the driller were fellow servants.¹⁷

§ 5139. **Porter of Palace-Car and Trainmen of Railway Company.**—The porter or other servants upon a sleeping-coach, commonly known as a palace-car, are not fellow servants of the trainmen, because, under the usual arrangements subsisting between palace-car companies and railway companies, they are servants of different masters.¹⁸

§ 5140. **Quarryman and Trainmen.**—An employé of a railway company whose duty it is to keep the cable, which is used in drawing loaded cars from a quarry on one side of the main track to a rock-crusher on the other side, out of the way of trains, is not deemed a fellow servant of the men employed on the trains, and does not assume the risk of injury from their negligence,—especially where they are under separate superintendents.¹⁹

§ 5141. **Sand-Man and Other Trainmen.**—The servant whose duty it is to see that a sufficient quantity of sand is supplied to the receptacle provided for that purpose in the dome of an engine, to sand the track so as to prevent the drive-wheels from slipping, is not (in Mississippi) deemed to act in the discharge of a primary, or absolute, or unassignable duty of the railway company, but is deemed a fellow servant of any trainmen who may be injured in consequence of his neglect to perform such duty.²⁰ This view seems to be untenable.

§ 5142. **Signal-Man on Street-Railway and Gripman.**—A watchman at a curve of a cable street-railroad, whose duty it is to signal approaching cars to stop and start, so that they will not meet upon the curve, is a fellow servant of a gripman on one of the cars.²¹

¹⁷ McCosker v. Long Island R. Co., 84 N. Y. 77; rev'g s. c. 21 Hun (N. Y.) 500; 59 How. Pr. (N. Y.) 258.

¹⁸ Jones v. St. Louis & C. R. Co., 125 Mo. 666; s. c. 26 L. R. A. 718; 28 S. W. Rep. 883; Hughson v. Richmond & C. R. Co., 2 App. (D. C.) 98; s. c. 23 Wash. L. Rep. 55.

¹⁹ Dixon v. Chicago & C. R. Co., 109 Mo. 413; s. c. 19 S. W. Rep. 412; s. c. on second appeal, *sub nom.* Church

v. Chicago & C. R. Co., 119 Mo. 203; 23 S. W. Rep. 1056.

²⁰ Louisville & C. R. Co. v. Petty, 67 Miss. 255; s. c. 7 South. Rep. 351; 30 Cent. L. J. 503; 41 Am. & Eng. R. Cas. 444; Illinois Cent. R. Co. v. Jones (Miss.), 16 South. Rep. 300 (no off. rep.). See *ante*, § 4918.

²¹ Murray v. St. Louis & C. R. Co., 98 Mo. 573; s. c. 12 S. W. Rep. 252; 5 L. R. A. 735; 41 Am. & Eng. R. Cas. 446.

§ 5143. **Street-Railway Conductor and Motorman.**—It has been held that the conductor and motorman on an electric car are fellow servants, and that the negligence of the conductor is imputable to the motorman.²²

§ 5144. **Telegraph-Operator and Track-Repairers.**—A telegraph-operator is not, with respect to the duty which he undertakes to discharge for the company of keeping a squad of section-hands informed as to the movements of trains over their section, acting as their fellow servant; but if one of them is injured in consequence of his neglecting to communicate such information, the company will be liable.²³

§ 5145. **Track-Laborer, Train-Conductor and Track-Walker.**—It has been held that a laborer employed by a railroad company to remove snow and other obstructions from its track, and who is under the immediate control of its roadmaster, is a fellow servant of a track-walker and of a train-conductor through whose negligence he is killed.²⁴

§ 5146. **Trainmen and Other Employés who are being Hauled to and from their Work.**—Train-crews, on the one hand, and trackmen, bridgemen, or servants of whatsoever department or grade, have been deemed fellow servants of each other when the latter are being hauled to or from their work, so that, if they are injured by the negligence of the trainmen, there can be no recovery of damages;²⁵ but decisions

²² *Savage v. Nassau Electric R. Co.*, 42 App. Div. (N. Y.) 241; s. c. 59 N. Y. Supp. 225; s. c. aff'd, 168 N. Y. 680; 61 N. E. Rep. 1134.

²³ *Northern Pac. R. Co. v. Charless*, 2 C. C. A. 380; s. c. 51 Fed. Rep. 562; 51 Am. & Eng. R. Cas. 198.

²⁴ *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97; s. c. 3 L. R. A. 824; 21 Pac. Rep. 437.

²⁵ *Seaver v. Boston & C. R. Co.*, 14 Gray (Mass.) 466; *Gilshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Carney v. Caraquet R. Co.*, 29 N. B. 425 (engineer and conductor killing a section-man whom they are carrying to his work by negligently going upon a defective bridge); *Manville v. Cleveland & C. R. Co.*, 11 Ohio St. 417 (conductor travelling on another train than his own to his place of service); *Wright v. Northampton & C. R. Co.*, 122 N. C. 852; s. c. 29 S. E. Rep. 100 (engineer and section-mas-

ter—fellow servants, even though no contract to carry the latter); *Vick v. New York & C. R. Co.*, 95 N. Y. 267 (employé in shops—fellow servant); *Russell v. Hudson River R. Co.*, 17 N. Y. 134 (employé on gravel-train, being transported home—fellow servant of engineer); *Austin & C. R. Co. v. Beatty*, 6 Tex. Civ. App. 650; s. c. 24 S. W. Rep. 934; *Hutchinson v. York & C. R. Co.*, 5 Exch. 343; s. c. 19 L. J. (Exch.) 296; 14 Jur. 837; 6 Eng. R. & Canal Cas. 580 (servant being carried is a fellow servant of those in charge of the train or in charge of another train with which it collides); *Morgan v. Vale of Neath R. Co.*, 5 Best & S. 736; s. c. L. R. 1 Q. B. 149; 35 L. J. (Q. B.) 23; 13 L. T. (N. S.) 564; 14 Wkly. Rep. 144; aff'g s. c. 5 Best & S. 570; 10 Jur. (N. S.) 1074; 33 L. J. (Q. B.) 260; 13 Wkly. Rep. 1031; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; s. c. 2 Jur. (N.

are met with holding the contrary,²⁶—as where a skilled machinist, riding on an engine to his place of duty, was injured by a collision which took place in consequence of the negligence of the engineer;²⁷ or where a brakeman was not acting as such, but was being carried to a certain point under orders,—he and the engineer through whose negligence he was injured not being engaged in the same common work;²⁸ or where a section-hand, riding to his place of work on a train, was injured by the negligence of the conductor.²⁹ The contrary has also been held with respect to one employed by a street-railway company to lay its track, who receives transportation to and from his work, and rides on a ticket furnished to him, as a part of the consideration of his employment, who has no duties to perform in connection with the operation of the car on which he rides, and whose contract does not require him to ride on any particular car.³⁰

§ 5147. **Watchman and Conductor or Engineer.**—A watchman at a bridge or trestle is not a fellow servant with a conductor and engineer of a train, they being engaged in different departments of the service, and working under the immediate direction of different foremen.³¹

S.) 691. See also, Northern Pac. R. Co. v. Peterson, 162 U. S. 346; s. c. 40 L. ed. 994; 16 Sup. Ct. Rep. 843 (injury to a member of a railroad-gang while riding on a hand-car to his place of work). Further as to this question, see Vol. III, §§ 2654, 2655.

²⁶ O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239.

²⁷ Stuber v. Louisville &c. R. Co., 102 Fed. Rep. 421.

²⁸ Galveston &c. R. Co. v. Waldo (Tex. Civ. App.), 26 S. W. Rep. 1004 (no off. rep.) (under a statute).

²⁹ McGill v. Southern Pac. Co.

(Ariz.), 33 Pac. Rep. 821 (no off. rep.).

³⁰ Peterson v. Seattle Traction Co., 23 Wash. 615; s. c. 63 Pac. Rep. 539; 65 Pac. Rep. 543 (holding him to be a *passenger* while so riding, and not a servant of the company); the court citing Denver &c. Rapid Transit Co. v. Dwyer, 20 Colo. 132; s. c. 36 Pac. Rep. 1106 (not a fellow servant with train-crew); Fitzpatrick v. New Albany &c. R. Co., 7 Ind. 436 (same holding); Gillenwater v. Madison &c. R. Co., 5 Ind. 339 (servant held to be a passenger).

³¹ Pike v. Chicago &c. R. Co., 41 Fed. Rep. 95.

CHAPTER CXXIX.

ILLUSTRATIONS OF THE FELLOW-SERVANT DOCTRINE IN MINES AND MINING, QUARRIES AND QUARRYING.

SECTION	SECTION
5151. Mine-engineer and miners or mine workmen.	5163. Mine-superintendent and contractor to break down rock.
5152. Mine-foremen or mine-bosses of various descriptions, and miners or mine-workers.	5164. Miner and ore-hoister or cage-operator not fellow servants.
5153. Mine-superintendent and miner or mine-worker.	5165. "Pushers" in a mine.
5154. Heads of different departments in coal mine.	5166. Miner and tool-carrier.
5155. Mine employés whose duty it is to keep the mine safe.	5167. Engineer and engine-repairer.
5156. Gas-tester in mine and miner.	5168. Other mining employés to whom the relation of fellow servants has been ascribed.
5157. Mine-engineer and fire-boss.	5169. Additional illustrations of the fellow-servant doctrine in mining cases.
5158. Fire-boss and miners or mine-workers.	5170. Engineer of quarry and quarryman.
5159. "Timber-boss" and miner.	5171. Servants engaged in blasting.
5160. Coal miner and men employed to remove the coal which he mines.	5172. Whether foreman of a quarry failing to give notice that a blast is about to be exploded acts as a fellow servant or as a vice-principal.
5161. Miner and common workman.	
5162. Miner and roadman in mine.	

§ 5151. **Mine-Engineer and Miners or Mine Workmen.**—A mine-engineer, by which is meant the operator of a steam-engine in a mine to raise and lower the hoisting cages or to operate a tramway, is generally deemed a fellow servant of the miners or other men working in the mine, or who are being lowered into the mine or hoisted from it.¹

¹ *Whatley v. Zenida Coal Co.*, 122 Ala. 118; s. c. 26 South. Rep. 124 (person in charge of a stationary engine operating a tramway on a mining-slope and the engineer of a pumping-engine located in the mine); *Trewatha v. Buchanan Gold & Co.*, 96 Cal. 494; s. c. 23 Pac. Rep. 571 (engineer operating machinery to hoist materials from

a mine and to raise and lower the miners); *Niantic Coal & Co. v. Leonard*, 25 Ill. App. 95; s. c. aff'd, 126 Ill. 216; 15 West. Rep. 142; 19 N. E. Rep. 294 (engineer letting the cage down too rapidly and mine-worker injured thereby deemed fellow servants); *Starne v. Schlottane*, 21 Ill. App. 97 (engineer of a coal mine whose duty it is to

§ 5152. **Mine-Foremen or Mine-Bosses of Various Descriptions, and Miners or Mine-Workers.**—Mine-foremen or mine-bosses of various descriptions, such as the "slate-picker boss,"² "pit-boss,"³ "fire-boss,"⁴ "shift-boss,"⁵ "mine-foreman,"⁶ and "inside foreman,"⁷ are generally deemed fellow servants of miners and mine-workers in the same mine.⁸ The Supreme Court of the United States have held, re-

lower and raise cages, and a common laborer preparing the bottom of the shaft to receive them); *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231; s. c. 33 W. N. C. (Pa.) 94; 27 Atl. Rep. 400; *Stoll v. Daly Min. Co.*, 19 Utah 271; s. c. 57 Pac. Rep. 295; *Buckley v. Gould & C. Min. Co.*, 8 Sawy. (U. S.) 394; s. c. 14 Fed. Rep. 833; *Spring Valley Coal Co. v. Patting*, 58 U. S. App. 575; s. c. 86 Fed. Rep. 433; 30 C. C. A. 163; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; s. c. 4 Jur. (N. S.) 767; 1 Pat. Sc. App. 785.

² *McCool v. Lucas Coal Co.*, 150 Pa. St. 638; s. c. 24 Atl. Rep. 350 (slate-picker boss is a fellow servant of a slate-picker); *Reese v. Biddle*, 112 Pa. St. 72; *Delaware & C. Co. v. Carroll*, 89 Pa. St. 374 (appointed under a statute prescribing their duties).

³ *Deserant v. Cerrillos & C. R. Co.*, 9 N. M. 495; s. c. 55 Pac. Rep. 290; 5 Am. Neg. Rep. 206 (pit-boss working under the superintendent deemed a fellow servant of other mine-workers); *What Cheer Coal Co. v. Johnson*, 6 C. C. A. 148; s. c. 56 Fed. Rep. 810 (foreman of eight or ten men, himself controlled by pit-boss, who in turn is controlled by superintendent or general manager, is a fellow servant with the men under him).

⁴ *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577; s. c. 34 Pac. Rep. 152, 772 (did not occupy the place of a vice-principal toward a miner in opening his lamp for the purpose of lighting his pipe, after receiving a statement from such miner that there was no gas in the place, which the boss was about to test).

⁵ *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463; s. c. 2 Det. Leg. N. 534; 3 Det. Leg. N. 43, 53; 64 N. W. Rep. 335; 66 N. W. Rep. 951; 32 L. R. A. 435, 438; 58 Am. St. Rep. 505.

⁶ *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; s. c. 33 W. N. C. (Pa.) 204; 27 Atl. Rep. 577;

Voshefskey v. Hillside Coal & C. Co., 21 App. Div. (N. Y.) 168; s. c. 47 N. Y. Supp. 386 (as to duties imposed by statutes).

⁷ *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; s. c. 33 W. N. C. (Pa.) 204; 27 Atl. Rep. 577 (inside foreman having charge of operations and of ventilation, subject to orders from the general superintendent).

⁸ *Colorado Coal & C. Co. v. Lamb*, 6 Colo. App. 255; s. c. 40 Pac. Rep. 251; *Brazil & C. Coal Co. v. Cain*, 98 Ind. 282; *Haley v. Kein*, 151 Pa. St. 11; s. c. 31 W. N. C. (Pa.) 18; 25 Atl. Rep. 98 (mine-boss neglected to close openings into an adjacent mine, so that deadly gases passed into his own mine and killed a miner,—proprietor not liable); *Velas v. Latton Coal Co.*, 197 Pa. St. 380; s. c. 47 Atl. Rep. 360; *Waddell v. Simonson*, 112 Pa. St. 567 (mine-boss is a fellow servant of a driver-boy employed to haul coal from the chambers of the mine); *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; s. c. 33 W. N. C. (Pa.) 204; 27 Atl. Rep. 577 (notwithstanding a statute requiring the mine-owner to give notice of any apprehended danger to the mine-foreman); *Redstone Ccke Co. v. Roby*, 115 Pa. St. 364; s. c. 8 Atl. Rep. 593; 19 W. N. C. (Pa.) 221 (appointed under statutes, is a fellow servant of miners injured from an explosion of fire-damp caused by his negligence); *Delaware & C. Canal Co. v. Carroll*, 89 Pa. St. 374 (mining-boss appointed under a statute prescribing his duty); *Hughes v. Oregon Imp. Co.*, 20 Wash. 294; s. c. 55 Pac. Rep. 119 (employés in charge of the fan furnishing air for the mine, gas-testers, pit-boss, and top-boss, who have no authority to employ or discharge men or to take supervision of any department of the business, are fellow servants, and not vice-principals, with respect to miners at work in the mine, and the com-

versing the judgments of the District Court and the Circuit Court of Appeals, that a mere foreman or boss of a gang of men working in a mine, being employed in the same department of business, and under a common head, is a fellow servant with them, whether he has or has not authority to engage and discharge the men under him.⁹ On the other hand, superior servants of mine-owners or operators passing under these designations have been held to be vice-principals and not fellow servants of miners or mine-workers under the following conditions:—Where a mine-boss directed a boy, ten years old, to leave the work which he was doing and to assist in switching coal-cars;¹⁰ where a mine-foreman directed an employé to work under a dangerous portion of the roof, the employé being ignorant of the danger,—the conclusion being that the foreman is presumed to know the condition of the roof;¹¹ where a shift-boss, whose duty it was to direct men where to work, sent one of them to drill for blasting in a new part of the mine, where there were unexploded blasts which were concealed, of which the boss had knowledge, but of which he gave no information to the miner;¹² where a shift-boss, in charge of men engaged in sinking a shaft, failed, when such shift went off duty, to warn the boss of the oncoming shift of a hole which had failed to explode;¹³ where a mine-foreman ordered a miner into a dangerous occupation which was no part of the work which he had engaged to perform, where he was injured by the falling of a mass of material, which accident he might have prevented by taking proper precautions.¹⁴ The following superior servants have been held not to be fellow servants with miners or mine-workers:—A mine-boss with respect to a minor employed in the mine, where the boss had full power to place and designate the employment of the hands in the mine;¹⁵ a superintendent of a mine and a boy employed therein to open and close doors;¹⁷ a pit-boss having authority to command workmen with respect to what they shall do;¹⁸ a

mon employer is not chargeable for their acts in shutting down the fan or in opening a door during a fire); *Williams v. Thacker Coal & Co.*, 44 W. Va. 599; s. c. 40 L. R. A. 812; 30 S. E. Rep. 107 (mine-boss employed in accordance with the provisions of a statute).

⁹ *Alaska & Min. Co. v. Whelan*, 168 U. S. 86; s. c. 42 L. ed. 390; 18 Sup. Ct. Rep. 40; rev'g s. c. 64 Fed. Rep. 462; 12 C. C. A. 225; 29 U. S. App. 1.

¹⁰ *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455; s. c. 4 L. R. A. 850; 6 Rail. & Corp. L. J. 152; 21 N. E. Rep. 1102.

¹¹ *Consolidated Coal Co. v. Wom-*

bacher, 134 Ill. 57; s. c. 24 N. E. Rep. 627.

¹² *McMahon v. Ida Min. Co.*, 95 Wis. 308; s. c. 70 N. W. Rep. 478; 60 Am. St. Rep. 117.

¹³ *Shannon v. Consolidated & C. Min. Co.*, 24 Wash. 119; s. c. 64 Pac. Rep. 169.

¹⁴ *Linderberg v. Crescent Min. Co.*, 9 Utah 163; s. c. 33 Pac. Rep. 692.

¹⁵ *Weaver v. Iselin*, 161 Pa. St. 386; s. c. 29 Atl. Rep. 49.

¹⁷ *Northern Pac. Coal Co. v. Richmond*, 7 C. C. A. 485; s. c. 58 Fed. Rep. 756.

¹⁸ *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57; s. c. 24 N. E. Rep. 627.

night-boss in a coal mine having authority to direct the operations;¹⁹ a "mine-captain" who has the entire management of the mine, without interference by the owner, though appointed by the agent of the owner.²⁰ And it must be kept in mind, here as elsewhere, that a servant of whatever grade who is clothed by the mine-owner with any of his primary, absolute, or unassignable duties, is, with respect to the discharge of such duties, his vice-principal and not a fellow servant of a miner or mine-worker who may be injured through his negligence in discharging them,—and this although he may be regarded as a fellow servant in relation to duties affecting the mere administration of the work.²¹

§ 5153. **Mine-Superintendent and Miner or Mine-Worker.**—We are now dealing *not with a mere foreman of work*, but with a superintendent of a mine or of a distinct department of a mine, who has general charge of its men, of its machinery, of its appliances and of its operations, with (in most cases) power to employ and discharge men and to supply materials. This person is generally deemed a vice-principal of the mine-owner, and not a fellow servant of those who work in the mine under his orders.²²

¹⁹ Consolidated Coal Co. v. Wombacher, 31 Ill. App. 288; s. c. aff'd, 134 Ill. 57.

²⁰ Ryan v. Bagaly, 50 Mich. 179; s. c. 45 Am. Rep. 35.

²¹ Russell Creek Coal Co. v. Wells, 96 Va. 416; s. c. 4 Va. L. Reg. 597; 31 S. E. Rep. 614 (company not liable where the place, originally safe, is rendered unsafe by the negligent manner in which the mine-boss directs work to be done therein).

²² Bessemer Land & Co. v. Campbell, 121 Ala. 50; s. c. 25 South. Rep. 793; 77 Am. St. Rep. 17 (mine operator liable for death of an employé by suffocation in the mine, resulting from the stopping of a fan, if the superintendent *allowed* it to be stopped, although he did not *cause* it to be stopped); Kelley v. Fourth of July Min. Co., 16 Mont. 484; s. c. 41 Pac. Rep. 273; Kelley v. Cable Co., 7 Mont. 70; s. c. 14 Pac. Rep. 633 (if miner injured by an explosion through negligence of the foreman in his capacity of foreman, mine-owner liable); Cunningham v. Union Pac. R. Co., 4 Utah 206; s. c. 7 Pac. Rep. 795 (foreman who has entire charge of a mine underground and its operation); Trihay

v. Brooklyn Lead Min. Co., 4 Utah 468; s. c. 11 Pac. Rep. 612 (foreman who has entire charge of a mine underground and its operation); Reddon v. Union Pac. R. Co., 5 Utah 344; s. c. 15 Pac. Rep. 262 (foreman who has entire charge of a mine underground and its operation). It has been held that where a corporation owning two mining-plants has a general superintendent, with general oversight over both plants, and a foreman in each mine, who employs and discharges the men, and directs and controls the entire operations of his mine and of the various gangs of men there employed, such foreman is a vice-principal, to whom has been delegated the duty of providing safe appliances and a safe place to work, and for whose acts and negligence in that regard the owner is responsible: Alaska United Gold Min. Co. v. Muset, 114 Fed. Rep. 66; s. c. 52 C. C. A. 14. For another case where the negligence of the superintendent of a mine was attributed to the mine-owner,—see Bessemer Land & Co. v. Campbell, 121 Ala. 50. State of evidence in which it was held that the *pump-man* of a mine

§ 5154. **Heads of Different Departments in Coal Mine.**—It has been held that the heads of different departments in the same coal mine, working together under a common superintendent, are in a common employment, and that the master is not liable to either of them for injuries caused by the negligence of the other.²³

§ 5155. **Mine Employés whose Duty it is to Keep the Mine Safe.**—An employé of a mine-owner whose duty it is to timber a drift in a mine so as to provide and keep a safe place for the other employés to work in, is employed to discharge one of the primary, absolute and unassignable duties of the master, and is, consequently, a vice-principal and not a fellow servant of the men working in the mine.²⁴ Contrary to this, another court has held that an employé in a mine whose duty it is to take down loose slate which is liable to fall, is not a vice-principal while so engaged, but is a fellow servant of the miners.²⁵

§ 5156. **Gas-Tester in Mine and Miner.**—In a case where the plaintiff was injured by an explosion of gas, while working in the defendant's coal mine, it appeared that the gas-tester had inspected the mine and placed warning notices in conspicuous places, and notified an assistant to get brattice-cloth and meet him later to remove the gas. The plaintiff and a fellow servant reached a breast where they were to labor, and saw the warning, but, thinking there was but little gas present, the plaintiff's companion took off his coat and brushed the gas, as he had been instructed to do when gas was present in small quantities only. His act drove the gas toward one of the open lamps carried by the men, such lamps being always used unless the men were otherwise instructed by the gas-tester, and an explosion took place. There was evidence that the brattice-cloth in use was insufficient to give ventilation, and that a new one had been promised, and that the gas-tester had brushed small collections of gas out of the place where the explosion occurred. It was held that such gas-tester

occupied the position of vice-principal so far as the work of making an extension of a pipe to keep the mine-shaft clear of water was concerned, so that his negligence in the discharge of such duty, whereby a workman was injured in consequence of the failure of the pumpman to secure a stull, justified a verdict in favor of the plaintiff, and

against the mine-owner: *Carleton Min. &c. Co. v. Ryan*, 29 Colo. 401; s. c. 68 Pac. Rep. 279.

²³ *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; s. c. 6 Repr. 125; 17 Alb. L. J. 513.

²⁴ *Grant v. Varney*, 21 Colo. 329; s. c. 40 Pac. Rep. 771.

²⁵ *Fosburg v. Phillips Fuel Co.*, 93 Iowa 54; s. c. 61 N. W. Rep. 400.

was not a fellow servant of the plaintiff, and that the master was liable for his negligence.²⁶

§ 5157. **Mine-Engineer and Fire-Boss.**—An employé of a coal-mining company whose duties consist in ventilating the mine, in attending to an inside furnace, and in guarding the wooden buildings at the entrance of the shaft which contain the engine and machinery, is deemed a fellow servant of the engineer, where the latter is not the superior of such employé or entrusted by the master with the discharge of any duty with respect to him.²⁷

§ 5158. **Fire-Boss and Miners or Mine-Workers.**—A fire-boss in a coal mine, whose duty it is to inspect the working-places and to inform the miners who work by contract as to the safety of their working-places, represents the mine-owner in so doing.²⁸

§ 5159. **"Timber-Boss" and Miner.**—A "timber-boss" whose duty it is to superintend the repairs of a stairway beside the track upon which run lifting-cars which are used in mining, is deemed a fellow servant of a miner assisting him in such repairs, so that the latter cannot recover for injuries from being struck by one of such cars, due to the failure of the timber-boss to have them stopped while repairs are being made.²⁹

§ 5160. **Coal-Miner and Men Employed to Remove the Coal which he Mines.**—A coal-miner who receives pay according to the quantity of coal mined by him is a fellow servant of the men employed by the operator of the mine to assist in getting out coal without actually drilling holes or aiding in blasting with powder, through whose negligence the former is killed.³⁰

§ 5161. **Miner and Common Workman.**—There is meager authority for the conclusion that a miner and a common workman employed about a mine are not fellow servants within the rule under consideration.³¹

²⁶ Costa v. Pacific Coast Co., 26 Wash. 138; s. c. 66 Pac. Rep. 398 (his negligence consisted, seemingly, in failing to warn the men of the quantity of gas present, and of the danger of using open lamps).

²⁷ Coal Creek Min. Co. v. Davis, 90 Tenn. 711; s. c. 18 S. W. Rep. 387.

²⁸ Cerrillos Coal R. Co. v. Deserant, 9 N. M. 49; s. c. 49 Pac. Rep. 807.

²⁹ Jenkins v. Mahopac Iron-Ore Co., 57 Hun (N. Y.) 588 (*mem.*); 32 N. Y. St. Rep. 866; 10 N. Y. Supp. 484.

³⁰ Cerrillos Coal R. Co. v. Deserant, 9 N. M. 49; s. c. 49 Pac. Rep. 807.

³¹ James v. Emmet Mining Co., 55 Mich. 335; Evans v. Carbon Hill Coal Co., 47 Fed. Rep. 437 (laborer engaged in constructing a railway for

§ 5162. **Miner and Roadman in Mine.**—These are fellow servants.³²

§ 5163. **Mine-Superintendent and Contractor to Break Down Rock.**—One who enters into a contract with a mining company to break down rock and ore for a certain distance, at a certain price per foot, the company to furnish the steam-drill and keep the drift clear of rock, is not a fellow servant of the superintendent of the mine, but is an independent contractor, and may recover for injuries resulting from the negligence of the superintendent.³³

§ 5164. **Miner and Ore-Hoister or Cage-Operator Not Fellow Servants.**—In one State it is held that a servant of a mining company, working at the bottom of a shaft which is operated by the company to hoist ore from the various levels of the mine for lessees of the levels, and an employé of a lessee allowing ore to fall and injure the former, are not fellow servants.³⁴ In another State, under a statute³⁵ providing that all persons who, while in the service of any one, are in the same grade of service, and are working together, at the same time and place, and to a common purpose, neither of such persons being entrusted by such employer with any superintendence or control over his fellow employés, are fellow servants of each other,—it is held that a miner is not a fellow servant with one whose duty it is to manage and operate a cage by which the miners are conveyed in and out of the mine.³⁶

§ 5165. **"Pushers" in a Mine.**—"Pushers" in charge of the several shifts of men operating a mine are fellow servants with respect to their duty of notifying each other, at the time of changes of shifts, of unexploded holes in the shaft.³⁷

§ 5166. **Miner and Tool-Carrier.**—It has been held that a miner is not a fellow servant with one employed as a "tool-carrier," whose only duty is to take sharpened tools into the mine and throw them off at the various levels, and bring up the dull ones.³⁸

transportation of coal from a mine deemed not a fellow servant with a miner at work outside the mine handling lumber to be used in the mine in timbering up, in the absence of facts in the pleading showing them to be in a common employment—so held in ruling on demurrer to complaint).

³² *Troughear v. Lower Vein Coal Co.*, 62 Iowa 576.

³³ *Mayhew v. Sullivan Min. Co.*, 76 Me. 100.

³⁴ *Union Gold Min. Co. v. Crawford*, 29 Colo. 511; s. c. 69 Pac. Rep. 600.

³⁵ *Utah Rev. Stat.* 1898, § 1343.

³⁶ *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; s. c. 68 Pac. Rep. 845.

³⁷ *Anderson v. Daly Min. Co.*, 16 Utah 28; s. c. 50 Pac. Rep. 815.

³⁸ *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; s. c. 68 Pac. Rep. 845.

§ 5167. **Engineer and Engine-Repairer.**—An engineer in charge of the blowing-engines in a mine is a fellow servant of an engine-repairer while the latter is at work upon one of the engines, so far as regards the duty of the engineer to prevent the starting of the engine.³⁹

§ 5168. **Other Mining Employés to whom the Relation of Fellow Servants has been Ascribed.**—The relation of fellow servants has been ascribed to an employé whose duty it is to see that a tram-track in a mine is in proper condition, and an employé whose duty it is to sprag the wheels of the tram-cars for the purpose of checking their speed;⁴⁰ to a timber-man and a dirt-scratcher in a coal mine injured while assisting the timber-man at his request,—the fact of his having been requested by the foreman to assist the timber-man on previous like occasions not being deemed to make the timber-man his vice-principal, since the timber-man had no power to compel the dirt-scratcher to assist him, or to discharge him if he refused;⁴¹ to an employé at the top of a mine-shaft whose duty it is to dump the ore-bucket and let it down, and an employé at the bottom of the shaft whose duty it is to fill the bucket, which is hoisted by means of a horse led by a boy, and let down slowly by the same means;⁴² to a miner killed by the explosion in an unused part of the mine into which he was sent without any previous inspection for the detection of explosive gas, and the underground manager whose duty it was to make such an inspection;⁴³ to a blacksmith employed on the surface to sharpen tools for miners engaged underground, and a servant employed to deliver the tools to those who are to use them.⁴⁴

§ 5169. **Additional Illustrations of the Fellow-Servant Doctrine in Mining Cases.**—The rule of a coal-mining company that the danger of falling coal is one of the usual risks of the service has no application where the fall is occasioned by the negligence of an employé acting in his capacity as a vice-principal.⁴⁵ A corporation working a mine by

³⁹ *Dantzler v. De Bardeleben Coal &c. Co.*, 101 Ala. 309; s. c. 22 L. R. A. 361; 14 South. Rep. 10 (under Ala. Code 1886, § 2590, sub-sec. 2).

⁴⁰ *Woodward Iron Co. v. Cook*, 124 Ala. 349; s. c. 27 South. Rep. 455.

⁴¹ *Kellyville Coal Co. v. Humble*, 87 Ill. App. 437.

⁴² *Adams v. Snow*, 106 Wis. 152; s. c. 81 N. W. Rep. 983.

⁴³ *Grant v. Acadia Coal Co.*, 34 N. S. 319.

⁴⁴ *Snyder v. Viola Min. &c. Co.*, 2

Idaho 771; s. c. 3 Idaho (off. ed.) 28; 26 Pac. Rep. 127.

⁴⁵ *Consolidated Coal Co. v. Gruber*, 188 Ill. 584; s. c. 59 N. E. Rep. 254; aff'g s. c. 91 Ill. App. 15 (assistant mine-manager, whose duty it was to repair coal-cutting machines, while testing one which was out of repair, and merely as a test, and not to mine coal, negligently cut away a block of coal left as a support, causing a large quantity of coal to fall and injure plaintiff).

a general superintendent is not liable for an injury to a miner from the negligence of one employed to point out to the miners the place where holes are to be drilled, although the latter has authority to hire and discharge workmen; since a mere boss or foreman is a fellow servant, and not a vice-principal.⁴⁶ A blacksmith employed in a mine cannot recover from the company employing him for injuries from an explosion of dynamite caused by the negligence of a fellow servant, in the absence of evidence that the directors of the company, or any one connected with it other than fellow servants with such blacksmith, was aware of the mode in which the dynamite was kept.⁴⁷

§ 5170. **Engineer of Quarry and Quarryman.**—These have been held to be fellow servants.⁴⁸

§ 5171. **Servants Engaged in Blasting.**—Servants in a mine or quarry engaged in drilling holes for blasts and loading them with powder are usually held to be fellow servants;⁴⁹ and this is so even though the negligent servant is a foreman.⁵⁰ It was held in one case that a servant engaged in blasting rock, and a servant engaged in hauling rock who was killed through his negligence, were fellow servants, although engaged in different branches of the same undertaking.⁵¹

§ 5172. **Whether Foreman of a Quarry Failing to Give Notice that a Blast is about to be Exploded Acts as a Fellow Servant or as a**

⁴⁶ *Gilmore v. Oxford Iron & Co.*, 55 N. J. L. 39; s. c. 25 Atl. Rep. 707 (following *O'Brien v. American Dredging Co.*, 53 N. J. L. 291).

⁴⁷ *McInnis v. Malaga Min. Co.*, 25 N. S. 345. The question of defective construction of a dividing partition in a shaft in a mine is immaterial, where a workman, while ascending a ladder in one side of the shaft, was struck by a timber negligently thrown down the other side of the shaft by a fellow workman, and which got into the side in which the ladder was by reason of the defective partition, where there is no evidence that if reasonable care had been used in throwing the log down the accident would have happened, but the presumption is strongly the other way: *Kevern v. Providence Gold & C. Min. Co.*, 70 Cal. 392.

⁴⁸ *Chapman v. Reynolds*, 77 Fed. Rep. 274; s. c. 33 U. S. App. 686; 23 C. C. A. 166.

⁴⁹ *Ward v. Naughton*, 74 App. Div. (N. Y.) 68; s. c. 77 N. Y. Supp. 344 (two forces of men employed in digging two trenches toward each other, had reached a point where a wall of rock only two feet thick separated them, when the blast was set off in one of the trenches, without sufficient warning, tearing down the wall and injuring the plaintiff, who was employed in the other trench); *Johnson v. Portland Stone Co.*, 40 Or. 436; s. c. 67 Pac. Rep. 1013; 68 Pac. Rep. 425; *Wiskie v. Montello Granite Co.*, 111 Wis. 443; s. c. 87 N. W. Rep. 461.

⁵⁰ *Ward v. Naughton*, 74 App. Div. (N. Y.) 68; s. c. 77 N. Y. Supp. 344; *Johnson v. Portland Stone Co.*, 40 Or. 436; s. c. 67 Pac. Rep. 1013; 68 Pac. Rep. 425.

⁵¹ *Bogard v. Louisville & C. R. Co.*, 100 Ind. 491.

Vice-Principal.—Under a statute which appears to be merely declaratory of the common-law doctrine, it has been held that the duty of giving notice to those at work in a quarry that a blast is about to be exploded, is not a personal duty resting upon the master, but that he does all that is required of him when he hires a competent servant for the purpose. Such servant, although a *foreman* of the work, is deemed to be a fellow servant; so that, if he neglects to give the proper warning, then, in the absence of averment and proof that he was incompetent or unfit for his position, or that the place was otherwise an unsafe place to work, the master will not be liable for an injury to a servant proceeding from this cause.⁵²

² *Donovan v. Ferris*, 128 Cal. 48; s. c. 60 Pac. Rep. 519.

CHAPTER CXXX.

ILLUSTRATIONS OF THE FELLOW-SERVANT DOCTRINE IN SHIPPING AND NAVIGATION.

SECTION	SECTION
5176. Servants of various grades employed in and about vessels generally deemed fellow servants.	5187. Employé of stevedore and crew of vessel.
5177. Circumstances in which they are not fellow servants.	5188. Dock superintendent and stevedore.
5178. Officers of a ship and its crew.	5189. Stevedore and stevedore.
5179. Master of vessel and member of crew.	5190. Stevedore and boatswain.
5180. Master of vessel and engineer or fireman.	5191. Foreman of stevedore and longshoreman.
5181. Master of vessel and mate.	5192. Employé of a "boss scooper" and member of the crew.
5182. Mate of vessel and members of the crew.	5193. Grain-shoveller and captain of a steam-tug.
5183. Engineer of boat and machine-oiler.	5194. Carpenter and boilermaker on the same ship.
5184. Engineer of vessel and coal-trimmer.	5195. Pilot and deck-hand.
5185. Winchman employed by ship-owner, and stevedore or stevedore's employés.	5196. Dry-dock foreman and dry-dock laborer.
5186. Superintendent of loading and men in the hold.	5197. Captain of a "State boat" and a laborer.
	5198. Engineer repairing machinery on a coal-dock and laborer repairing a chute connected with the dock.

§ 5176. **Servants of Various Grades Employed in and about Vessels Generally Deemed Fellow Servants.**—Subject to exceptions hereafter noted, it may be stated generally that all servants of various grades who work together in and about vessels, whether in loading them,¹ or in unloading them,² or in making various repairs upon

¹ *Ocean S. S. Co. v. Cheney*, 86 Ga. 278; s. c. 12 S. E. Rep. 351 (person employed to attend hatchway and to give warning to those below assisting in loading is their coemployé); s. c. on second appeal, *sub nom. Cheeney v. Ocean S. S. Co.*, 92 Ga. 726; 19 S. E. Rep. 33; 44 Am. St. Rep. 113 (hatch-tender absenting himself from his station, where he is placed to warn laborers in the hold, is, with respect to a workman

in the hold injured by a bale of cotton being dropped into it without warning, his coemployé); *Kenny v. Cunard S. S. Co.*, 52 N. Y. Super. 434 (laborer loading a cargo is the fellow servant of another laborer working above him); *The Bolivia*, 59 Fed. Rep. 626 (laborer in loading deemed a fellow servant of winchman through whose carelessness a box fell into the hold).

² *Olsen v. Starin*, 60 N. Y. Supp.

them,³ or in navigating them,⁴ or in working about the wharves at which they are docked,⁵ or in rigging them,⁶ are fellow servants where they are employed by a common master.⁷

§ 5177. **Circumstances in which they are Not Fellow Servants.**—

On the other hand, courts have refused to ascribe the relation of fellow servant to a longshoreman employed in unloading a ship, with respect to the servants on board the ship having charge of its supplies;⁸ to coemployés of a workman, where such coemployés are en-

134; s. c. 43 App. Div. (N. Y.) 422 (servant operating a steam-engine in unloading, and another servant of the same master piling the lumber as it is unloaded); *The Servia*, 44 Fed. Rep. 943 (longshoreman engaged in unloading injured by the fall of iron from a skid, caused by the negligence of the guy-tender or engineer).

³ *Butler v. Townsend*, 126 N. Y. 105; s. c. 36 N. Y. St. Rep. 508; 26 N. E. Rep. 1017; rev'g s. c. 32 N. Y. St. Rep. 1055; 10 N. Y. Supp. 809 (workmen employed to fix sheets of metal on the hull of a vessel and other workmen employed in caulking the seams therein).

⁴ *Hedley v. Pinkney & Co. S. S. Co.*, [1894] A. C. 222 (sailor falling overboard and drowning because of the neglect of the master to ship stanchions and rails provided for the purpose of raising the bulwarks to a proper height); *Carlson v. United & Co. Pilots' Assn.*, 93 Fed. Rep. 468 (mate of vessel and men drowned, through his negligence, in a yawl lowered to take a pilot from an outgoing vessel).

⁵ *Red River Line v. Cheatham*, 9 C. C. A. 124; s. c. 60 Fed. Rep. 517 (drowning of a deck-hand through the negligence of the tender of the fall attached to the landing-stage in letting it go so that the stage tilts and falls into the river, throwing the deck-hand off). But the negligence of the mate on a steamboat in failing to give a signal before letting the gangplank slide to the deck, by reason of which a deck-hand who was coming to his assistance was injured, was the negligence of a vice-principal, even though his act in *untying* the plank might have been a duty not pertaining to his duty as vice-principal: *Nelson v. S. Willey S. S. & Co.*, 26 Wash. 548; s. c. 67 Pac. Rep. 237.

⁶ *Burns v. Sennett* (Cal.), 44 Pac. Rep. 1068 (no off. rep.) (servants working together in rigging appliances for stevedores are fellow servants of a stevedore injured by their negligence); *Pickett v. Atlas S. S. Co.*, 12 Daly (N. Y.) 441 (scaffold-builder and rigger employed on a steamship in port).

⁷ *The Islands*, 28 Fed. Rep. 478; *The Sachem*, 42 Fed. Rep. 66; *Wood v. New Bedford Coal Co.*, 121 Mass. 252 (employé assisting in unloading coal from vessel, and operating a winch to which guy-rope was attached, by which buckets could be swung into position for dumping, injured by failure of engineer to stop hoisting-machinery at proper place, the ascending bucket drawing out guy-rope and causing crank of winch to fly around and injure him—no recovery); *Baron v. Detroit & Co. Nav. Co.*, 91 Mich. 585; s. c. 52 N. W. Rep. 22 (ship-carpenter fell through uncovered hatchway left so by negligence of fellow workmen); *Geoghagan v. Atlas S. S. Co.*, 146 N. Y. 369; s. c. 40 N. E. Rep. 507 (master, mate or other officer, in failing to close doors of a gangway at night, acts as a fellow servant of other employés and not as a vice-principal); *Moy v. Ocean S. S. Co.*, 12 Misc. (N. Y.) 375; s. c. 33 N. Y. Supp. 563; *Smith v. Empire Transp. Co.*, 89 Hun (N. Y.) 588; s. c. 70 N. Y. St. Rep. 120; 35 N. Y. Supp. 536 (painter of an iron floor injured by its fall where it had been safely placed on end, but where its supports were removed by fellow servants); *Quebec S. S. Co. v. Merchant*, 133 U. S. 375; s. c. 33 L. ed. 656; 7 Rail. & Corp. L. J. 432; 10 Sup. Ct. Rep. 397 (porter and carpenter are fellow servants of the stewardess).

⁸ *Sansol v. Compagnie Generale Transatlantique*, 101 Fed. Rep. 390.

gaged in clearing a dock,—they being deemed the general representatives of the master, so far as the work of clearing is concerned, in removing timbers standing over the head of such workman;⁹ to one employed in unloading lumber from a vessel, with respect to a gang of men on shore employed to receive and pile the lumber on the dock;¹⁰ to an engineer having charge of the hoisting-machinery of a canal-boat, whose duty it was to inspect the ropes and replace old ones with new ones, with respect to an employé who was injured by the breaking of a rope which had become worn;¹¹ to a superintendent who failed to keep his promise to station a hatch-tender at the hatchway to inform laborers in the hold when bales of cotton were going to be dropped into it.¹²

§ 5178. Officers of a Ship and its Crew.—The officers of a ship and the members of its crew of whatever grade, so far as concerns the details of the navigation of the ship, are deemed to be engaged in a common undertaking in their several stations, and are, hence, regarded by the maritime law, as well as by the common law, as fellow servants of each other.¹³

§ 5179. Master of Vessel and Member of Crew.—Although the master of a ship is the tyrant of the crew, possessing vastly more power over them by virtue of the admiralty law and of the statute law than is possessed by any superintendent or foreman over the men under him on land,—yet judicial casuistry has ascribed to him the status of a fellow servant with respect to the members of the crew of whatever grade, and whether the ship is moored to a dock or is out upon the sea.¹⁴ There are a few decisions to the contrary, and they seem to

⁹ *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636; s. c. 57 Fed. Rep. 915.

¹⁰ *John Spry Lumber Co. v. Dugan*, 80 Ill. App. 394.

¹¹ *Cregan v. Marston*, 32 N. Y. St. Rep. 913; s. c. 10 N. Y. Supp. 681.

¹² *Cheaney v. Ocean S. S. Co.*, 92 Ga. 726; s. c. 19 S. E. Rep. 33; 44 Am. St. Rep. 113.

¹³ *Olson v. Oregon Coal & Co.*, 44 C. C. A. 51; s. c. 104 Fed. Rep. 574; aff'g s. c. 96 Fed. Rep. 109; 32 Chic. Leg. N. 43 (member of crew injured through the negligence of an officer in leaving a hatchway open).

¹⁴ *Geoghegan v. Atlas S. S. Co.*, 3 Misc. (N. Y.) 224; s. c. 51 N. Y. St. Rep. 868; 22 N. Y. Supp. 749; s. c. aff'd, 146 N. Y. 369; 40 N. E. Rep.

507 (master or mate used an insufficient rope instead of an iron door which had been provided, to bar an opening in the side of the vessel, and a member of the crew fell through and was drowned—no recovery); *Larssen v. Delaware & C. R. Co.*, 59 App. Div. (N. Y.) 202; s. c. 69 N. Y. Supp. 352 (captain a fellow servant of a deck-hand on a barge); *Olson v. Oregon Coal & Co.*, 104 Fed. Rep. 574; s. c. 44 C. C. A. 51; aff'g s. c. 96 Fed. Rep. 109; 32 Chic. Leg. N. 43 (negligence of master in leaving cover off of a hatch is that of a fellow servant of the ship-carpenter); *The Ravensdale*, 63 Fed. Rep. 624 (captain of a lighter engaged in delivering boards upon a vessel could not recover for injuries from the fall of

proceed upon the preferable doctrine.^{14a} Some of them proceed upon the well-known theory that in the particular instance the master was in default in the discharge of any one of the primary, absolute, or unassignable duties of the owner,—as where the master of a ship made use of a rope to suspend a triangle upon which men were to sit while working upon the mast, which was manifestly defective by reason of having been spliced and whipped so as to run smoothly.^{14b} Another proceeds upon the ground that the master, officers, and crew of a vessel sunk in a collision with another vessel belonging to the same owners, through the fault of the officers or crew of the latter vessel, are entitled to recover damages because they are not engaged in common employment with such officers and crew.^{14c} This doctrine, it will be observed, would equally apply to trainmen upon different railway-trains.^{14d} In another case it was held that where a fireman on a steam-tug was injured by the negligence of the master, he might recover damages, they being of different rank, and the fireman being subject to the orders of the master.^{14e}

§ 5180. Master of Vessel and Engineer or Fireman.—The master of a steamboat and its engineer,¹⁵ or its fireman,¹⁶ have been held not to be fellow servants, the reason being that the master, having entire charge and control of the vessel, and the others being bound to obey his orders, is a vice-principal.

§ 5181. Master of Vessel and Mate.—These have been held to be fellow servants in the same common employment.¹⁷

boards through the insecure manner of fastening the rope holding them while being hoisted, where the fault was that of one of the workmen engaged in the common employment); *Hedley v. Pinckney & Co. S. S. Co.*, [1892] 1 Q. B. 58; *Wyman v. The Duart Castle*, 6 Can. Exch. 387 (captain, chief engineer, and employes on board a steamship are fellow servants of another employe).

^{14a} *Keating v. Pacific Steam-Whaling Co.*, 21 Wash. 415; s. c. 58 Pac. Rep. 224 (holding that an ordinary seaman and the mate or captain are not fellow servants); *Ramsay v. Quinn*, 8 Ir. R. C. L. 322; s. c. 1 Cent. L. J. 478 (the law regards the captain as a special owner of the ship, and he is liable in damages to a member of the crew injured through his negligence).

^{14b} *The Julia Fowler*, 49 Fed. Rep. 277.

^{14c} *The Petrel*, [1893] Prob. 320.

^{14d} As to which see *ante*, § 5017.

^{14e} *The Clatsop Chief*, 7 Sawy. (U. S.) 274; s. c. 8 Fed. Rep. 163, 767.

¹⁵ *The Transfer No. 4 and Car Float No. 16*, 9 C. C. A. 521; s. c. 61 Fed. Rep. 364; following *Chicago & C. R. Co. v. Ross*, 112 U. S. 394; s. c. 5 Sup. Ct. Rep. 184 (railroad conductor).

¹⁶ *The Clatsop Chief*, 7 Sawy. (U. S.) 274; s. c. 8 Fed. Rep. 163, 767.

¹⁷ *Halverson v. Nisen*, 3 Sawy. (U. S.) 562; *Mathews v. Case*, 61 Wis. 491; s. c. 50 Am. Rep. 151; 21 N. W. Rep. 513 (mate could not recover for an injury resulting from master's failure to fasten a yawl-boat on the deck).

§ 5182. **Mate of Vessel and Members of the Crew.**—The mate of a vessel is generally deemed a fellow servant of the members of the crew, since the office of the mate is merely that of the foreman of work; so that if a member of a crew is injured through the negligence of the mate, he has no action against the ship or its owner.¹⁸

§ 5183. **Engineer of Boat and Machine-Oiler.**—Under a statute defining servants as “those engaged in the same general business,” it has been held that an oiler of the machinery on a steam ferry-boat is a fellow servant of the engineer, by whose alleged negligence in starting the machinery without warning the oiler the latter is killed, notwithstanding the fact that the engineer employs and discharges the firemen and oilers working under him.¹⁹

§ 5184. **Engineer of Vessel and Coal-Trimmed.**—The engineer of a vessel, through whose negligence the electric lights go out, has been held to be the fellow servant of a coal-trimmer, who, in consequence of such negligence, falls down a hatchway, where other lights which were available were not put in place owing to the negligence of another employé.²⁰

¹⁸ *Livingston v. Kodiak Packing Co.*, 103 Cal. 258; s. c. 37 Pac. Rep. 149; *Benson v. Goodwin*, 147 Mass. 237; s. c. 6 N. Eng. Rep. 592; 17 N. E. Rep. 517 (sailor or “runner” on a coasting vessel deemed a fellow servant of the mate while engaged under his direction in getting up the anchor); *Kalleck v. Deering*, 161 Mass. 469; s. c. 37 N. E. Rep. 450; 42 Am. St. Rep. 421 (mate of coasting vessel ordered sailor to use a defective triangle, constructed by the mate, for the purpose of holding him while scraping the mast—no recovery for resulting injury, since the employé assumes risk of negligence of his superiors in commanding him, as well as negligence of fellow servants; besides which there was a presumption that sufficient materials were furnished for the construction of the triangle); *Olson v. Clyde*, 32 Hun (N. Y.) 425 (ship-owner not liable for injuries sustained by a sailor while obeying the orders of the mate negligently given); *The Walla Walla*, 46 Fed. Rep. 198 (second mate deemed the fellow servant of a long-shoreman whom he did not hire, where he is merely engaged in rushing the work without having the superintendence of it); *Carlson v.*

United &c. Pilots' Assn., 93 Fed. Rep. 468 (mate in charge of a pilot boat, attempting to take a pilot from an outgoing vessel, deemed a fellow servant of the men in the yawl); *The Miami*, 93 Fed. Rep. 218; s. c. 35 C. C. A. 281; aff'g s. c. 87 Fed. Rep. 757 (mate and boatswain, the latter injured through the negligence of the mate in managing a chain in lowering the topmast); *The Egyptian Monarch*, 36 Fed. Rep. 773 (a second mate superintending the work of reeling in a hawser is a fellow servant with a seaman turning the reel on board ship). Contrary decisions are met with which hold that the mate of a vessel is not a fellow servant of a deck-hand or sailor with respect to the details of operating the vessel: *Daub v. Northern Pac. R. Co.*, 18 Fed. Rep. 625; but they are believed to be unsound.

¹⁹ *Stevens v. San Francisco &c. R. Co.*, 100 Cal. 554; s. c. 35 Pac. Rep. 165.

²⁰ *Mellen v. Wilson's Sons & Co.*, 159 Mass. 88; s. c. 34 N. E. Rep. 96. There was no testimony as to whose duty it was to supply lanterns. The plaintiff had complained of not being furnished with a lantern. He had finished his work and was go-

§ 5185. **Winchman Employed by Ship-Owner, and Stevedore or Stevedore's Employés.**—A stevedore is understood to be an independent contractor who takes the job of loading or unloading a vessel. Plainly, a winchman on the ship or on the wharf, employed and furnished by the owner of the ship, is not a fellow servant either of the stevedore himself,²¹ of a laborer, or of a longshoreman employed by the stevedore, because they are servants of different masters; but if the employé of the stevedore is injured through the negligence of the winchman, the ship or its owner will be liable.²² There are, however, decisions which ascribe the relation of fellow servant to these two different classes of persons.²³

§ 5186. **Superintendent of Loading and Men in the Hold.**—A superintendent of the work of loading cotton on a ship by having bales thrown through the hatchway into the hold of the vessel, is not a fellow servant of the laborers in the hold, where he represents the company in the duty of furnishing a sufficient supply of employés to effect the work with reasonable safety to those working in the hold.²⁴

§ 5187. **Employé of Stevedore and Crew of Vessel.**—The employés of a stevedore who has the contract of unloading a vessel, and members of the crew of the vessel, are not fellow servants, because they are servants of different masters.²⁵ There are decisions to the contrary, but they seem to be unsound, because they apply the fellow-servant doctrine to the servants of different masters who are merely con-associated in their work.²⁶

ing to his bunk when the accident occurred. The opinion classes a coal-trimmer and the engineer as fellow servants under these circumstances: *Mellen v. Wilson's Sons & Co.*, *supra*.

²¹ *The Victoria*, 69 Fed. Rep. 160.

²² *The Lisnacrieve*, 87 Fed. Rep. 570; *McGough v. Ropner*, 87 Fed. Rep. 534 (although the ship is under charter, provided the owner retains control and furnishes the officers and crew); *The Anaces*, 93 Fed. Rep. 240; s. c. 34 C. C. A. 558; *rev'g* s. c. 87 Fed. Rep. 565; *Johnson v. Netherlands & C. Nav. Co.*, 132 N. Y. 576; s. c. 43 N. Y. St. Rep. 783; 30 N. E. Rep. 505; *Lauro v. Standard Oil Co.*, 74 App. Div. (N. Y.) 4; s. c. 76 N. Y. Supp. 100. Compare *The Harold*, 21 Fed. Rep. 428 (where the ship was held not liable for the negligence of the winchman injuring the employé of the stevedore).

²³ *The Furnessia*, 30 Fed. Rep. 878 (stevedore only assisting in unload-

ing held a fellow servant of a boatswain in charge of a steam-winch handling the cargo). But an injury to a stevedore operating a winch, received in consequence of placing his hand where it is caught by the cogs while turning his head to watch the hatchway, caused by the negligence of a fellow *stevedore*, stationed to let him know when he is to set the winch in motion, is ascribed to the negligence of a fellow servant: *The Serapis*, 51 Fed. Rep. 91; s. c. 8 U. S. App. 49; *rev'g* s. c. 49 Fed. Rep. 393.

²⁴ *Cheaney v. Ocean S. S. Co.*, 92 Ga. 726; s. c. 19 S. E. Rep. 33; 44 Am. St. Rep. 113.

²⁵ *Johnson v. Netherlands & C. Nav. Co.*, 57 Hun (N. Y.) 591; s. c. 32 N. Y. St. Rep. 916; s. c. *aff'd*, 132 N. Y. 576; *Cameron v. Nystrom*, [1893] A. C. 308.

²⁶ *The Harold*, 21 Fed. Rep. 428. It appeared in this case that the

§ 5188. **Dock Superintendent and Stevedore.**—It has been held that a superintendent of a dock is not the fellow servant of a stevedore whom the superintendent employs as the agent of a ship-owner to unload his ships.²⁷ But the omission of a dock superintendent to have the wedge-shaped "mouthpiece" properly fastened to the skid or gang-plank upon which trucks were drawn from a ship to the dock, by reason of which a stevedore was injured, was negligence in the performance of a *mere detail of work*, and hence that of a fellow servant, for which the owner of the vessel was not liable, it having furnished suitable and safe appliances, though it was not the stevedores' duty to rig the skid.^{27a}

§ 5189. **Stevedore and Stevedore.**—A stevedore injured while assisting the crew of a vessel in replacing the floor of the between-deck has been held not a fellow servant with a stevedore engaged in unloading a cargo from the vessel.²⁸

§ 5190. **Stevedore and Boatswain.**—These are deemed to be fellow servants when working together in con-association and in furtherance of a single object.²⁹

§ 5191. **Foreman of Stevedore and Longshoreman.**—Where a longshoreman engaged in loading barrels on a ship by means of a rope, was injured by the alleged rotten condition of the rope, which he charged was due to the negligence of a foreman employed by steve-

members of the gang were procured by the stevedore, but were paid by the day by the ship, although this was done through the stevedore. Compare *The Kensington*, 91 Fed. Rep. 681 (foreman of a stevedore gang held to be a fellow servant of a stevedore at work loading). Where, in an action by a stevedore for an injury received through the negligence of the drumman on a steamship, the complaint alleged and the answer admitted that the drumman was in the employ of the steamship company, it was error to submit the question to the jury whether the drumman was the servant of the stevedore or of the steamship company, and to charge that if he was subject only to the orders of the stevedore at the time, that ended the case: *Lauro v. Standard Oil Co.*, 74 App. Div. (N. Y.) 4; s. c. 76 N. Y. Supp. 800.

²⁷ *McC Campbell v. Cunard S. S. Co.*, 69 Hun (N. Y.) 131; s. c. 53 N. Y. St. Rep. 330; 23 N. Y. Supp. 477.

^{27a} *McC Campbell v. Cunard S. S. Co.*, 144 N. Y. 552; s. c. 64 N. Y. St. Rep. 246; rev'g s. c. 76 Hun (N. Y.) 609 (*mem.*); 58 N. Y. St. Rep. 870; 27 N. Y. Supp. 1112; which aff'd s. c. 69 Hun (N. Y.) 131; 53 N. Y. St. Rep. 330; 23 N. Y. Supp. 477.

²⁸ *The Terrier*, 73 Fed. Rep. 265. Compare *The Kensington*, 91 Fed. Rep. 681; *The Phoenix*, 34 Fed. Rep. 760.

²⁹ *The Furnessia*, 30 Fed. Rep. 878. Stevedore was selected by boss stevedore, but paid by ship, which was not loaded under a contract, but by men employed by the ship. Boatswain and stevedore were fellow servants, being "engaged in a single operation, and each employed by the ship's owner to perform the same": *The Furnessia*, *supra*.

dores to superintend the loading of the ship, but it did not appear that the duty of inspection had been delegated to such foreman,—it was held that, under the circumstances of the case, the plaintiff and the foreman were fellow servants.³⁰

§ 5192. **Employé of a "Boss Scooper" and Member of the Crew.**—An employe of a "boss scooper," who has the entire charge of the work of elevating grain out of vessels into an elevator, and who employs, discharges and pays his laborers, is not a fellow servant with a member of the crew of a vessel who, though engaged in sweeping the grain from the deck of the vessel, is not subject to the control of the boss scooper; so that for such deck-hand's negligence, resulting in death to an employé of the boss scooper at work in the hold, the owners of the vessel are liable.³¹

§ 5193. **Grain-Shoveller and Captain of a Steam-Tug.**—The relation of fellow servants has been ascribed to a laborer who shovelled grain for an elevator company and the captain of a tug owned by the company engaged in bringing a vessel to the elevator.³²

§ 5194. **Carpenter and Boilermaker on the Same Ship.**—There is a doubtful decision to the effect that a carpenter employed in fitting casings about a patch upon a tank in the hold of a ship is a fellow servant with a boilermaker engaged in putting a patch upon such tank, who at times voluntarily assisted such carpenter, although such boilermaker is in the employ of a third person who charges for his time by the day's work, and the carpenter is paid by the month, as both are substantially in the employ of the ship-owners and subject to their control.³³ If this decision is sound, then mere con-association creates the relation of fellow servants within the meaning of the rule under consideration, although the men are servants of different masters.

§ 5195. **Pilot and Deck-Hand.**—A pilot in charge of the course of a ship is not a fellow servant of a deck-hand in such a sense as to prevent the deck-hand from sustaining a libel against the ship for an injury due to the negligence of the pilot.³⁴

³⁰ Kelly v. Hogan, 37 Misc. (N. Y.) 761; s. c. 76 N. Y. Supp. 913.

³² Baltimore Elevator Co. v. Neal, 65 Md. 438.

³³ Kane v. Mitchell Transp. Co., 90 Hun (N. Y.) 65; s. c. 35 N. Y. Supp. 581; 70 N. Y. St. Rep. 203; s. c. aff'd, 153 N. Y. 680.

³⁴ The Coleridge, 72 Fed. Rep. 676.

³⁴ The Titan, 23 Fed. Rep. 413; s. c. 23 Blatch. (U. S.) 177.

§ 5196. **Dry-Dock Foreman and Dry-Dock Laborer.**—The foreman of a dry dock has been held to be a fellow servant of a laborer assisting in the work of raising a vessel in the dock, in such a sense as to preclude a recovery by the laborer for an injury sustained in consequence of the negligence of the foreman.³⁵

§ 5197. **Captain of a "State Boat" and a Laborer.**—The captain of a State boat in New York and a laborer engaged in digging clay from a bank and loading it upon the boat have been held to be fellow servants; so that where the captain set the laborer to work upon the bank and the captain had loosened the overhanging earth to such an extent that it fell upon the laborer, the State was not liable, although but for the operation of the fellow-servant doctrine it might have been.³⁶

§ 5198. **Engineer Repairing Machinery on a Coal-Dock and Laborer Repairing a Chute Connected with the Dock.**—These have been held to be fellow servants.³⁷

³⁵ Hart v. New York &c. Dry Dock Co., 48 N. Y. Super. 460.

³⁷ Porter v. Silver Creek &c. Coal Co., 84 Wis. 418; s. c. 54 N. W. Rep.

³⁶ Loughlin v. State, 105 N. Y. 1019.
159; s. c. 11 N. E. Rep. 271.

CHAPTER CXXXI.

ILLUSTRATIONS OF THE FELLOW-SERVANT DOCTRINE IN OTHER CASES, ARRANGED ALPHABETICALLY.

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- 5202. Bridge foreman and bridge carpenter.
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- 5204. Carpenter and elevator-boy.
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SECTION

- 5221. Elevator-operator and electrician and engineer employed in a hotel.
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- 5230. Excavation, superintendent of, and laborer.
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SECTION	SECTION
5238. Hoisting-machine, engineer operating, and common laborer.	5255. Repairer of machinery and operator thereof.
5239. Hoisting-machine, engineer operating, and foreman of building contractor.	5256. Repairers of the same machine.
5240. Laundress and driver of her master's wagon conveying her to her work.	5257. Scaffolding or staging, builders of, and general workmen.
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5252. Painters and other workmen on the same structure.	5269. Further illustrations of the fellow-servant doctrine.
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§ 5202. **Bridge Foreman and Bridge Carpenter.**—It has been held that a bridge carpenter could not recover for the negligence of a bridge foreman in permitting a jack-screw to fall which had been set up by the two men, and which the foreman had agreed to watch, they being fellow servants.¹

§ 5203. **Carpenter: Head Carpenter and a Mill-Hand.**—It has been held that the head carpenter at a mill, although engaged in making repairs on his master's vessel, which is close by, is still a fel-

¹ Peirce v. Oliver, 18 Ind. App. 87; s. c. 47 N. E. Rep. 485.

low servant of a mill-hand, at least while he is engaged in the mill sawing lumber for such repairs.²

§ 5204. **Carpenter and Elevator-Boy.**—A carpenter working upon an elevator-shaft in a building in course of construction, and the boy running the elevator, are fellow servants.³

§ 5205. **Carpenter and Riveter Engaged in Ship-Building.**—Where a carpenter and riveter are engaged in ship-building they are deemed fellow servants in such a sense as to preclude recovery by the riveter of damages from the master for an injury caused by the negligence of the carpenter in constructing a scaffold on which the riveter works.⁴

§ 5206. **Carpenter and Rubbish-Cleaner.**—It has been held that a carpenter employed in the construction of a building is not a fellow servant of one employed to clean up the premises and remove the rubbish.⁵

§ 5207. **Carpenters Replacing Planks about Machinery, and Machine-Oilers.**—Members of a "carpenter gang," whose duty it is to replace planks about a machine called the "bloom rolls," after their removal for the purpose of attaching new rolls, are not fellow servants of one employed to oil the machine; but their negligence in replacing the planks is chargeable to the master.⁶

§ 5208. **Chain-Gang Boss and Chain-Gang Prisoner.**—A chain-gang boss is not a fellow servant of a chain-gang prisoner; and if the prisoner is killed or injured through the negligence of the boss, the employer of the chain-gang will be liable.⁷

§ 5209. **Chemist and Laborer Employed in a Mill.**—A laborer was engaged in completing machinery in a paper-mill, when the chemist of the company, entering the mill, improperly set the machinery in motion. The chemist was not directly shown to have had any general

² Sayward v. Carlson, 1 Wash. 29; s. c. 23 Pac. Rep. 830.

³ Hughes v. Fagin, 46 Mo. App. 37.

⁴ Beesley v. Wheeler, 103 Mich. 196; s. c. 27 L. R. A. 266; 61 N. W. Rep. 658. But see *ante*, § 3947, *et seq.*

⁵ Spillane v. Eastman's Co., 65 N.

Y. Supp. 668; s. c. 32 Misc. (N. Y.) 235.

⁶ Eingartner v. Illinois Steel Co., 94 Wis. 70; s. c. 34 L. R. A. 503; 1 Chic. L. J. Wkly. 695; 14 Nat. Corp. Rep. 275; 68 N. W. Rep. 664; 59 Am. St. Rep. 859.

⁷ Boswell v. Barnhart, 96 Ga. 521; s. c. 23 S. E. Rep. 414.

power or authority, either over the employés of the mill or the operation of the machinery, such matters being in charge of a superintendent. It was held that the chemist was a fellow servant of the employé, who was killed by being caught in the machinery.⁸

§ 5210. **Coal-Passer and Chief Engineer.**—It has been held that a coal-passer at the boilers of a manufacturing establishment is not a fellow servant of the chief engineer in charge of the factory.⁹

§ 5211. **Coal-Yard, Foreman and Employés in.**—Where employés in a coal-yard, under the direction of a foreman, were engaged in unloading coal from a vessel by means of iron buckets running on steel cables, which were dumped automatically at the proper point by a device called a “tripper,” or “bumper,” and the foreman directed two men to let the “tripper” down to a certain hopper, but let it go several feet too far before telling them to stop it, and before it was pulled back a bucket of coal was hauled up and emptied at the point where the “tripper” was, just as the plaintiff passed under it, injuring him,—it was held that the foreman, in assisting to change the “tripper,” acted as a fellow servant with the plaintiff, and the coal company was not responsible for the negligent manner in which the work was done.¹⁰

§ 5212. **Contractor and Sub-Contractor, Employés of.**—A person employed by a sub-contractor furnishing the iron-work for a public building, who is injured by the falling of a wall built by employés of the contractor, is not a fellow servant with them, and the contractor cannot claim exemption from liability on that ground.¹¹

§ 5213. **Contractor with a Dock Company and the Dock Company, Employés of.**—It has been held that an employé of contractors engaged by a dock company to handle ore, who is subject generally to the directions of the dock company, the contractors having agreed with the company that any man not satisfactory to the company will be promptly discharged, is a fellow servant of an employé of the dock company whose duty it is to inspect the machinery and to keep it in repair, there being no relation of subordination between the employé

⁸ *Wilson v. Hudson River Water Power & Co.*, 71 Hun (N. Y.) 292; s. c. 54 N. Y. St. Rep. 484; 24 N. Y. Supp. 1072.

⁹ *Mattise v. Consumers' Ice Man. Co.*, 46 La. An. 1535; s. c. 16 South. Rep. 400; 49 Am. St. Rep. 356.

¹⁰ *Okonski v. Pennsylvania & Fuel Co.*, 114 Wis. 448; s. c. 90 N. W. Rep. 429.

¹¹ *Jansen v. Jersey City*, 61 N. J. L. 243; s. c. 39 Atl. Rep. 1025.

of the contractors and the employé of the dock company; so that for the negligence of the latter, whereby the former is injured, there can be no recovery.¹²

§ 5214. Convicts and Persons Voluntarily Laboring with them.—It has been held that an employé does not, by voluntarily engaging in labor with convicts who are in the employ of his master, release his master from liability for injuries sustained by such employé in consequence of the failure of the master to use the requisite care and caution in employing and retaining the convicts.¹³

§ 5215. Day Shift and Night Shift, Members of.—A member of a day shift of railway laborers engaged in unloading a car is a fellow servant with a member of the night shift, who is injured by the negligence of the other in selecting an imperfect plank upon which to walk from the car to a shed into which the car is being unloaded.¹⁴

§ 5216. Day-Workman and Night-Watchman.—These are deemed fellow servants, so that if a day-workman negligently and insecurely piles planks and leaves them in that condition, and a night-watchman catches his foot in them and falls, there can be no recovery against the common master.¹⁵

§ 5217. Electrical Workmen.—Where the plaintiff and other workmen in the employ of a city were jointly engaged in removing an electric wire, and were not under any special directions, but were using their judgment as to the manner of the work, and the plaintiff's fellow servants negligently cut the wire, so that it fell over a heavily charged primary wire of an electric company, by reason of which the plaintiff was injured, it was held that such workmen were fellow servants with the plaintiff; and unless the city was derelict in its duty, in not taking proper precautionary measures for the safety of its employés so engaged, whereby the injury ensued, without the concurrence of plaintiff's acts, or those of fellow servants, there could be no recovery.¹⁶

¹² McCafferty v. Dock Co., 11 Ohio C. C. 457; s. c. 1 Ohio C. D. 262. The difficulty with this decision is, that the two persons were not servants of the same master.

¹³ Porter v. Waters-Allen Foundry & Co., 94 Tenn. 370; s. c. 29 S. W. Rep. 227.

¹⁴ Van den Heuvel v. National Furnace Co., 84 Wis. 636; 54 N. W. Rep. 1016.

¹⁵ Bodwell v. Nashua Man. Co., 70 N. H. 390; s. c. 47 Atl. Rep. 613.

¹⁶ Wagner v. Portland, 40 Or. 389; s. c. Pac. Rep. 985; 67 Pac. Rep. 300.

§ 5218. **Elevator, Engineer Operating, and Farm-Laborer.**—Where an elevator was being used on a farm to hoist grain into a barn, and the engineer negligently allowed the elevator to go too high, causing the rope to break, and thereby injuring the plaintiff, a farm-laborer who was assisting in the work, it was held that the defendant was not liable, the plaintiff and the engineer being fellow servants.¹⁷

§ 5219. **Elevator-Operator and Other Servants of the Same Master.**—The operator of an elevator in a building is generally held to be the fellow servant of other servants of the common master at work in the same building.¹⁸ Thus, if an elevator is used to carry employes to and from their work, the engineer in control of its motive-power, the elevator-boy, and an employé who is being carried in the elevator to his work, are all deemed fellow servants; so that if the employé who is being carried is hurt, the common master is not liable.¹⁹

§ 5220. **Elevator-Operator and Chambermaid.**—An elevator-man in a hotel is a fellow servant of a chambermaid employed therein, and injured by reason of the negligence of the former.²⁰

¹⁷ *Stringham v. Steuart*, 64 How. Pr. (N. Y.) 5. See *Stringham v. Hilton*, 111 N. Y. 188; s. c. 19 N. Y. St. Rep. 621; 18 N. E. Rep. 870; 1 L. R. A. 483; aff'g s. c. 27 Hun (N. Y.) 562.

¹⁸ *Mann v. O'Sullivan*, 126 Cal. 61; s. c. 58 Pac. Rep. 375; 77 Am. St. Rep. 149; *Kelley v. Boston Lead Co.*, 128 Mass. 456 (recovery sought on ground that elevator was out of repair, which the evidence failed to show); *Hasty v. Sears*, 157 Mass. 123; s. c. 31 N. E. Rep. 759; 34 Am. St. Rep. 267; *Hughes v. Fagin*, 46 Mo. App. 37; *Spees v. Boggs*, 193 Pa. St. 112; s. c. 47 Atl. Rep. 875 (elevator-man and employé of the tailoring-department of a dry-goods store); *Oriental Investment Co. v. Sline*, 17 Tex. Civ. App. 692; s. c. 41 S. W. Rep. 130; *Wolcott v. Studebaker*, 34 Fed. Rep. 8.

¹⁹ *Wolcott v. Studebaker*, 34 Fed. Rep. 8. It has been held that a carpenter sent by his employer to repair an elevator, under the direction of the owner's superintendent, who, in the carpenter's presence, orders the elevator-boy not to run the car down to the story where the work is to be done until notified

that it has been finished, is, for the purpose of making the repairs, a servant of the owner of the elevator and in common employment with the elevator-boy, and assumes the ordinary risks of the employment, including the boy's carelessness in running the car down upon and injuring him: *Hasty v. Sears*, 157 Mass. 123; s. c. 31 N. E. Rep. 759; 34 Am. St. Rep. 267. This decision seems to be unsound, because it makes mere co-association the conclusive test of fellow servants, although the servants are in the employ of different masters and are but casually associated together. On the other hand, we have an isolated decision to the effect that the operators of an elevator in a building in the process of construction are not fellow servants with a gang of carpenters, one of whom is killed while at work by the counterweight of the elevator coming down on him: *Leiter v. Kinnare*, 68 Ill. App. 558.

²⁰ *Oriental Invest. Co. v. Sline*, 17 Tex. Civ. App. 692; s. c. 41 S. W. Rep. 130 (Texas statute limiting the fellow-servant doctrine applies only to railroad employes).

§ 5221. **Elevator-Operator and Electrician and Engineer Employed in a Hotel.**—An elevator-boy and an electrician and engineer employed in a hotel, both of whom are subject to the orders of the president of the hotel company, its general manager, and its chief clerk, are fellow servants; so that the hotel company is not liable for an injury to the engineer resulting solely from the negligence of the boy.²¹

§ 5222. **Elevator, Superintendent of Construction of, and Workman Subject to his Orders.**—It has been held that a person who superintends the construction of an elevator in a building, which building is in process of construction, whose duty it is to determine when the measurements shall be taken in the upper floors, and how far the construction of the building shall progress before they are taken, is, in so determining, a fellow servant with a workman in the employ of the elevator company, who is injured while taking a measurement under the direction of such superintendent, since his determination constitutes a detail or part performance of the work itself.²²

§ 5223. **Employés Cleaning Out a Pit and Employé Feeding a Machine.**—Employés engaged in cleaning out a pit in a factory, formerly occupied by the gearing of a machine, are fellow servants of an employé engaged in feeding a machine in the same factory, both being engaged in the common business of the master,—in this case, the manufacture of rubber goods.²³

§ 5224. **Engineer and Workman Engaged in Drawing Cars Loaded with Rock up an Incline.**—An employé whose duty it was to apply power for drawing loaded cars up an incline to the top of cement-kilns, and a coemployé who signalled him when to apply the power, and whose duty it was to attend to the drawing up of the car and to dump the rock into the kilns, were held to be fellow servants; and the employer was not liable for such coemployé's death where it was due to the negligence of the engineer in applying the power without the proper signal.²⁴

§ 5225. **Engineer in Charge of Machinery and Machinist or Other Workmen.**—It has been held that an engineer in charge of machinery

²¹ *McCarty v. Rood Hotel Co.*, 114 Mo. 397; s. c. 46 S. W. Rep. 172.

²² *Whallon v. Sprague Electric Elevator Co.*, 1 App. Div. (N. Y.) 264; s. c. 37 N. Y. Supp. 174; 72 N. Y. St. Rep. 519.

²³ *Burke v. National India Rubber Co.*, 21 R. I. 446; s. c. 44 Atl. Rep. 307.

²⁴ *Clark County Cement Co. v. Wright*, 16 Ind. App. 630; s. c. 45 N. E. Rep. 817.

in a manufacturing or other establishment is a fellow servant of a workman employed therein;²⁵ of a machinist employed to make certain alterations therein, where the engineer negligently started the wheel while the machinist was at work,—and this although the machinist was the employé of a firm of master machinists employed to do the work;²⁶ of a fireman killed in consequence of the failure of the engineer to make a hydrostatic test of a tubular boiler after removing and replacing the caps, as it was his duty to do;²⁷ and it has been so held although the engineer has power to give orders to the men and to employ men to work on short jobs in the absence of the manager.²⁸ The relation of fellow servants has been held to exist in the cases of an engineer in charge of the boilers of a tramway power-house and a teamster employed to haul coal to such power-house;²⁹ an engineer in charge of a saw-mill and an employé whose duty it is, during the noon hour, to go down into the box of the lower band-saw wheel and clean out the saw-dust, and who, while thus engaged, is killed by the negligence of the engineer in starting up the machinery;³⁰ an engineer in charge of an engine operating a machine for sawing, whose duties include that of keeping the machinery in good condition and of repairing it when broken or defective, and the servant engaged in operating the saw, with respect to an injury caused by the saw flying from its place, owing to a defect in the attachments that held it,—the engineer's duties being considered part of the *operation* of the machinery;³¹ an engineer in charge of a steam-shovel and a workman engaged with the machine.³² But it has been held that the engineer in charge of a refrigerating-machine, who acts under the direction of the superintendent when the superintendent is present, but who is in sole charge during his absence, with the same power to control the workmen that the superintendent has when present, is not, when the superintendent is absent, a fellow servant of a workman who is injured in consequence of obeying the orders of the engineer in a dangerous service;³³ and that the engineer of a steam-shovel working

²⁵ Philadelphia Iron &c. Co. v. Davis, 111 Pa. St. 597; s. c. 56 Am. Rep. 305.

²⁶ Ewan v. Lippincott, 47 N. J. L. 192; s. c. 54 Am. Rep. 148.

²⁷ Bell v. Consolidated Gas &c. Co., 36 App. Div. (N. Y.) 242; s. c. 56 N. Y. Supp. 780 (decision seemingly untenable because, in making such tests, the engineer represented the master).

²⁸ Prevost v. Citizens' Ice &c. Co., 185 Pa. St. 617; s. c. 42 W. N. C. (Pa.) 185; 40 Atl. Rep. 88; 64 Am. St. Rep. 659.

²⁹ Denver Tramway Co. v. O'Brien, 8 Colo. App. 74; s. c. 44 Pac. Rep. 766.

³⁰ Bergstrom v. Staples, 82 Mich. 654; s. c. 46 N. W. Rep. 1035.

³¹ Theleman v. Moeller, 73 Iowa 108; s. c. 34 N. W. Rep. 765; 5 Am. St. Rep. 663.

³² Thompson v. Chicago &c. R. Co., 18 Fed. Rep. 239; s. c. 5 McCrary (U. S.) 542.

³³ Ryan v. Los Angeles Ice &c. Co., 112 Cal. 244; s. c. 32 L. R. A. 524; 44 Pac. Rep. 471.

about a clay-bank is a vice-principal, and not a fellow servant, of one injured while working about such shovel, who had been directed to obey the engineer's instructions.³⁴

§ 5226. Engineer in Manufacturing Establishment and a Superior.—A person who is employed as engineer for a manufacturing corporation, but who is also under the duty of obeying generally the orders of one placed in authority over him, who has power temporarily to withdraw him from the performance of the special duty for which he is employed and to assign him to the performance of other and inconsistent duties not connected with or embraced in his special employment,—is not a fellow servant with such superior, and cannot be regarded as a mere volunteer if injured while performing duties so assigned to him by such superior.³⁵

§ 5227. Engineer in Printing-Establishment and Printer and Engraver.—These are fellow servants, so that the engraver and printer cannot recover from the common master for an injury sustained by falling through a trap-door negligently left unfastened by the engineer.³⁶

§ 5228. Engineer in a Shop and One Employed at Work therein.—These are deemed to be fellow servants.³⁷

§ 5229. Engineer of Steam-Roller and Flagman.—It has been held that an engineer of a steam-roller used in repairing the streets of a city is a fellow servant of a flagman also employed by the city, injured by the carelessness of the engineer in suddenly starting the roller without warning, although the flagman is subject to the orders of the engineer and liable to discharge by him.³⁸

§ 5230. Excavation, Superintendent of, and Laborer.—It has been held that a superintendent of the work of excavating for a railroad-

³⁴ *Alton Paving & Co. v. Hudson*, 74 Ill. App. 612; s. c. aff'd, 176 Ill. 270; 52 N. E. Rep. 256.

³⁵ *Blackman v. Thomson-Houston Elec. Co.*, 102 Ga. 64; s. c. 29 S. E. Rep. 120.

³⁶ *Pawling v. Hoskins*, 132 Pa. St. 617; s. c. 19 Atl. Rep. 301; 47 Phila. Leg. Int. 326; 25 W. N. C. (Pa.) 443; 19 Am. St. Rep. 617.

³⁷ *Henshaw v. Pond's Extract Co.*, 66 Hun (N. Y.) 632; s. c. 50 N. Y. St. Rep. 263; 21 N. Y. Supp. 177; s. c. aff'd, 149 N. Y. 582 (engineer and

machine-oiler injured by the negligence of the engineer in starting an engine which had been stopped to be oiled); *Greenway v. Conroy*, 160 Pa. St. 185; s. c. 34 W. N. C. (Pa.) 98; 40 Am. St. Rep. 715; 28 Atl. Rep. 692 (engineer of a mill who marks out work for other employes deemed a fellow servant of a boy injured by putting on a belt,—engineer had no authority to direct boy to put on the belt).

³⁸ *Hanna v. Granger*, 18 R. I. 507; s. c. 28 Atl. Rep. 659.

bed is not a fellow servant of a laborer who is set to work *after* the completion of blasting; but if such a laborer is injured in consequence of the explosion of an unexploded blast left in the ground, through the negligence of the superintendent, he will have an action for damages against the common master on the theory that, since the master has created the risk due to the presence of explosives for his own purposes, he is bound, not only to exercise the utmost care and take every available precaution against possible injury to the workmen, but to *give them warning of the risk* before asking them to incur it; and the superintendent represents him for that purpose.³⁹

§ 5231. Excavators and Brick-Layer Engaged on a Sewer.—A brick-layer engaged in building a sewer has been held to be a fellow servant of the workmen who excavate and sheathe the trench and of the foreman who directs the entire work.⁴⁰

§ 5232. Excavators and Pipe-Layers.—Excavators, who open a trench, are not deemed fellow servants of another employé who is directed to place a sewer-pipe in position in the trench; so that the neglect of the excavators to sheathe the trench so that it will be safe is not a risk which the pipe-layer assumes.⁴¹

§ 5233. Excavator and Sheathers.—A laborer engaged in excavating a trench for water-pipes in a city is a fellow servant with the other laborers engaged in putting in wooden curbing as the excavation progresses to prevent the earth falling into the trench; and the city is not responsible for the negligence of the latter in putting in the curbing.⁴²

§ 5234. Fireman in Charge of Boiler and Helper at Machine-Drill.—It has been held that a fireman in charge of the boiler used for supplying steam to a machine-drill, employed in blasting rock, and a helper at such machine-drill, are not fellow servants.⁴³

§ 5235. Flouring-Mills, Servants Employed In and About.—All employés in and about a flouring-mill, engaged in the same business by the same employer for the accomplishment of a common object,

³⁹ *Burke v. Anderson*, 69 Fed. Rep. 814; s. c. 34 U. S. App. 132; 16 C. A. 442.

⁴⁰ *Curley v. Hoff*, 62 N. J. L. 758; s. c. 42 Atl. Rep. 731; 5 Am. Neg. Rep. 668.

⁴¹ *Schmit v. Gillen*, 58 N. Y. Supp. 458; s. c. 41 App. Div. (N. Y.) 302.

⁴² *Bergquist v. Minneapolis*, 42 Minn. 471; s. c. 44 N. W. Rep. 530.

⁴³ *Heldmaier v. Cobbs*, 96 Ill. App. 315; s. c. aff'd, 195 Ill. 172; s. c. 62 N. E. Rep. 853.

none of whom has any control or authority over the others, are fellow servants within the rule under consideration;⁴⁴ and so are the employés in charge of *flour rolling-mills* with respect to another employé who is injured while engaged in operating a *feed-mill* on the same floor.⁴⁵

§ 5236. **Gas-Pipe Fitter and Gas Company, Employés of.**—It has been held that one in the employ of a pipe-fitter, requested by a gas company to send a man to assist in making connections, is not a fellow servant with an employé of the gas company, through whose negligence in failing to shut off the gas he is injured by an explosion, where his wages are paid by such fitter, who charges the gas company an advance over the amount.⁴⁶

§ 5237. **Hod-Carrier and Truck-Driver.**—A hod-carrier, employed to carry bricks up a ladder during the temporary work of repairing a building, has been held not to be a fellow servant with the driver of one of the trucks of his employer.⁴⁷

§ 5238. **Hoisting-Machine, Engineer Operating, and Common Laborer.**—An engineer operating a hoisting-machine on a building in process of construction, and the workmen engaged in receiving pieces of lumber, when hoisted by the machine, are *prima facie* fellow servants;⁴⁸ and so where the operation consists of building a bridge.⁴⁹

§ 5239. **Hoisting-Machine, Engineer Operating, and Foreman of Building Contractor.**—Where the foreman of a contractor engaged in constructing a brick building was injured while riding on an elevator in such building, through the negligence of the engineer operating it, it was held that he could not recover, the negligence being that of a fellow servant.⁵⁰

⁴⁴ Schmidt v. Leistikow, 6 Dak. 386; s. c. 43 N. W. Rep. 820.

⁴⁵ Frazee v. Stott, 120 Mich. 624; s. c. 6 Det. Leg. N. 325; 6 Am. Neg. Rep. 297; 79 N. W. Rep. 896 (and this relation continues when the employés in charge of the flouring-mill are detailed to exchange the rollers in the feed-mill for those that are sharper).

⁴⁶ Hatfield v. Saint John Gaslight Co., 32 N. B. 100.

⁴⁷ McTaggart v. Eastman's Co., 58 N. Y. Supp. 1118; s. c. 28 Misc. (N. Y.) 127; aff'g s. c. 57 N. Y. Supp. 222; 27 Misc. (N. Y.) 184.

⁴⁸ Sheehan v. Prosser, 55 Mo. App. 569.

⁴⁹ Ryan v. McCully, 123 Mo. 636; s. c. 27 S. W. Rep. 533.

⁵⁰ Ingram v. Fosburgh, 73 App. Div. (N. Y.) 129; s. c. 76 N. Y. Supp. 344.

§ 5240. Laundress and Driver of her Master's Wagon Conveying her to her Work.—It has been held that an injury to a laundress employed in a private family, while being conveyed to her place of work in a wagon owned by her employer, either gratuitously or as a part of her contract of employment, which injury is due to the negligence of the driver, who is her employer's coachman, is one incident to her employment occasioned by the negligence of a fellow servant, and she cannot recover damages therefor against her employer.⁵¹

§ 5241. Lumber-Camp, Foreman of, and Men Operating a Log-Train.—A foreman of a lumber-camp, whose duty, in the interest of a common employer, required him to ride on a log-train, to and fro between the camp and the mill, was held to be a fellow servant with the employes of the same employer operating such log-train, and not a passenger, unless there was an expressed or implied contract requiring him, directly or indirectly, to pay fare for his passage.⁵²

§ 5242. Lumber-Piler and Lumber-Scaler.—Certain servants employed to pile lumber in a yard left boards projecting at intervals to be used as steps by the measurer, following the usual custom in that regard; but they negligently used a knotty and weak board for one of the steps, and the plaintiff, while engaged in measuring the pile, stepped on the board, which broke and injured him. It was held that the plaintiff and the pilers of the lumber were fellow servants,—the duties of both being but steps in preparing the lumber for sale; and the piling of the lumber in convenient form to be measured being in itself part of the work they were all engaged to perform.⁵³

§ 5243. Lumber-Yard Boss and Workman.—The boss in a lumber-yard who has charge of the yard, and who superintends the workmen employed therein and the piling of the lumber, but performs no manual labor in connection therewith, is not a fellow servant of a workman injured by the falling of the lumber in consequence of the negligent manner in which it has been piled.⁵⁴

§ 5244. Machinist and Workman whom he Calls to his Assistance.—If a machinist working under a superintendent occupies such a

⁵¹ *McGuirk v. Shattuck*, 160 Mass. 45; s. c. 35 N. E. Rep. 110.

⁵² *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42; s. c. 40 S. E. Rep. 368; 55 L. R. A. 908.

⁵³ *Fraser v. Red River Lumber*

Co., 45 Minn. 235; s. c. 47 N. W. Rep. 785.

⁵⁴ *Zintek v. Stimson Mill Co.*, 6 Wash. 178; s. c. 32 Pac. Rep. 997; 33 Pac. Rep. 1055.

status that he is not a vice-principal with respect to his ordinary duties, he does not become such with respect to other employes whom he calls to help him in doing work which cannot be done without their assistance.⁵⁵

§ 5245. **Mason and Carpenter.**—A stone-mason and a carpenter employed at the common task of constructing a bridge, though under different foremen, are fellow servants.⁵⁶ So, one employed by a city, and directed by the city sanitary officer to do the mason-work on a barn being erected on its hospital-grounds, and one employed by the city sanitary officer to superintend the carpenter-work, are fellow servants.⁵⁷

§ 5246. **Masons and Ditch-Diggers.**—It has been held that employes engaged in digging a ditch for a conduit, working under a separate foreman and having nothing whatever to do with the masons engaged in constructing the conduit in the ditch, are not fellow servants with the masons,—on the theory that the employes engaged in digging the ditch are discharging a positive duty of the master, that of preparing a safe place for the masons to work; so that a mason injured by the caving in of the ditch could recover for the master's negligent failure in that respect.⁵⁸

§ 5247. **Mason and Hod-Carrier.**—These are fellow servants where they are working in the employ of the same master.⁵⁹

§ 5248. **Mason and his "Tender."**—A mason and the employé who is assigned by the common employer to the duty of "tending" him are fellow servants.⁶⁰

§ 5249. **Men of All Grades Working Together.**—Excluding those cases where a servant of whatever grade is appointed to discharge one of the primary, absolute, or unassignable duties of the master, it may be laid down that men of all grades working together merely

⁵⁵ *Stevens v. Chamberlin*, 40 C. C. A. 421; s. c. 100 Fed. Rep. 378; *Hathaway v. Illinois & C. R. Co.*, 92 Iowa 337; s. c. 60 N. W. Rep. 651.

⁵⁶ *Bier v. Jeffersonville & C. R. Co.*, 132 Ind. 78; s. c. 31 N. E. Rep. 471.

⁵⁷ *Olmstead v. Raleigh*, 130 N. C. 243; s. c. 41 S. E. Rep. 292.

⁵⁸ *Eichholz v. Niagara Falls & C. Co.*, 68 App. Div. (N. Y.) 441; s. c. 73 N. Y. Supp. 842.

⁵⁹ *Bannon v. Sanden*, 68 Ill. App. 164; *Blazinski v. Perkins*, 77 Wis. 9; s. c. 45 N. W. Rep. 947; *Maier v. McGrath*, 58 N. J. L. 469; s. c. 33 Atl. Rep. 945 (contractor not liable to hod-carrier for an injury from a scaffolding negligently constructed by masons).

⁶⁰ *Kennedy v. Spring*, 160 Mass. 203; s. c. 35 N. E. Rep. 779.

as servants are deemed to be fellow servants of each other within the meaning of the rule under consideration.⁶¹

§ 5250. **Millwright and Mill-Operator.**—It has been held that a millwright engaged in repairing beams in a mill was not a fellow servant of one who operated a saw in the mill; and, consequently, that the sawyer could recover damages from the common master for an injury received from the fall of a chisel which the millwright negligently left on the beam over the saw, the fall of which was presumably caused by the vibration of the machinery,—the reason being that the two were employed in different departments of the service, and that the millwright was performing one of the absolute and unassignable duties of the master in repairing the mill.⁶²

§ 5251. **Municipal Employés.**—The fellow-servant and vice-principal doctrine applies in the case of the employés of municipal corporations, and will exonerate from or charge the municipal corporation with liability for a negligent injury visited upon its employés where it would exonerate or charge any other corporation or natural person under like circumstances.⁶³

⁶¹Gunn v. Willingham, 111 Ga. 427; s. c. 36 S. E. Rep. 804 (derrick-operator and man receiving timbers from the derrick); Fort Hill Stone Co. v. Orm, 84 Ky. 183; Hewitt v. Flint & C. R. Co., 67 Mich. 61; s. c. 11 West. Rep. 148; 34 N. W. Rep. 659; Weisel v. Eastern R. Co., 79 Minn. 245; s. c. 82 N. W. Rep. 576 (railway servant injured while putting a hose on the tender of an engine by the falling of loose coal dislodged by another servant standing on the tender to receive the hose); Lindvall v. Woods, 41 Minn. 212; s. c. 4 L. R. A. 793; 42 N. W. Rep. 1020 (all the workmen on a railroad-grade, including the teamsters drawing dump-cars, the men filling in a cut, the men filling the cars, the men unloading them, and the foreman assisting the man injured by the falling of the trestle upon which he was working); Kelly v. Chicago & C. R. Co., 35 Minn. 490 (yard-brakeman, whose business it is to handle disabled cars, and fellow servants handling such cars); Kennedy v. Allentown Foundry & C. Works, 63 N. Y. Supp. 195; s. c. 49 App. Div. (N. Y.) 78 (servant engaged in laying pipe in-

jured in consequence of another servant giving a wrong signal); Mele v. Delaware & C. Co., 39 N. Y. St. Rep. 153; s. c. 14 N. Y. Supp. 630 (holding that *prima facie* all servants employed in railway service by a common master are fellow servants); Arnold v. Delaware & C. Co., 125 N. Y. 15; s. c. 34 N. Y. St. Rep. 372; 25 N. E. Rep. 1064; Young v. West Virginia & C. R. Co., 42 W. Va. 112; s. c. 4 Am. & Eng. R. Cas. (N. S.) 134; 24 S. E. Rep. 615 (brakeman assumes the risk of the negligence of another brakeman on the same train).

⁶²Hammarberg v. St. Paul & Lumber Co., 19 Wash. 537; s. c. 53 Pac. Rep. 727.

⁶³Stahl v. Duluth, 71 Minn. 341; s. c. 74 N. W. Rep. 143; Reagan v. Casey, 160 Mass. 374; s. c. 36 N. E. Rep. 58 (city employé at work in digging a sewer not a fellow servant with a driver of a wagon hired by the city to cart away the dirt, who is not subject to the control and direction of the foreman placed over the sewer-digger); Fitzsimmons v. Taunton, 160 Mass. 223; s. c. 35 N. E. Rep. 549; Olmstead v. Raleigh, 130 N. C. 243; s. c. 41 S.

§ 5252. **Painters and Other Workmen on the Same Structure.**—These are fellow servants.⁶⁴

§ 5253. **Plumbers and Scrub-Woman.**—Where plumbers employed in the regular service of a corporation had been working underneath the floor of the office of such corporation, and failed properly to replace the trap-door in the floor when they were through with their work, by reason of which a woman employed to clean the offices stepped on the trap-door and fell through to the ground, it was held that the negligence was that of fellow servants, for which there could be no recovery.⁶⁵

§ 5254. **Porter and Another Porter Operating an Elevator in the Same Store.**—Porters employed in a store are fellow servants, and the negligence of one of them in operating an elevator, resulting in injury to the other, gives no cause of action against their employer.⁶⁶

§ 5255. **Repairer of Machinery and Operator Thereof.**—It would seem that a servant of whatever grade, of a master using machinery, whose duty it is to keep the machinery in repair, acts in the discharge of a primary, absolute and unassignable duty of the master, within a principle already considered,⁶⁷ so that he is to be regarded as a vice-principal of the master, and so that a servant injured through his negligent failure to discharge such duties or the negligent manner in which he discharges them, has a right of action against the master; and so some of the cases hold.⁶⁸ But where the operator of a machine *assists* in repairing it, he is held to be a fellow servant with

E. Rep. 292 (circumstances under which mason and carpenter were fellow servants); *Brabon v. Seattle*, 29 Wash. 6; s. c. 69 Pac. Rep. 365 (driver of a hose-cart and fireman are not fellow servants).

⁶⁴ *World's Columbian Exposition v. Bell*, 76 Ill. App. 591 (negligence of one painter in adjusting a rope supporting a swinging scaffold on which the other is working, not chargeable to the master); *Lyons v. Boston Towage & Co.*, 163 Mass. 158; s. c. 39 N. E. Rep. 800 (employee injured while painting inside of tank with black varnish, through the ignition of the fumes of varnish from a torch held by a fellow workman at the request of such employee, where the employ-

ment had continued for twelve years, and it was a part of the employee's regular duty to paint the tanks).

⁶⁵ *Bateman v. New York Cent. & R. Co.*, 67 App. Div. (N. Y.) 241; s. c. 73 N. Y. Supp. 390 (nor was company liable because door was not fastened to the floor with hinges, where it was perfectly safe when properly in position).

⁶⁶ *Beyer v. Victor*, 2 Misc. (N. Y.) 496; s. c. 51 N. Y. St. Rep. 83; 22 N. Y. Supp. 392.

⁶⁷ *Ante*, § 4926.

⁶⁸ *Fox v. Spring Lake Iron Co.*, 89 Mich. 387; s. c. 50 N. W. Rep. 872; *Tudor Iron Works v. Weber*, 31 Ill. App. 306; s. c. *aff'd*, 129 Ill. 535.

the other employés engaged in repairing it, and cannot recover from the master for injuries caused by their negligence.⁶⁹ Other cases ascribe to him the relation of fellow servant to another servant of the same master working in the same shop or about the same premises.⁷⁰ This applies only where the injury proceeds from the machine-repairer while engaged in his proper duties: if he is the injured person he may be regarded as a fellow servant of the one inflicting the injury,—as where a tunnel-repairer is injured through the negligence of the engineer and others in charge of a train while being carried from one point to another on the line of the railroad.⁷¹

§ 5256. **Repairers of the Same Machine.**—It has been held that a master, constructing or repairing machines for others, is not liable for injuries received by an employé while engaged in doing work upon a machine undergoing repair, where the injury results from the negligence of another competent employé, who so carelessly and negligently performs his work upon the machine as to leave it unfit to have further repairs made upon it by the employé who is injured. Thus, in one case, it appeared that a locomotive was in the repair-shops of a railway company for a general overhauling. The defendant's rules required the employés in its repair-shops to repair all defects in an engine reported by the engineer, and to examine the engine for any other defects and repair them. The boilermakers reported that all defects in the boiler of the locomotive had been repaired, and the machinists reported all necessary repairs to machinery as having been made, the boilermakers and machinists having worked on the engine at the same time. After this, steam was made for the purpose of setting the safety-valve, and one of the machinists who had made other repairs on the engine was directed to set the valve, with the assistance of the deceased. The only way to set the valve was by referring to the steam-gauge, and a necessary part of the proceeding was to test the gauge by a certain test provided for that purpose, and to examine the pipe conveying steam to the gauge to see if it was unobstructed, which duty was negligently omitted. While engaged in setting the safety-valve the engine blew up and killed the deceased; and

⁶⁹ Reading Iron Works v. Devine, 109 Pa. St. 246.

⁷⁰ McGee v. Boston Cordage Co., 139 Mass. 445 (a person employed to make ordinary repairs of a machine, required to keep it in order from day to day, is a fellow servant with those employed to run it); Rice v. King Philip Mills, 144 Mass.

229; s. c. 4 N. Eng. Rep. 59; 10 N. E. Rep. 101; 59 Am. Rep. 80; Rogers Locomotive &c. Works v. Hand, 50 N. J. L. 464; s. c. 13 Cent. Rep. 266; 14 Atl. Rep. 766; Cuddy v. Sezepansky, 19 Ohio C. C. 356; s. c. 10 Ohio C. D. 263.

⁷¹ Capper v. Louisville &c. R. Co., 103 Ind. 305.

after the explosion the boiler was found to have been in a badly defective and rusty condition, and the pipe leading to the steam-gauge to have been badly obstructed, so that the gauge would not show the true pressure in the boiler at any given moment. It was held that all these various repairs, including the setting of the safety-valve, were for the same common purpose,—that of putting the engine in condition for service; and hence the employés engaged therein were fellow servants, and there could be no recovery for the death of the deceased.⁷²

§ 5257. **Scaffolding or Staging, Builders of, and General Workmen.**—A class of cases ascribes to the servants who build a scaffolding or staging whereon to work the relation of fellow servants to workmen injured by the defective construction of the same,⁷³ even where the builder of the scaffolding and the servant injured in using it are in different departments of service.⁷⁴ Other cases ascribe negligent defects in such appliances to the negligence of the master in failing to furnish a safe place whereon his servants are to work or a safe appliance with which they are to work, and take the view that the servant who constructs the staging or scaffolding does so in the discharge of one of the primary, absolute and unassignable duties of the master, under a principle already considered; and, hence, that the master is liable to any servant injured in consequence of the defective construction of such an appliance by another servant of whatever grade,⁷⁵ but especially where it is done by the superintendent

⁷² *Murphy v. Boston & C. R. Co.*, 88 N. Y. 146; s. c. 42 Am. St. Rep. 240; 14 Wkly. Dig. (N. Y.) 222; aff'g s. c. 24 Hun (N. Y.) 142; 11 Wkly. Dig. (N. Y.) 566; aff'g s. c. 8 Abb. N. Cas. (N. Y.) 41; 59 How. Pr. (N. Y.) 197. Nor was the locomotive a machine furnished by the master for the use of those engaged in repairing it: *Murphy v. Boston & C. R. Co.*, *supra*.

⁷³ *O'Connor v. Neal*, 153 Mass. 281; s. c. 26 N. E. Rep. 857 (a mason cannot recover for injuries sustained by falling from a staging, due solely to the carelessness of a laborer employed to assist him in placing one of the barrels supporting the staging); *Hoppin v. Worcester*, 140 Mass. 222; s. c. 2 N. E. Rep. 779; *Olsen v. Nixon*, 61 N. J. L. 671; s. c. 4 Am. Neg. Rep. 515; 40 Atl. Rep. 694; *Swain v. Brooklyn Alcatraz Asphalt Co.*, 68 N. Y. Supp. 50; s. c. 57 App. Div. (N. Y.) 56 (foreman and others who con-

structed a scaffold were fellow servants of one injured upon it); *Kimmer v. Weber*, 151 N. Y. 417; s. c. 56 Am. St. Rep. 630; 45 N. E. Rep. 860; rev'g s. c. 76 Hun (N. Y.) 482; 59 N. Y. St. Rep. 349; 27 N. Y. Supp. 1093 [but see *ante*, § 3959, under N. Y. Labor Law]; *Kelly v. Davidson*, 31 Ont. 521 (scaffolding rendered unsafe by the unauthorized act of other employés in removing a stay).

⁷⁴ *Hoar v. Merritt*, 62 Mich. 386; s. c. 29 N. W. Rep. 15 (carpenter and painter); *Pfeiffer v. Dialogue*, 64 N. J. L. 707; s. c. 46 Atl. Rep. 772 (bolter of iron plates and carpenters at work on a vessel).

⁷⁵ *McNamara v. MacDonough*, 102 Cal. 575; s. c. 36 Pac. Rep. 941 (carpenter employed by the day to erect a scaffold for the use of masons and hod-carriers, not deemed a fellow servant of a hod-carrier employed upon the work); *Blackman v. Thomson-Houston Elec. Co.*,

of the erection of the building, who is deemed to represent the master as his vice-principal.⁷⁶

§ 5258. **Servant Hired Out and Servant of the Hirer.**—A servant who is temporarily hired out to another by his employer is, while engaged in the service of the hirer, a fellow servant of an employé of the hirer, when they are working together in the accomplishment of the same general object,—as, for example, in hauling stone.⁷⁷

102 Ga. 64; s. c. 29 S. E. Rep. 120 (circumstances under which the engineer of a manufacturing establishment may recover damages for an injury from a defect in the *plan* of construction of a scaffold which was unknown to him); *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; s. c. 50 N. E. Rep. 225; aff'g s. c. 68 Ill. App. 523; 2 Chic. L. J. Wkly. 160 (employé in lumber-yard not a fellow servant of the servant entrusted with the erection of a scaffolding); *Chicago &c. R. Co. v. Maroney*, 67 Ill. App. 618 (brick-layer not a fellow servant of carpenters who constructed a scaffolding subsequently used by the brick-layer, where they were under different foremen and their work was entirely disassociated); *Kansas City Car &c. Co. v. Sawyer*, 7 Kan. App. 146; s. c. 4 Am. Neg. Rep. 152; 53 Pac. Rep. 90 (person delegated by the master to select materials for a scaffolding for the use of other workmen deemed a vice-principal of the master); *Sims v. American Steel-Barge Co.*, 56 Minn. 68; s. c. 45 Am. St. Rep. 451; 57 N. W. Rep. 322 (work-crew exclusively engaged in putting up staging and scaffolding not fellow servants of general workmen); *Richards v. Hayes*, 17 App. Div. (N. Y.) 422; s. c. 45 N. Y. Supp. 234 (master liable to a servant injured by the insufficiency of a scaffold furnished to him by the foreman, although it was sufficient for the work for which it was originally designed); *Cadden v. American Steel-Barge Co.*, 88 Wis. 409; s. c. 60 N. W. Rep. 800 (riveter on the side of a vessel not a fellow servant with the scaffold-builders); *Heckman v. Mackey*, 35 Fed. Rep. 353 (foreman putting up a staging not a fellow

servant of the carpenter injured by his negligence); *F. C. Austin Man. Co. v. Johnson*, 89 Fed. Rep. 677; s. c. 32 C. C. A. 309; 60 U. S. App. 661 (bridge-contractor responsible for the negligence of a servant whom he places in charge of the erection of a bridge, in erecting an unsafe scaffolding); *Kerr-Murray Man. Co. v. Hess*, 98 Fed. Rep. 56; s. c. 38 C. C. A. 647 (holding that a servant charged by the master with providing materials for building a scaffolding is a vice-principal, so that the master is liable for his negligence in providing defective and unsafe material). See to the contrary, *Killea v. Faxon*, 125 Mass. 485 (builder of staging and employé of coppersmith erecting the gutters). When minor not guilty of contributory negligence as matter of law, because he uses a scaffolding constructed by superior officers whose duty it is to make frequent inspections of it,—see *Eddy v. Aurora Iron Min. Co.*, 81 Mich. 548; s. c. 46 N. W. Rep. 17.

⁷⁶*Haworth v. SeEVERS Man. Co.*, 87 Iowa 765; s. c. 51 N. W. Rep. 68. And so where a scaffold was constructed by ordinary unskilled laborers, in accordance with a *plan* by a person in authority, who also superintended its construction: *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64; s. c. 29 S. E. Rep. 120.

⁷⁷*Cunningham v. Syracuse Imp. Co.*, 20 App. Div. (N. Y.) 171; s. c. 46 N. Y. Supp. 954. See also, *Johnson v. Boston*, 118 Mass. 114; *Hasty v. Sears*, 157 Mass. 123; s. c. 34 Am. St. Rep. 267; *Morgan v. Smith*, 159 Mass. 570; *Coughlan v. Cambridge*, 166 Mass. 268. Compare *Murray v. Dwight*, 15 App. Div. (N. Y.) 241.

§ 5259. **Street Commissioner and Street Laborers.**—Whatever the relation of a street commissioner to street laborers may be while negligently placing a bent in a bridge, he is held to be the vice-principal with respect to a subsequent command which he gives to a laborer, ignorant of the danger, to work near such bent, which falls and injures him.⁷⁸

§ 5260. **Substitute of a Servant and Another Servant.**—If a servant hires another person to work in his place, the substitute becomes a fellow servant with respect to one who was a fellow servant of the hirer.⁷⁹

§ 5261. **Telegraph-Lineman and Other Workmen.**—A telegraph-lineman assumes the risk of a pole not being properly guyed in consequence of the negligence of his fellow workmen, although the lineman is ordered by the foreman to climb the pole.⁸⁰

§ 5262. **Telegraph-Lineman and Superintendent.**—In a case where a lineman in the employ of a telephone company was injured, while under the charge of a foreman, through the negligence of another servant who was with the party, exercising general supervision over all, including the foreman, and who had general charge of the business throughout a large territory, and was entrusted with the hiring and discharge of the employés, and such negligence took place while he was coöperating with the plaintiff in the work and at the same time directing it, it was held that he was a fellow servant with the plaintiff, for whose negligence the plaintiff could not recover.⁸¹

§ 5263. **Telegraph-Repairers and Quarry-Crew.**—An employé of a railroad company engaged in repairing a telegraph-line forming part of the road is a fellow servant with members of a quarry-crew employed by the company to get out stone to repair the road-bed, by whose negligence the line-repairer is injured.⁸²

§ 5264. **Travelling Salesman and Mechanic.**—It has been held that a travelling salesman whose duty, when not travelling, is to perform work in the shops of his employer, does not act as a vice-prin-

⁷⁸ *Lebanon v. McCoy*, 12 Ind. App. 500; 40 N. E. Rep. 700.

⁷⁹ *Anderson v. Guinean*, 9 Wash. 304; s. c. 37 Pac. Rep. 449.

⁸⁰ *Greene v. Western U. Tel. Co.*, 72 Fed. Rep. 250.

⁸¹ *Knutter v. New York &c. Tel. Co.*, 67 N. J. L. 646; s. c. 52 Atl. Rep. 565.

⁸² *Neal v. Northern Pac. R. Co.*, 57 Minn. 365; s. c. 59 N. W. Rep. 312.

cipal in directing a mechanic to assist him, but is a fellow servant with such mechanic under such circumstances.⁸³

§ 5265. **Tunnel-Boss and Workman in a Tunnel.**—These have been held to be fellow servants when working together in a tunnel under such circumstances that the boss is not discharging the primary duty of the master in keeping the tunnel safe.⁸⁴

§ 5266. **Tunnel, Workman in, and Engineer on Surface Operating Elevator.**—Where it was the duty of an employé to haul cars loaded with rock and earth to the foot of a shaft in a tunnel, where they were turned over to another man and put on a steam-power elevator operated by an engineer on the surface; and it was also such employé's duty to bring supplies from the surface, and while he was ascending for this purpose on the elevator, the engineer negligently started it with a jerk, injuring him,—it was held in a suit by the injured employé that he and the engineer were not fellow servants.⁸⁵

§ 5267. **Watchman of Show and "Show Boss."**—A watchman employed by an itinerant show company has been held to be a fellow servant of one employed to maintain discipline among employés of the company.⁸⁶

§ 5268. **Various Other Illustrations of the Fellow-Servant Doctrine.**—Among the numerous illustrations of the fellow-servant rule with which the law reports teem, we give the following holdings:—That, in the absence of an express agreement, one employed to repair an elevator is not entitled to a warning from the master as to when the elevator is to start, when the repairer relies upon a fellow servant, the same being the operator of the elevator, whom he has requested to give such warning;⁸⁷ that an employé engaged with other employés in hoisting ice to the top of a car by means of an apparatus called a beam-scale, something like a large sawhorse, adopted by the employés themselves and placed on the tops of two cars stand-

⁸³ *McBride v. Indianapolis Frog &c. Co.*, 5 Ind. App. 482; s. c. 32 N. E. Rep. 579.

⁸⁴ *Ross v. Union Cement &c. Co.*, 25 Ind. App. 463; s. c. 58 N. E. Rep. 500.

⁸⁵ *Duffy v. Kivilin*, 195 Ill. 630; s. c. 63 N. E. Rep. 503; aff'g s. c. 98 Ill. App. 483.

⁸⁶ *McKay v. Buffalo Bill's Wild*

West Co., 17 Misc. (N. Y.) 601; s. c. 40 N. Y. Supp. 592.

⁸⁷ *Mann v. O'Sullivan*, 126 Cal. 61; s. c. 58 Pac. Rep. 375. That the negligence of an employé in moving an elevator without notice to his coemployé, by which the latter is injured, is not imputable to the master, was held in *Whatley v. Block*, 95 Ga. 15; s. c. 21 S. E. Rep. 985.

ing side by side, cannot recover for an injury caused by the beam or horse tipping over because of his negligence or that of his fellow servant in pulling laterally instead of perpendicularly in hoisting the ice;⁸⁸ that one of several men employed to move a derrick, who was injured by the neglect of his fellow workman to fasten a guy-rope, whereby the derrick was allowed to fall, had no cause of action against the common employer;⁸⁹ that a workman, who was thrown against a trimming-saw which he was operating in his employer's sawmill, by reason of having been struck by one end of a plank lying on the rolls, the other end of which had been caught by a piece of timber on the carriage of the main saw,—it being the duty of a fellow servant to see that the plank was so placed on the rolls that it could not be caught by the carriage, and of another fellow servant to see that the carriage was not run unless it was clear of the planks on the rolls,—could not recover damages from the common master, both of his fellow servants having contributed to his injury, and his own contributory negligence combining to produce the accident;⁹⁰ that the negligence of a servant in failing to replace a plank over a drain after he had removed it, whereby the plaintiff fell into the drain and was injured, was the negligence of a fellow servant, for which the master was not liable;⁹¹ that the fact that a workman was injured through the act of a fellow workman in taking down a trestle as a whole instead of separating it and taking it down in sections, the strain caused thereby pulling a second trestle over upon the plaintiff, exhibits no right to recover against the master;⁹² that the negligence of a fellow servant on one occasion, in failing to readjust the cylinders of a machine after oiling it, cannot be imputed to the master, where the fellow servant was competent when selected, and it was his daily duty to oil the machine,—with the conclusion that a servant who had his hands drawn into the rollers by reason of the oiler

⁸⁸ *Tobin v. Friedman Man. Co.*, 67 Ill. App. 149. The fact that the foreman allowed the use of the apparatus did not make the master liable. The only danger lay in its being carelessly handled, which was plainly obvious to the workmen: *Tobin v. Friedman Man. Co.*, *supra*.

⁸⁹ *Neilson v. Gilbert*, 69 Iowa 691.

⁹⁰ *Demers v. Deering*, 93 Me. 272; s. c. 44 Atl. Rep. 922.

⁹¹ *Stewart v. International Paper Co.*, 96 Me. 30; s. c. 51 Atl. Rep. 237.

⁹² *Cogan v. Burnham*, 175 Mass. 391; s. c. 56 N. E. Rep. 585. The

plaintiff contended that defendant was negligent in not having a large post planted in the ground to hold the end of the rope by which the trestle was being lowered. The court held that the necessity for this post arose from the negligent manner of taking down the trestle adopted by the workmen—from a temporary condition arising during the progress of the work; and for the lack of appliances to meet such temporary condition the master was not liable; *Cogan v. Burnham*, *supra*.

leaving the rollers too far apart cannot recover from the master on that ground;⁹³ that an employé, who is injured by reason of the sudden fall of a frozen crust of earth which had been undermined, while he is near the bank loading a wagon with dirt, the negligence, if any, consisting in allowing the crust to fall without warning, being that of his coemployés instead of that of the superintendent,—has no cause of action against the common employer;⁹⁴ that a servant injured by reason of the negligence of his fellow servants in piling bales of hay cannot recover damages from the master, in the absence of evidence tending to show that the superintendent was responsible for the manner in which the bales were piled, or that he knew or ought to have known that the hay was liable to fall, or that he set the injured servant at work where he was working when he was injured, he having merely directed him a week before the accident to go to the hay shed and work there and stow away hay;⁹⁵ that an employer is not responsible for the death of a workman killed while hoisting planks to an upper story by the falling through a hole in the floor of a heavy truck which a fellow workman was using to land the planks, but which he had neglected to block, though means for so doing were very simple and always at hand,—the court reasoning that the truck was a common and well-known tool, and that the duty of using it safely rested upon the workman using it, and not upon the employer or his superintendent.⁹⁶

§ 5269. Further Illustrations of the Fellow-Servant Doctrine.—

The fellow-servant rule has been applied so as to exonerate the master, where one servant was caught in the rope of a steam-winch, which had been suddenly started by the engineer without giving him warning;⁹⁷ where a woman operating a sewing-machine in a factory was forced against the machine and injured by the tipping over of a pile of cloth piled up behind her by another employé, from which pile she selected the cloth with which she worked, there being room so

⁹³ *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214; s. c. 41 N. E. Rep. 265; 28 Chic. Leg. N. 34; 2 Am. & Eng. Corp. Cas. (N. S.) 620.

⁹⁴ *Gorman v. Woodbury*, 173 Mass. 180; s. c. 53 N. E. Rep. 373. Employés above were wedging off the frozen crust, and customarily gave warning by saying "Look out below" when the crust was about to fall, but the crust seems to have broken off before they had time to warn the plaintiff. The only direction the superintendent seems to

have given them was to go up and break off the frozen crust. The superintendent had charge of a large force of men, and his duties required him to be at various places: *Gorman v. Woodbury*, *supra*.

⁹⁵ *Fitzgerald v. Boston & C. R. Co.*, 156 Mass. 293; s. c. 31 N. E. Rep. 7.

⁹⁶ *O'Keefe v. Brownell*, 156 Mass. 131; s. c. 30 N. E. Rep. 479.

⁹⁷ *Garvey v. New York & C. S. S. Co.*, 26 App. Div. (N. Y.) 456; s. c. 50 N. Y. Supp. 77; 84 N. Y. St. Rep. 77.

that the pile could have been made wider at the bottom or placed so far from the plaintiff that, in tipping over, it would not have struck her;⁹⁸ where an employé was injured by the breaking of a switchboard upon which he was standing, caused by a fellow servant stepping upon it in making an attempt to cross from one part of the building to another, the switchboard not being intended as a passageway, and not being a part of the passageway, though occasionally used for that purpose without authority of the employer;⁹⁹ where a lumberman was injured through the negligence of his coemployés in failing to keep the rollers upon which a piece of timber was being moved at right angles with the timber, in consequence of which it slewed around so that the end of it struck a lumber pile, causing some of the planks to fall on his leg;¹⁰⁰ where some workmen were engaged in testing a pipe which had just been laid in a trench for the conveyance of natural gas, and one of them, feeling a strong desire to smoke, struck a match to light his pipe, which naturally caused an explosion of the natural gas;¹⁰¹ where one employé of an iron works was injured by the negligent manner in which his coemployés had loaded iron upon an iron wagon or "buggy," which the injured employé was required to push on a track from a rolling mill to other departments of the works, or by their negligence in selecting a defective "buggy," when they might have selected one that was in good condition;¹⁰² where a workman was injured while engaged in handling the crank of a crane hoisting a heavy weight, in consequence of the slipping of the shaft from slow gear into fast gear, requiring much greater power, through several fellow workmen stationing themselves upon one side of the crank, while only one workman was stationed on the opposite side, the lateral pressure produced by their being stationed in this position causing the shaft bearing the gear-cogs to slip, no man being stationed at the brake, and the handle, which was strong enough to bear the strain while using the slow gear, though cracked, broke under the increased strain and struck the injured servant;¹⁰³ where a mill-owner had constructed its mill after a common and approved mode but nevertheless an injury was visited upon an employé

⁹⁸ *Hale v. Wayside Knitting Co.*, 59 App. Div. (N. Y.) 395; s. c. 69 N. Y. Supp. 404.

⁹⁹ *Teetsel v. Simmons*, 88 Hun (N. Y.) 621; s. c. 34 N. Y. Supp. 972; 69 N. Y. St. Rep. 35.

¹⁰⁰ *Weeklund v. Southern Or. Co.*, 20 Or. 591; s. c. 27 Pac. Rep. 260.

¹⁰¹ *Allegheny Heating Co. v. Rohan*, 118 Pa. St. 223; s. c. 11 Atl. Rep. 789; 21 W. N. C. (Pa.) 139.

¹⁰² *Bemisch v. Roberts*, 143 Pa. St. 1; s. c. 2 W. N. C. (Pa.) 169; 22 Pitts. L. J. (N. S.) 1; 48 Phila. Leg. Int. 305; 21 Atl. Rep. 998.

¹⁰³ *Barlow v. Standard Steel Casting Co.*, 154 Pa. St. 130; s. c. 26 Atl. Rep. 12 (negligence held to be that of fellow servants in the operation of the crane).

by reason of the fact that he and his coemployés had permitted tools and rubbish to accumulate on the floor of the mill at a place where the presence of such tools and rubbish was dangerous, causing the employé to stumble and fall while trying to escape from under a falling mass of red-hot iron, whereby he was burned;¹⁰⁴ where five employés joined together in moving a large grindstone, and one of them took his position in front of it to prevent it from moving too rapidly and to direct its movement and to look out for defects in the floor, but failed to observe and avoid a defect in the floor, which caused the stone to fall over and kill one of them;¹⁰⁵ where a boy who was shown to be a careful, prudent and competent person for the work which he was engaged to do, injured a fellow employé by negligently letting down a steam-hammer before the latter had time to withdraw his hand from the place of danger.¹⁰⁶

§ 5270. Further Illustrations of the Fellow-Servant Doctrine.—

For further illustrations of the fellow-servant rule, we might refer to holdings to the effect:—That a mill-owner is not liable to the operator of a roller machine for an injury caused by the negligence of two other competent servants, who were ordered by the foreman to exchange the rollers in the machine for sharper ones, in so replacing a guide-board in front of the rollers as to leave the machine in a dangerous condition, whereby the plaintiff, in the proper discharge of his duties, had his fingers caught and crushed in the rollers,—the negligent servants being fellow servants of plaintiff, even while engaged in taking out and putting in the rollers;¹⁰⁷ that an employer is not liable for an injury to his employé caused by the explosion of a barrel of paint kept in the employer's building, where the barrel was set on fire by the carelessness of a coemployé, and the explosion occurred in an attempt, at the request of the foreman, to put out the fire;¹⁰⁸ that there can be no recovery for the death of a servant caused

¹⁰⁴ *Devlin v. Phoenix Iron Co.*, 182 Pa. St. 109; s. c. 37 Atl. Rep. 927; 28 Pitts. L. J. (N. S.) 124.

¹⁰⁵ *Sullivan v. Nicholson File Co.*, 21 R. I. 540; s. c. 45 Atl. Rep. 549 (was the negligence of a fellow servant).

¹⁰⁶ *Houston &c. R. Co. v. Suess*, 14 Tex. Civ. App. 384; s. c. 37 S. W. Rep. 378.

¹⁰⁷ *Frazee v. Stott*, 120 Mich. 624. The defendant had furnished a safe place, proper machinery, etc., and competent men. Under such circumstances he was not required

personally to superintend every detail of the work, such as the necessary fixing of the machinery; more especially as he himself may not have been skilled in such things: *Frazee v. Stott*, *supra*.

¹⁰⁸ *Burke v. Parker*, 107 Mich. 88; s. c. 2 Det. Leg. N. 620; 64 N. W. Rep. 1065 [decided Nov. 19, 1895; rehearing denied, but new trial granted Jan. 14, 1896]. The court say: "A fire occurred upon defendant's premises, and at its inception the employés were called upon to aid in extinguishing it, and thus

by the failure of another servant in charge of a guy-rope to hold or fasten it, so that the deceased was killed by the swinging of a load which he did not expect,—there being no evidence of defective appliances or of negligence in employing fellow servants;¹⁰⁹ that a laborer employed in levelling the bottom of a canal after it has been blasted cannot recover from the employer for injuries where the evidence shows that they resulted from the negligence of a fellow laborer in striking with his pick a charge which had been left unexploded, and no negligence on the part of the employer is shown;¹¹⁰ that a servant familiar with the location of a trap-door, who falls through it when it is suddenly and negligently opened from below by a fellow workman, who had been instructed by the foreman not to open it from below, has no right of action against the master;¹¹¹ that a laborer injured by the fall of a steel ingot from a mass of such ingots, carelessly piled by his fellow laborers in the same employment, cannot recover from the employer, a corporation, when no want of reasonable care on the part of the managing agents of the employing corporation is shown, either in the piling of the ingots, or in the employment and retention of laborers competent for the work;¹¹² that in loading and arranging express-matter in a car, an express-messenger acts within the scope of his ordinary duties as a servant, and a fellow servant cannot recover because of the negligent manner in which

preserve the master's property and prevent a general conflagration. The dangers ordinarily incident to a fire are obvious to persons of mature years. Employer and employes are equally conscious of such danger, and ordinarily equally skilled in the means employed to extinguish a fire. The work of extinguishment is usually attended with danger, and explosions are not uncommon. The law recognizes a fire as one of the perils which excuses acts otherwise illegal." [Here the court cites the example of the right to go upon another's premises to extinguish a fire, and the duty of an insured to exercise due diligence with respect to the prevention and extinguishment of fires and the protection of property]. The court then goes on to say: "If it be negligence to call upon his employes to assist in such an emergency, it would be impossible to do a work which the exigency demands should be done.

Suppose that a human life had been in peril, and the employer had called upon his employes to assist in the rescue; could it be said that he did so at his peril? Can the act under such circumstances be said to have been a wrongful act?" Opinion by McGrath, C. J.

¹⁰⁹ *Mulligan v. Ballon*, 73 App. Div. (N. Y.) 486; s. c. 77 N. Y. Supp. 214.

¹¹⁰ *Hutchinson v. Parker*, 39 App. Div. (N. Y.) 133; s. c. 57 N. Y. Supp. 168; s. c. aff'd, 169 N. Y. 579 (*mem.*); 61 N. E. Rep. 1130. The plaintiff contended that the master had not furnished a safe place to work and that accident was the result of a negligent inspection: *Hutchinson v. Parker*, *supra*.

¹¹¹ *Anthony v. Leeret*, 105 N. Y. 591; s. c. 8 N. Y. St. Rep. 542; 26 Wkly. Dig. (N. Y.) 469; 12 N. E. Rep. 561.

¹¹² *Nash v. Nashua Iron & Co.*, 62 N. H. 406.

the arranging is done.¹¹³ And so in the other cases noted in the margin.¹¹⁴

¹¹³ Wells, Fargo & Co. v. Page, 29 Tex. Civ. App. 489; s. c. 68 S. W. Rep. 528.

¹¹⁴ O'Sullivan v. Flynn, 67 App. Div. (N. Y.) 516; s. c. 73 N. Y. Supp. 1108 (servant killed by the springing back of a sewer-pipe when uncoupled—conclusion that if

there was any negligence at all it was that of the deceased and his fellow servants); Reusch v. Groetzinger (Pa. C. P.), 16 Lanc. L. Rev. 13 (heavy stone slipped from a crow-bar with which a fellow workman was lifting it, so that it fell, crushing the plaintiff's foot).

CHAPTER CXXXII.

DECISIONS UNDER STATUTES MODIFYING OR AFFECTING THE FELLOW-SERVANT RULE.

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5313. Whether such statutes apply to logging-railways.
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SECTION

5316. Contributory negligence as a defense under these statutes.
5317. Statutes giving a right of action for injury or death of "any person."
5318. Under the English Coal-Mines Regulation Act, 1872.

§ 5278. **A List of Such Statutes.**—Statutes have been enacted—some applying only to railway companies, and others more or less general in their application—modifying, and in some cases affirming, the rule of the common law that the master is not liable in damages to one servant for injuries inflicted upon him through the negligence of another servant in the same common employment.¹ These statutes, variously known as Employers' Liability Acts, Fellow-Servant Acts, Superior-Servant Acts, Vice-Principal Acts, etc., are found in Alabama,² Arkansas,³ British Columbia,⁴ California,⁵ Colorado,⁶ Connecticut,⁷ Dakota,⁸ England,⁹ Florida,¹⁰ Georgia,¹¹ Indiana,¹² Iowa,¹³ Kansas,¹⁴ Kentucky,¹⁵ Manitoba,¹⁶ Massachusetts,¹⁷ Mexico,¹⁸

¹Some of these statutes are collected in the appendix to a recent work on the statutory liability of employers: *Reno's Employers' Liability Acts* (2d ed.), beginning at page 553.

²Ala. Civ. Code 1896, §§ 1749-1751; Acts 1885, p. 115 (Employers' Liability Act—applies to all classes of employés).

³Ark. Stat. 1894, §§ 6248, 6249; Acts 1893, p. 68 (railway fellow-servant act).

⁴Brit. Col. Rev. Stat. 1897, ch. 69, p. 795, Acts 1891, ch. 10 (Employers' Liability Act—applies to all classes of employés except domestic or menial servants).

⁵Cal. Civ. Code, § 1970 (declaratory of the common-law rule).

⁶Mills' Ann. Colo. Code 1896, §§ 1511a-1511e; Sess. Laws 1893, ch. 77 (Employers' Liability Act—applies to all classes of employés); Sess. Laws 1901, ch. 67 (fellow-servant act).

⁷Conn. Gen. Stat. 1902, § 4702; Acts 1901, ch. 155, p. 1329 (vice-principal act).

⁸Dak. Comp. Laws 1887, § 3753; Civil Code, § 1130.

⁹43 & 44 Vict., ch. 42, 1880 (Employers' Liability Act—applies to railway employés, and to any person to whom the Employers and Workmen Act, 1875, applies); Workmen's Compensation Act, 1897.

¹⁰Fla. Rev. Stat. 1892, Appendix, p. 1009; Laws 1891, ch. 4071, § 3 (railway fellow-servant act).

¹¹Ga. Code 1895, §§ 2297, 2321, 2323 (Code 1882, §§ 2083, 3033, 3036) (applies to railway fellow servants).

¹²Burns' Rev. Stat. Ind. 1901, §§ 7083, 7085-7087; Acts 1893, ch. 130, p. 294, §§ 1, 3-5 (Employers' Liability Act—applies to employés of every railroad and other corporation operating in the State, except municipal corporations; and does not extend to employés of firms and of individuals). The second section of this act was repealed by Acts 1895, ch. 64, p. 148, § 1; and the fourth section was held to be unconstitutional in *Baltimore & c. R. Co. v. Reed*, 158 Ind. 25; s. c. *sub nom.* *Baltimore & c. R. Co. v. Read*, 62 N. E. Rep. 488.

¹³Iowa Code 1897, §§ 2039, 2071 (railway fellow-servant act).

¹⁴Kan. Gen. Stat. 1901, § 5858; Laws 1874, ch. 93, § 1 (railway fellow-servant act).

¹⁵Ky. Const. 1891, § 241.

¹⁶Manitoba Workmen's Compensation for Injuries Act, 1893.

¹⁷Mass. Rev. Laws 1902, ch. 106, §§ 71-79 (Employers' Liability Act—applies to all classes of employés except domestic servants and farm-laborers).

¹⁸Mex. Laws, art. 184.

Minnesota,¹⁹ Mississippi,²⁰ Missouri,²¹ Montana,²² New South Wales,²³ New York,²⁴ New Zealand,²⁵ North Carolina,²⁶ North Dakota,²⁷ Nova Scotia,²⁸ Ohio,²⁹ Ontario,³⁰ Pennsylvania,³¹ Queensland,³² South Australia,³³ South Carolina,³⁴ South Dakota,³⁵ Texas,³⁶ Utah,³⁷ Victoria,³⁸ and Wisconsin.³⁹

§ 5279. Act or Omission in Obedience to Rules and Regulations of the Master, or Particular Instructions.—Some of the Employers' Liability Acts allow a recovery where injury is caused by reason of the act or omission of any person in the service, done or made in obedience to the rules of the master, or in obedience to particular instructions given by any person delegated with the authority of the master in that behalf. But it has been held that the master is not liable for

¹⁹ Minn. Stat. 1894, § 2701; Laws 1887, ch. 13 (railway fellow-servant act). As to other classes of employes the common-law rules of the State have been reaffirmed by statute: Gen. Laws 1895, ch. 173.

²⁰ Miss. Acts Spec. Sess. 1898, ch. 66; amending Acts 1896, ch. 87 (fellow-servant act—applies to employes of any corporation). Section 3559 of the Code of 1892, which applied only to employes of railway corporations, was a reenactment of section 193 of the Constitution of 1890, which contained a clause granting to the Legislature the right to extend its provisions to any other class of employes. By Acts Spec. Sess. 1898, ch. 65, the statute giving a right of action for wrongful death is greatly enlarged, and its benefits extended to all classes of employes.

²¹ Mo. Rev. Stat. 1899, §§ 2873-2876; Acts 1897, p. 96 (railway fellow-servant act).

²² Mont. Civ. Code 1895, § 905; Comp. Stat. 1888, § 697 (railway superior-servant act).

²³ 61 Vict., No. 28 (Employers' Liability Act).

²⁴ N. Y. Laws 1902, ch. 600, p. 1748 (Employers' Liability Act—applies to all classes of employes).

²⁵ 40 Vict., No. 20.

²⁶ N. Car. Priv. Laws 1897, ch. 56 (railway fellow-servant act).

²⁷ N. Dak. Rev. Codes 1899, § 3072; Laws 1899, ch. 129 (railway fellow-servant act). As to other classes of employes the common-law rules of the State have been reaffirmed by statute: Code 1899, § 4096.

²⁸ Nova Scotia Rev. Stat. 1900, vol. 2, ch. 179, p. 786 (Employers' Liability Act—applies to all classes of employes except domestic or menial servants).

²⁹ Bates' Ann. Ohio Stat. (2d ed.), §§ 3365-22; 87 Ohio Laws, p. 150 (railway superior-servant act).

³⁰ Ont. Rev. Stat. 1897, ch. 160 (Workmen's Compensation for Injuries Act—applies to all classes of employes except domestic or menial servants, or servants engaged in husbandry, gardening or fruit-growing).

³¹ 2 Pepper & L. Pa. Dig., col. 3957, § 137; Pa. Laws 1868, p. 58 (applies to employes of third persons engaged about railway premises).

³² Employers' Liability Act, 1886.

³³ Employers' Liability Act, 1884.

³⁴ S. Car. Const. 1895, art. 9, § 15 (railway fellow servants); S. Car. Civ. Code 1902, § 2848; 23 S. Car. Laws, p. 716 (extending provisions of above section of Constitution to employes of street-railways).

³⁵ S. Dak. Rev. Civ. Code 1903, § 1449 (declaratory of the common-law rule).

³⁶ Sayles' Tex. Civ. Stat. 1897, arts. 4560f-4560i; Acts Spec. Sess. 1897, p. 14 (railway and street-railway fellow-servant act).

³⁷ Utah Rev. Stat. 1898, §§ 1342, 1343; Laws 1896, p. 99 (vice-principal act).

³⁸ Employers' and Employes' Act, 1890; amended in 1891, No. 1219.

³⁹ Wis. Stat. 1898, § 1816; Laws 1893, ch. 220 (railway fellow-servant act); superseding Laws 1889, ch. 438.

an injury due to the *disobedience* by a fellow servant of such a rule;⁴⁰ nor for an injury caused by the *omission of a duty* required by such a rule;⁴¹ nor for an injury caused by the *negligent performance* of a proper order.^{41a}

§ 5280. **Negligence of Person to whose Orders the Injured Servant was Bound to and Did Conform.**—Again, some of the Employers' Liability Acts give a right of action to an employé who is injured by reason of the negligence of any person to whose orders he is bound to conform, and does conform, if his injury results from so conforming. Thus, where an employé was injured by the falling of car-trucks which he and other employés were loading under the direction of a foreman, when, because of his position, which he had assumed by the foreman's order, he could not get out of the way when the foreman ordered the other men to let the trucks go, when the men might have held the trucks long enough for him to have got out of the way had they been so ordered,—it was held that he might recover.⁴² It has been held that it is not essential to a recovery that

⁴⁰ Laughran v. Brewer, 113 Ala. 509; s. c. 21 South. Rep. 415.

⁴¹ Baltimore &c. R. Co. v. Little, 149 Ind. 167; s. c. 9 Am. & Eng. R. Cas. (N. S.) 427; 48 N. E. Rep. 862. A *complaint* by a section-hand, which averred that his injuries "resulted from his conforming to the orders of the section-master" in going on the track, when he was struck and injured by a hand-car "on account of the negligence of defendant's agents," but which failed to aver negligence on the part of the *person giving the orders* to which he was bound to conform, and to ascribe the injuries to such negligence,—was held to be insufficient: Central &c. R. Co. v. Lamb, 124 Ala. 172; s. c. 26 South. Rep. 969.

^{41a} Thacker v. Chicago &c. R. Co., 159 Ind. 82; s. c. 64 N. E. Rep. 605 (foreman on rear hand-car signalled front car to stop while going twenty miles an hour; brakes applied so suddenly that plaintiff, who had not been warned, was thrown off).

⁴² Louisville &c. R. Co. v. Wagner, 153 Ind. 420; s. c. 1 Repr. (Ind.) 1085; 6 Am. Neg. Rep. 269; 14 Am. & Eng. R. Cas. (N. S.) 706; 53 N. E. Rep. 927. For a *complaint* which was held to state a cause of action, where a section-hand, who

was riding on a rapidly-moving hand-car, pursuant to the order of the foreman, who was on another car, was thrown off and injured by reason of the foreman ordering the car on which the plaintiff was riding to be stopped suddenly, without warning the plaintiff,—see Thacker v. Chicago &c. R. Co., 159 Ind. 82; s. c. 64 N. E. Rep. 605. A *complaint* declaring that a certain person was foreman of the defendant's switching-crew, and that he ordered the plaintiff, a member of the crew, to make a coupling on a certain switch, which order the plaintiff was bound to obey, and that while the plaintiff was so engaged the foreman ordered another cut of cars to be sent in on the same switch, which struck the cars the plaintiff was ordered to couple and injured him,—was held to state a cause of action: Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633; s. c. 62 N. E. Rep. 295. Where the plaintiff was ordered by his foreman to stand on a plank placed across the well of a lift, and while he was so standing the foreman pulled the starting-rope, which caused one end of the plank to drop, and the plaintiff, to save himself, caught hold of another rope and was carried up

the injury should happen immediately following the order given by the negligent servant, but it is sufficient if such negligence occurs while the injured servant is working under the orders of the negligent servant. For instance, where the plaintiff and other workmen had been ordered into a trench by the defendant's superintendent to repair a leak in a gas-main, and some time afterward, while the men were still at work in the trench and the gas was still escaping, to the superintendent's knowledge, the latter approached too near the trench with a lighted lantern, and an explosion followed, injuring the plaintiff, the defendant was held liable.⁴³ But it must appear that the injured servant was *bound to conform*, and did in fact conform, to the order or direction of the negligent servant; so that where a foreman in a factory, on leaving the room temporarily, gave orders that the plaintiff and other workmen should obey the orders of a certain workman during the foreman's absence, and the plaintiff, while engaged in assisting the temporary foreman, was injured through his negligence, it was held that such temporary foreman was not a servant to whose orders the plaintiff was bound to conform, since the foreman had no authority from the master to delegate his duties; but the negligent servant was merely a fellow servant with the plaintiff, for whose negligence the master was not liable.⁴⁴ It has also been

to the pulley and injured, it was held that his injuries were the *result of conforming* to the order of the foreman, for whose negligence the master was liable: *Wild v. Waygood*, [1892] 1 Q. B. 783. A servant borrowed from the general contractors for a building, by sub-contractors, to assist the latter's workman in constructing a lift which they have contracted to erect in the building, and whose wages the sub-contractors have promised to pay, is a servant of the latter, and bound to obey the orders of the workman he is assisting: *Wild v. Waygood*, *supra*. A railroad company is not liable under this section of the Alabama statute for an injury to a brakeman who assumed a position between cars separated from each other, for the purpose of coupling them, after the conductor should have made a coupling between the first car and the cars attached to the engine, from the failure of the conductor to make the first coupling, as he had stated he would do, by reason of which the cars came back and injured the brakeman, where the

conductor's failure was *not due to negligence* or recklessness, but to the speed with which the engine came back against the first car: *Alabama &c. R. Co. v. McDonald*, 112 Ala. 216; s. c. 20 South. Rep. 472.

⁴³ *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87; s. c. 54 N. E. Rep. 414. In *Hodges v. Standard Wheel Co.*, 152 Ind. 680; s. c. 1 Repr. (Ind.) 476; 52 N. E. Rep. 91, it was held, in an opinion by Jordan, J., that the negligence of a representative of an employer, *occurring subsequently* to the giving of an order, and while engaged in assisting the employé who is injured, is not negligence for which the employer is liable. But on a petition for a rehearing, in a *per curiam* opinion, it was held that the determination of this point was not necessary to a decision of the case, and the question was left open: *Hodges v. Standard Wheel Co.*, *supra*.

⁴⁴ *Hodges v. Standard Wheel Co.*, 152 Ind. 680; s. c. 1 Repr. (Ind.) 476; 52 N. E. Rep. 391; 54 N. E. Rep. 383. To the same effect is

held that this section of these acts applies only to injuries incurred while obeying the *special* orders or directions of a servant to whose orders the injured servant is bound to conform, and has no reference to a general order or direction given with regard to the general discharge of his duty.⁴⁵ A Federal court has, on the contrary, held that this clause of the Indiana statute is equivalent merely to a requirement that the injured servant shall have been *acting in the line of his duty* as an employé; and a railroad-engineer injured without negligence on his part while in charge of his engine, at a time and place when and where he had a right to be with his train, through the negligence of those in charge of another engine, must be presumed to have been at the time discharging the regular duties of his employment, and the case is within the statute.^{45a}

Boyd v. Indian Head Mills, 131 Ala. 356; s. c. 31 South. Rep. 80. In another case it appeared that the plaintiff was injured while coupling cars. He received no special directions from the conductor at that time. Owing to intervening obstructions, the plaintiff could not signal directly to the engineer, and two other brakemen were stationed to transmit the signals. The plaintiff signalled to back slowly. Without the plaintiff's knowledge, the brakeman nearest to him then signalled to move faster. The signal was transmitted by the other brakeman to the engineer, and also by the conductor, who stood near the engine. The engineer obeyed, and the plaintiff was caught and injured. It was held that he could not recover, since his injuries resulted from the negligence of his fellow brakeman, and not from the negligence of any person to whose orders he was bound to conform: *Grand Rapids & C. R. Co. v. Pettit*, 27 Ind. App. 120; s. c. 60 N. E. Rep. 1000. See also, *Howard v. Bennett*, 58 L. J. (Q. B.) 129; s. c. 60 L. T. 152. In a case brought under the Ontario act, it appeared that the plaintiff and a mason had together erected a temporary gangway at the direction of their foreman. While the plaintiff was subsequently carrying a load of mortar to the mason over such gangway, an insecurely fastened plank therein gave way and injured the plaintiff. It was held that the mason was not a person to whose orders the plaintiff,

in respect to the mode of carrying the mortar, was bound to conform; hence there could be no recovery under the act for the mason's negligence; nor could the plaintiff recover at common law, he and the mason being fellow servants: *Ferguson v. Galt Public School*, 27 Ont. App. 480; s. c. 20 Occ. N. 307.

⁴⁵ *Grand Rapids & C. R. Co. v. Pettit*, 27 Ind. App. 120; s. c. 60 N. E. Rep. 1000 (brakeman discharging his ordinary duties in coupling cars is not acting under the special order of the conductor); *Mobile & C. R. Co. v. George*, 94 Ala. 199; s. c. 10 South. Rep. 145 (brakeman given general order to uncouple cars from engine, but not given special order at the time of the injury). It has been held that the liability of an employer under this section of the Indiana act (section 1, subdiv. 2), is not nullified by specifications and enumerations contained in the fourth subdivision: *Louisville & C. R. Co. v. Wagner*, 153 Ind. 420; s. c. 1 Repr. (Ind.) 1085; 6 Am. Neg. Rep. 269; 14 Am. & Eng. R. Cas. (N. S.) 706; 53 N. E. Rep. 927. This clause of the Indiana statute is held to restrict the employer's common-law liability for the negligence of a vice-principal; so that unless the injured employé is, at the time of the injury, actually *obeying an order* of a superior servant having power to direct him, he cannot recover: *Thacker v. Chicago & C. R. Co.*, 159 Ind. 82; s. c. 64 N. E. Rep. 605.

^{45a} *Cincinnati & C. R. Co. v. Thiebaud*, 114 Fed. Rep. 918; s. c. 52 C.

§ 5281. **Negligence of Persons Engaged in Superintendence.**—One feature of the Employers' Liability Acts is that they make employers liable for the negligence of persons "engaged in superintendence." The language of the British statute on the point now to be considered is that the employer is liable where (among other things) a personal injury is caused to a workman " * * (3) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence."⁴⁶ A statute of Colorado is nearly in the same language, as follows: "By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence."⁴⁷ The corresponding clause in the Alabama statute is: "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence."⁴⁸ The corresponding clause of the Massachusetts statute is a little more explicit, thus: "The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence; or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer."⁴⁹ The New York statute contains a clause of a similar import.⁵⁰ Under these statutes an employer has been held liable for the death of an employé caused by defective appliances furnished to the employé at the direction of his superintendent;⁵¹ for an injury to an employé caused by the falling of a tree which was lodged against the one which he was chopping by order of his foreman, because of the foreman's negligent failure to warn him, as he had promised to do, when the tree he was chopping was about to fall.⁵² But the fact that a ledge-stone was left two or three days on a staging used in the construction of a building, projecting to such an extent that it was liable to fall if it was hit or the staging jarred, did not show that the foreman was negligent in exercising superintendence, where he had

C. A. 538 [citing *Pittsburg &c. R. Co. v. Montgomery*, 152 Ind. 1; s. c. 49 N. E. Rep. 582; 71 Am. St. Rep. 301].

⁴⁶ 43 & 44 Vict., ch. 42, § 1, cl. 2.

⁴⁷ Colo. Sess. Laws 1893, c. 77, § 1, cl. 2; *Mills' Supp. Ann. St. Colo.* 1891-1896, § 1511a.

⁴⁸ Ala. Acts of 1885, p. 115, § 1, cl. 2; Ala. Civil Code 1896, § 1749, cl. 2.

⁴⁹ Rev. Laws Mass. 1902, c. 106, § 71, cl. 2; Stat. Mass. 1887, c. 270, § 1.

⁵⁰ N. Y. Laws 1902, c. 600, § 1, cl. 2.

⁵¹ *Illinois Car &c. Co. v. Walch*, 132 Ala. 490; s. c. 31 South. Rep. 470.

⁵² *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444; s. c. 31 South. Rep. 527.

no occasion to visit that part of the work while the stone was there, and did not have actual knowledge that it was there, and the amount the stone projected could not be seen from below.⁵³ In another case it appeared that, after a stone had been lifted on edge, the foreman held it on edge and directed the plaintiff and three other men to go around on the other side and let it down carefully and easily. It was held that, the plaintiff being an experienced workman, the foreman was not negligent in not giving him more specific directions; and, it not being shown that the stone was too heavy for the men to handle with their hands, the foreman was not negligent in not adopting other means for letting it down.⁵⁴

§ 5282. Who are "Engaged in Superintendence" within the Meaning of these Statutes.—This question may be answered by saying that employés under the following conditions have been deemed to be "engaged in superintendence":—An employé who has superintendence entrusted to him, notwithstanding the fact that when he committed the negligent act he was voluntarily assisting the injured employé in manual labor, he being engaged in an act of superintendence at the time;⁵⁵ a foreman of a section-gang upon a railroad track, not at work himself, but looking on and seeing that the work is done, and being there for the purpose, among others, of giving warning of the approach of trains to the section-hands;⁵⁶ the foreman of a gang of men employed on a pile-driver with authority to employ and dismiss men, who frequently has charge of the work, and who gives all the directions which are given at the time when one of the employés receives an injury, and who does not work, and is not expected to work, with his hands;⁵⁷ a superintendent in general control of the entire work of excavating a trench,—with the conclusion that he was engaged in an act of superintendence in walking along the bank and in stopping to look down at the work, standing at a place where there was a crack in the earth without giving any warning to those at work in the trench, whereby the earth was precipitated upon them;⁵⁸ a per-

⁵³ *Carroll v. Willcutt*, 163 Mass. 221; s. c. 39 N. E. Rep. 1016.

⁵⁴ *La Belle v. Montague*, 174 Mass. 453; s. c. 54 N. E. Rep. 859.

⁵⁵ *Kansas City & C. R. Co. v. Burton*, 97 Ala. 240; s. c. 12 South. Rep. 88; 53 Am. & Eng. R. Cas. 115 (citing *Osborne v. Jackson*, 11 Q. B. Div. 619, which is in point).

⁵⁶ *Davis v. New York & C. R. Co.*, 159 Mass. 532; s. c. 34 N. E. Rep. 1070 (not a mere fellow servant of the section-hands).

⁵⁷ *McPhee v. Scully*, 163 Mass. 216; s. c. 39 N. E. Rep. 1007.

⁵⁸ *McCoy v. Westborough*, 172 Mass. 504; s. c. 52 N. E. Rep. 1064. So, an injury to an inexperienced employé by the falling of an embankment of earth which he was undermining, during the temporary absence of the employer's superintendent, who failed to notify the employé of the danger, is due to the negligence of one exercising superintendence within the meaning of

son who was entrusted with the duty of superintending the lowering of a shaft by the general superintendent of the employer, the general superintendent not assuming personal charge of the work and not being present,—with the conclusion that the person referred to was acting as superintendent with the authority and consent of the employer;⁵⁹ an employé of the owner of a small foundry who directed the men to their work in the absence of the owners, and who also did work of a similar kind, and in the absence of the owners directed the workmen to use for a casting a mold in which he had made a perforation with a rusty piece of iron, so that when the molten iron came in contact with the rust left in the mold by the perforating iron it caused an explosion, injuring the workman,—the conclusion being that the employé giving directions, who placed the dangerous mold in the hands of the injured employé, acted as superintendent;⁶⁰ the foreman of a crew of section-hands;⁶¹ a locomotive-engineer;⁶² a yardmaster, superior to all other employés present, who personally takes the place of the engineer, and is running the engine at the time a car is derailed, or is present directing and controlling the engineer;⁶³ a superintendent who negligently started a machine which the operator had stopped while he went to an upper floor, out of sight of the machine, in order to adjust certain parts of it which had become loose.⁶⁴ A sound view of this question was taken by the Massachusetts court in a case where an employé had been killed in consequence of the defective condition of what is called a “cat’s-paw hitch” which had been made by a fellow servant, after the superintendent had come into the room and made an inspection. Here an instruction that the plaintiff could not recover because the hitch was improperly made by a fellow servant was properly refused, since the jury might have found that the superintendent saw the hitch and made no objection to its condition, or that he failed in his duty of superintendence in failing to see that it was not in a safe condition.⁶⁵

the Massachusetts act, where the superintendent knew the danger, and intended to come back very soon, and understood all the time that he was “looking after” the bank and the men: *Lynch v. Allyn*, 160 Mass. 248; s. c. 35 N. E. Rep. 550.

⁵⁹ *Knight v. Overman Wheel Co.*, 174 Mass. 455; s. c. 54 N. E. Rep. 890.

⁶⁰ *McCabe v. Shields*, 175 Mass. 438; s. c. 56 N. E. Rep. 699.

⁶¹ *Richmond & C. R. Co. v. Hammond*, 93 Ala. 181; s. c. 9 South. Rep. 577.

⁶² *Louisville & C. R. Co. v. Mothershed*, 97 Ala. 261; s. c. 12 South. Rep. 714; *Culvert v. Alabama & C. R. Co.*, 108 Ala. 330; s. c. 18 South. Rep. 827 (has superintendence over the fireman and the loading of the tender with coal).

⁶³ *Louisville & C. R. Co. v. Mothershed*, 97 Ala. 261; s. c. 12 South. Rep. 714.

⁶⁴ *Roche v. Lowell Bleachery*, 181 Mass. 480; s. c. 63 N. E. Rep. 943.

⁶⁵ *Knight v. Overman Wheel Co.*, 174 Mass. 455; s. c. 54 N. E. Rep. 890.

The Supreme Court of Alabama have taken the view that the act of superintendence, the negligent performance of which will charge the employer, need not be a superintendence over the servant receiving the injury; but that the master is liable if his superintendent is negligent in the performance of the duties entrusted to him, whereby another employé in the same service is injured, no matter what may be the relation existing between them.⁶⁶

§ 5283. Who Not "Engaged in Superintendence" within the Meaning of these Statutes.—The following persons have been held not to be "entrusted with and exercising superintendence" within the meaning of these statutes:—An engineer engaged continuously in running an engine, who committed an error in raising a "fall" when signalled to lower it, causing the hook at the end of the fall to swing and strike the plaintiff, although such engineer also performed some acts of superintendence, the evidence showing that neither his sole nor principal duty was that of superintendence, and the act which caused the injury not being an act of superintendence;⁶⁷ a section-foreman by

⁶⁶ *Kansas City & C. R. Co. v. Burton*, 97 Ala. 240; s. c. 12 South. Rep. 88; 53 Am. & Eng. R. Cas. 115. In the same case it is held that for one having superintendence of railway-tracks and cars in a railway-yard, either to direct or to allow a car to be placed too near another track, or, upon its being there without his fault, to suffer it to remain, is negligence while in the exercise of his *superintendence* within the meaning of the Alabama statute: *Kansas City & C. R. Co. v. Burton*, *supra*. Circumstances under which it was held that there was no adequate evidence of negligence on the part of the person engaged in the superintendence: *Fleming v. Elston*, 171 Mass. 187; s. c. 50 N. E. Rep. 531 (some evidence that the superintendent was near plaintiff just before accident, with crowbar in his hand, but if plaintiff was struck by crowbar, none of circumstances appeared). An employé who, while rolling a cotton-bale, was struck by another bale thrown down from a pile by a fellow servant, was denied a recovery for the injury sustained, although the defendant's superintendent previously told the fellow servant to "throw down cotton," such order being merely a command or request to hurry on the work in a proper way:

Gouin v. Wampanoag Mills, 172 Mass. 222; s. c. 51 N. E. Rep. 1078. A servant injured by the falling of bales of hay cannot recover on the ground of negligence of the superintendent, in the absence of evidence that he had anything to do with the piling of the hay, or that he appointed the servant's place to work at the time of the injury,—especially where the evidence is uncontradicted that the hay was properly piled: *Fitzgerald v. Boston & C. R. Co.*, 156 Mass. 293; s. c. 31 N. E. Rep. 7. The testimony of an employé that it took most of his time telling the other employés what to do and giving them their work, and that during the whole day he kept run of the men, and kept them at work, and told them what to do and what not to do, justifies a finding by the jury that his *principal duty* was that of superintendence within the Massachusetts statute, notwithstanding his later testimony when recalled by the master, that he worked about three-quarters of the time with his own hands, and that during that time he was bossing the men: *Riou v. Rockport Granite Co.*, 171 Mass. 162; s. c. 50 N. E. Rep. 525.

⁶⁷ *Cashman v. Chase*, 156 Mass. 342; s. c. 31 N. E. Rep. 4.

whose negligence in running a hand-car a section-hand riding thereon was injured;⁶⁸ an ordinary weaver whose usual work is merely to operate a loom, and whose duty it is also, when the loom gets out of order, to notify the loom-fixer to put it in order;⁶⁹ a common painter, receiving the same pay and doing the same work as other men on the job, though he performs some acts of superintendence, the evidence failing to show that superintendence is his sole or principal duty;⁷⁰ an engineer whose duty it is personally to operate a stationary engine, although he usually has a helper, where, in the absence of the helper, by the negligence of the engineer in starting the engine, or in failing to prevent a third person from starting it, a person engaged in repairing the engine is killed; since the primary duty of the engineer is not that of a superintendent, but that of a laborer.⁷¹ So, the starting of a table used for the transfer of cars in a street-car barn by a car-shifter whose duty it was to get cars ready for the conductors and motormen, was not an act of superintendence within the meaning of the same statute, as to the conductor who was injured thereby.⁷² So, the proprietor of a machine-shop was not liable for injuries to a servant due to the negligence of a superintendent of the shop in acting as a motorman in taking a car out of the shop, this being the act of a fellow servant with respect to the servant injured.⁷³ So, the superintendent of an iron foundry does not exercise acts of superintendence within the meaning of the Massachusetts statute, in setting up molds and inspecting them with reference to their condition as to dampness, or in assuring an employé that they are all right, where such acts are a matter of detail and of recurring necessity.⁷⁴ So, the act of an employé in a quarry, in placing a can of powder preparatory to blasting in a position where it would be hit by a swinging tag attached to a derrick, was not an act of superintendence, though his

⁶⁸ *Shepard v. Boston &c. R. Co.*, 158 Mass. 174; s. c. 33 N. E. Rep. 508.

⁶⁹ *Roseback v. Ætna Mills*, 158 Mass. 379; s. c. 32 N. E. Rep. 577 (weaver and loom-fixer held to be fellow servants, so that loom-fixer could not recover for injuries caused by weaver starting loom while he was fixing it at the request of the weaver).

⁷⁰ *Adasken v. Gilbert*, 165 Mass. 443; s. c. 43 N. E. Rep. 199.

⁷¹ *Dantzler v. De Bardeleben Coal &c. Co.*, 101 Ala. 309; s. c. 22 L. R. A. 301; 14 South. Rep. 10. It is also the rule in England that su-

perintendence must be the *sole* or *principal duty* of the negligent servant: *Kellard v. Rooke*, 21 Q. B. Div. 367; but it will be noticed that neither the Alabama nor the English statute contains the words "whose sole or principal duty is that of superintendence": *Ante*, § 5281.

⁷² *Whelton v. West End St. R. Co.*, 172 Mass. 555; s. c. 5 Am. Neg. Rep. 615; 52 N. E. Rep. 1072.

⁷³ *Brittain v. West End St. R. Co.*, 168 Mass. 10; s. c. 46 N. E. Rep. 111.

⁷⁴ *Whittaker v. Bent*, 167 Mass. 588; s. c. 46 N. E. Rep. 121.

principal duty was that of a superintendence.⁷⁵ Where a mason and a laborer engaged in carrying mortar to him, together built a temporary gangway at the command of their foreman, and the laborer was subsequently injured, while carrying mortar to the mason over the gangway, by the giving way of an insecurely fastened plank therein, it was held that the mason was not a person having superintendence entrusted to him, in regard to the construction of the gangway, for whose negligence the laborer could recover.⁷⁶

§ 5284. **Employé may be "Exercising Superintendence," although Performing Common Labor.**—It will be observed that these statutes contain a clause "*entrusted with and exercising superintendence.*" Here, as in other cases,⁷⁷ a common servant may, for the time being, be "entrusted with and exercising superintendence;" and, *vice versa*, one holding the general office of superintendent may be acting as a common servant in doing the act which results in an injury to another servant, in which case it will be regarded as the act of a fellow servant, and the master will not be liable. So, the mere fact that an employé performs a small amount of ordinary labor does not necessarily involve the conclusion that his principal duty is not that of superintendence.⁷⁸ The act of the superintendent of an establishment in leaning over between the plaintiff's machine and another machine to give directions to another workman, whereby the superintendent accidentally touched the "shipper" and started the plaintiff's machine, thereby injuring him, was not an act of superintendence within the meaning of the statute so as to charge the employer with liability.⁷⁹ But the mere fact that one given authority of superintendence works with his hands the greater part of the time, does not necessarily exclude him from being one whose "principal business is that of superintendence"; and where a superintendent, although performing manual labor himself, is also during the same time actively exercising the duty of superintendence, such superintendence may be found, in a proper case, to be such "principal business." Thus, where a foreman had full charge of the work of getting out stone, and gave all the orders and directions necessary to

⁷⁵ *Riou v. Rockport Granite Co.*, 171 Mass. 162; s. c. 50 N. E. Rep. 525.

⁷⁶ *Ferguson v. Galt Public School*, 27 Ont. App. 480; s. c. 20 Occ. N. 307.

⁷⁷ *Ante*, § 4918.

⁷⁸ *Crowley v. Cutting*, 165 Mass. 436; s. c. 43 N. E. Rep. 197; *Rey-*

nolds v. Barnard, 168 Mass. 226; s. c. 46 N. E. Rep. 703; *Flynn v. Boston Electric Light Co.*, 171 Mass. 395; s. c. 8 Am. & Eng. Corp. Cas. (N. S.) 489; 50 N. E. Rep. 937 (no negligence on part of foreman).

⁷⁹ *Joseph v. George C. Whitney Co.*, 177 Mass. 176; s. c. 58 N. E. Rep. 639.

that end, but when not otherwise engaged he took a hammer and worked with the other men, remaining in control, however, all the time, the master was held liable for his negligence in giving an order to tighten a rope, by reason of which another employé was injured.⁸⁰ So, the manual labor of a superintendent who directed the method of lowering a spar on a ship into its socket, in unwinding a rope from the drumhead, cannot be separated from his duty as superintendent so as to relieve the master from liability for an injury to a servant resulting from the superintendent's negligence in unwinding the rope when it was in a wet condition.⁸¹

§ 5285. Negligence of Person Having Charge or Control of Any Car, Train, Locomotive, etc., on a Railway.—Some of the Employers' Liability Acts give a right of action for injuries caused by the negligence of any person having charge or control (among other things) of any car, train, or locomotive-engine on a railway. Under the Massachusetts act, a "train" is defined as "one or more cars which are in motion, whether attached to an engine or not"; and any person who, "as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive-engine or train shall be deemed a person in charge or control" thereof. Thus, under that act, a railway company has been held liable for an injury to an employé on a train, resulting from the negligence of the *engineer* in charge of the engine, or that of the *brakeman* in charge of the train.⁸² But *brakemen* whose duty it is to take care of the brakes on the cars of a train while it is being switched to another track under the supervision and direction of the conductor, are not "in charge or control" of the train so as to make the company liable for injuries to another employé resulting from their negligent failure to stop the train in time to prevent a collision.^{82a} A *railroad conductor* was held to have been in charge of a train, notwithstanding his temporary absence therefrom at the time of an injury to a brakeman, where nothing was done contrary to his orders, or that was not reasonably to be expected.⁸³ But it was held that a *conductor of a switch-engine* having charge of making up a freight-train in a yard was *not* a person in charge or control of

⁸⁰ Canney v. Walkeine, 51 C. C. A. 53; s. c. 113 Fed. Rep. 66.

⁸¹ O'Brien v. Look, 171 Mass. 36; s. c. 50 N. E. Rep. 458.

⁸² Shea v. New York &c. R. Co., 173 Mass. 177; s. c. 6 Am. Neg. Rep. 82; 53 N. E. Rep. 396 (car being shifted in railroad-yard by means of locomotive coupled to it, brake-

man standing on front platform of car; collision due to negligence of either engineer or brakeman, injuring car-cleaner at work in the car).

^{82a} Caron v. Boston &c. R. Co., 164 Mass. 523; s. c. 42 N. E. Rep. 112.

⁸³ Donahue v. Old Colony R. Co., 153 Mass. 356; s. c. 26 N. E. Rep. 868.

such freight-train, so as to make the company liable to a freight-brakeman for injuries resulting from such train having been negligently made up; since the statute includes only those whose duties relate to the charge of the train when complete.⁸⁴ It is held that an *engineer of a railway-train* must be regarded as the person in charge, within the meaning of the Massachusetts act, for the purpose of giving signals or slackening speed at the approach of danger, although the conductor for many purposes has charge of the train; hence a workman on the track who is injured by the engineer's negligence in this respect, and is himself free from fault, can recover.^{84a} A *hand-car* has been held to be a "car" within the meaning of the Alabama statute.⁸⁵ Under the same statute the following persons were held to be in "charge or control" so as to render the company liable for their negligence:—An *engineer* who suddenly moved a train after having stopped it at a signal from an employé to enable the latter to couple cars by going between them, after an unsuccessful effort to couple them from the outside with a stick;⁸⁶ the *foreman of a section-gang*, who failed to give signals required by the rules of the road, by reason of which a laborer on a *hand-car* was injured in jumping therefrom to avoid a collision occasioned by the foreman's negligence;⁸⁷ an *engineer* who propelled a train with such force against standing cars as to injure a brakeman attempting to couple the standing cars to another car.⁸⁸

⁸⁴ *Thyng v. Fitchburg R. Co.*, 156 Mass. 13; s. c. 30 N. E. Rep. 169.

^{84a} *Davis v. New York & C. R. Co.*, 159 Mass. 532; s. c. 34 N. E. Rep. 1070.

⁸⁵ *Kansas City & C. R. Co. v. Crocker*, 95 Ala. 412; s. c. 11 South. Rep. 262; *Richmond & C. R. Co. v. Hammond*, 93 Ala. 181; s. c. 9 South. Rep. 577.

⁸⁶ *Hissong v. Richmond & C. R. Co.*, 91 Ala. 514; s. c. 8 South. Rep. 776.

⁸⁷ *Richmond & C. R. Co. v. Hammond*, 93 Ala. 181; s. c. 9 South. Rep. 577.

⁸⁸ *Alabama & C. R. Co. v. McDonald*, 112 Ala. 216; s. c. 20 South. Rep. 472. A *complaint* by a section-hand averring that the injuries complained of "were caused by the negligent running of a hand-car by some one in the employ of defendant," but failing to aver that some one of defendant's employés was *in charge* of the car, was held to be insufficient: *Central & C. R. Co. v. Lamb*, 124 Ala. 172; s. c. 26 South. Rep. 969. For a *complaint*

which was held to state a cause of action with regard to the negligence of an *engineer of a switch-engine*, in giving a violent jerk to cars which were being got out of a train,—see *Southern R. Co. v. Jackson*, 133 Ala. 384; s. c. 31 South. Rep. 988. In an action brought in *Kentucky* under the Alabama statute, it was held that a recovery might be had for the negligent killing of an employé by those in charge of a locomotive, although the negligence was *neither gross nor willful*: *Louisville & C. R. Co. v. Graham*, 98 Ky. 688; s. c. 17 Ky. L. Rep. 1229; 34 S. W. Rep. 229. Under such a statute a railroad company cannot avoid liability for injury to an employé caused by the negligence of those in charge of a train, on the ground that the negligence was that of fellow servants: *Baltimore & C. R. Co. v. Peterson*, 156 Ind. 364; s. c. 59 N. E. Rep. 1044. Under the clause of the Indiana statute providing that a railroad company shall be liable when the injury is caused by

Under the English act an engineer who has charge or control of a train does not cease to have charge of it because some of the carriages are uncoupled from each other and from the engine in order that they may be separately dealt with; so that, if the engineer fails to see that the cars are properly "scotched" by the fireman, in consequence of which one of them runs down an incline and injures a servant while the engineer is engaged in removing another car, the company will be liable.^{88a} Under the Ontario statute, it has been held that the *motorman* of a car running on an electric system is a "person who has the charge or control" thereof, so as to charge his employers with liability for injuries inflicted on a fellow servant owing to the motorman's negligence in passing too close to a wagon which is moving out of the way of the car.⁸⁹

§ 5286. Negligence of Person Having Charge or Control of Any Signal, Points, Switch, etc.—The following persons have been held to be in "charge or control" of a switch, so as to charge the employer with liability for injuries caused by their negligence:—*Engineers* and *conductors* who were provided with *keys* to a switch, with the duty of opening and fastening which no one was specially charged, such switch giving entrance to a spur-track attached to the main track to enable trains to pass each other,—they being regarded as in charge of the switch *pro hac vice*;⁹⁰ a *tower-man*, whose duty it was to move switches by levers in a tower on signals from men on the track below, and who threw a different switch than directed by a signal, causing an approaching train to run on a wrong track and collide with a switchman who gave the signal;⁹¹ one who, though employed as a yardmaster, was engaged in switching cars in and out of a spur-track leading to a quarry, where it was his duty to open and close switches and follow the switch-engine from yard to yard, taking cars in and out of the quarry, and he had a *key* for the purpose of opening and closing switches.⁹²

the negligence of a locomotive-engineer or trainman, or when caused by the negligence of a fellow servant in the same common service when the injured person is conforming to the order of some superior at the time,—it was held that the second part of the clause, requiring that the person injured be conforming to the order of some superior at the time, limits only the liability expressed in such second part, and that railroad companies are liable to their employés for the negligence of locomotive-engineers and trainmen, the same as to

strangers: *Indianapolis Union R. Co. v. Hculihan*, 157 Ind. 494; s. c. 60 N. E. Rep. 943.

^{88a} *McCord v. Cammell*, [1896] A. C. 57; s. c. 65 L. J. Q. B. (N. S.) 202; 73 Law T. Rep. 634.

⁸⁹ *Snell v. Toronto R. Co.*, 27 Ont. App. 151; s. c. 20 Occ. N. 224.

⁹⁰ *Birmingham R. & C. Co. v. Baylor*, 101 Ala. 488; s. c. 13 South. Rep. 793.

⁹¹ *Welch v. New York & C. R. Co.*, 176 Mass. 393; s. c. 57 N. E. Rep. 668.

⁹² *Albrecht v. Milwaukee & C. R. Co.*, 94 Wis. 397; s. c. 69 N. W.

§ 5287. **Negligence of Person Having Charge or Control of Any Switch-Yard.**—The statute of Indiana, making a railroad company liable for an injury to an employé caused by the negligence of any employé who has charge of any switch-yard, imposes upon the company the duty of employing foremen who will not by their negligence injure the other employés; and where the negligence of the foreman in charge of a switch-yard causes an injury to an employé therein, his act constitutes a breach of the duty of the master, and at the same time a breach of duty on his own part toward his coemployé, and the person injured may maintain a joint action against the master and servant for the injury.⁹³

§ 5288. **Defects in Ways, Works, Machinery, or Plant.**—These statutes make the employer liable for defects in the ways, work, machinery, or plant, connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or the negligence of some person entrusted by him with the duty of seeing that they were in proper condition. It has been held that a *carpenter* who understands and looks after machinery, although he is subject to the orders of a superintendent, and is also a salesman, may be found to be a person entrusted with the duty of seeing that the ways, works, or machinery are in proper condition, so as to render the employer liable for his negligence in regard thereto.⁹⁴ So, where an employer entrusts to his *superintendent* the duty of seeing that the ways, work, and machinery are in proper condition, he is liable for injuries to an employé caused by the negligence of the superintendent in the discharge of such duty, though there is no evidence of any negligence on the part of the employer.⁹⁵ Under the original Massachusetts act it was

Rep. 63 (under Wis. Laws 1889, ch. 438). An employé in charge of a *switch* is not within the contemplation of the Indiana statute, which makes the employer liable for the negligence of any person "who has charge of any signal, telegraph-office, switch yard," etc., as the section is to be read as punctuated, and no comma is to be inserted between "switch" and "yard": *Baltimore &c. R. Co. v. Little*, 149 Ind. 167; s. c. 48 N. E. Rep. 862; 9 Am. & Eng. R. Cas. (N. S.) 427 (the court holding that the term "switch yard" was properly used to mean "railroad-yard").

⁹³*Charman v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 449.

⁹⁴*Copithorne v. Hardy*, 173 Mass. 400; s. c. 53 N. E. Rep. 915.

⁹⁵*Lynch v. Allyn*, 160 Mass. 248; s. c. 35 N. E. Rep. 550. The Dakota Code, § 1130, declares that an employer is not bound to indemnify his employé for injuries caused by the negligence of another person employed by the same employer in the same general business, unless in case of neglect to use ordinary care in the selection of the culpable employé; and section 1131 declares that an employer must in all cases indemnify his employé for losses caused by the employer's want of ordinary care. In Dakota, the law as declared by the Code displaces the common law. It was

held that an *isolated empty car* on its way to be returned to its owner, from whom the railway company had received it loaded, was not part of the ways, works, or machinery of the company;⁹⁶ but the present act provides that a car which is in use by, or *in the possession* of a railway company, shall be considered a part of the ways, works, or machinery.⁹⁷ A *temporary gangway*, made of planks, by means of which the plaintiff carried mortar to a mason, was not a "way" within the meaning of the Ontario act, so as to make the employer liable for injuries due to an insecurely fastened plank therein.⁹⁸

§ 5289. Liability for Injuries Resulting from the Wanton, Willful, or Intentional Misconduct of an Employé.—It has been held that an employer is liable in damages under the Employer's Liability Acts for the wanton, willful, or intentional misconduct of an employé resulting in an injury to another employé, where the relation is such between the employés that the master would be liable for the injury had it been inflicted negligently, instead of wantonly.⁹⁹

§ 5290. Under the Arkansas Code.—It is provided by statute in this State that all persons engaged in the service of any *railroad corporation*, who are entrusted with the authority of superintendence, control or command of their coemployés, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals, and not fellow servants.¹⁰⁰ Thus, where it appeared that it was the duty of an *engine-foreman* and his crew to do any work needed in the yards, such as switching and moving cars, etc., it was held that such foreman was a vice-principal as to

held that a brakeman injured by reason of defective, worn-out, and broken brakes, which an employé of the railroad company was charged with the duty of keeping in repair, could maintain an action against the railroad company, without regard to the question of the company's negligence in the selection of the employé charged with the duty of keeping the brakes in repair: *Northern Pac. & C. R. Co. v. Herbert*, 116 U. S. 642. It is held with obvious propriety that no cause of action arises under the Massachusetts statute where the injury is received merely by reason of the negligence of a fellow servant in *handling* or *using* a machine, tool, or appliance which is itself in a proper condition: *Ash-*

ley v. Hart, 147 Mass. 573; s. c. 18 N. E. Rep. 416; 1 L. R. A. 355 (injury arose from failure of fellow servant to fasten his end of a staging, and not from any defect in the staging, as charged).

⁹⁶ *Coffee v. New York & C. R. Co.*, 155 Mass. 21; s. c. 48 Am. & Eng. R. Cas. 370; 28 N. E. Rep. 1128.

⁹⁷ Mass. Rev. Laws 1902, ch. 106, § 71, cl. 3, subdiv. 2.

⁹⁸ *Ferguson v. Galt Public School*, 27 Ont. App. 480; s. c. 20 Occ. N. 307.

⁹⁹ *Southern R. Co. v. Moore*, 128 Ala. 434; s. c. 29 South. Rep. 659; *Louisville & C. R. Co. v. York*, 128 Ala. 305; s. c. 30 South. Rep. 676.

¹⁰⁰ Ark. Stat. 1894, § 6248; Acts 1893, p. 68.

the crew, though he had no power to employ the men, but only reported them for negligence or refusal to do their work.¹⁰¹ So, a foreman of a section-gang, with power to employ and discharge the men under him, and to control them in the performance of their duty, is a vice-principal; and he remains a vice-principal even when actively assisting in the manual performance of the work.¹⁰² A railroad company is liable for the negligence of a servant having authority to command or direct other employes, though such vice-principal has *no authority over the servant who is injured* through his negligence.¹⁰³ But such a company is not liable for the negligence of one who has *no authority* to act as a "boss," though his coemployes may regard him as such, or though he *assumes* some sort of control over them.¹⁰⁴ The statute further provides that all persons who are engaged in the service of a railway corporation, and who, while so engaged, are working together to a common purpose, and are of the same grade and in the same department of service, and neither of whom is entrusted by such corporation with any superintendence or control over his fellow employes, are fellow servants with each other, for whose negligence resulting in injury to each other the corporation is not liable.¹⁰⁵ Under this section of the statute the *inspector in a roundhouse*, who is subject to the authority of the mechanical department, is not a fellow servant with a *locomotive-fireman* while on the road, who is subject to the authority of the transportation department;¹⁰⁶ nor is a *locomotive-fireman*, who is injured by a collision of trains caused by the failure of a *telegraph-operator* to deliver orders received by him from the train-despatcher, a fellow servant with such operator.¹⁰⁷

§ 5291. Under the California Civil Code.—Section 1970 of the Civil Code of California enacts as follows: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is em-

¹⁰¹ St. Louis & C. R. Co. v. Tuohey, 67 Ark. 204; s. c. 54 S. W. Rep. 577.

¹⁰² Haworth v. Kansas City & C. R. Co., 94 Mo. App. 215; s. c. 68 S. W. Rep. 111 (under Arkansas statute).

¹⁰³ St. Louis & C. R. Co. v. McCain, 67 Ark. 377; s. c. 55 S. W. Rep. 165 (foreman of switching-crew and *switchman of another crew*); St. Louis & C. R. Co. v. Thurmond, 70 Ark. 411; s. c. 68 S. W. Rep. 488 ("fire-knocker," who had no authority over other employes, injured by negligence of a "hostler," who had supervision over

men under him, in running engine into the engine under which the "fire-knocker" was at work).

¹⁰⁴ Hunter v. Kansas City & C. R. Co., 85 Fed. Rep. 379; s. c. 54 U. S. App. 653; 29 C. C. A. 206 (white laborer and negro laborers).

¹⁰⁵ Ark. Stat. 1894, § 6249; Acts 1893, p. 68.

¹⁰⁶ Kansas City & C. R. Co. v. Becker, 67 Ark. 1; s. c. 46 L. R. A. 814; 53 S. W. Rep. 406.

¹⁰⁷ St. Louis & C. R. Co. v. Furry, 114 Fed. Rep. 898; s. c. 52 C. C. A. 518.

ployed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." Thus, a carpenter engaged in inclosing an elevator-shaft within a frame for the owner of a building, and the operator of the elevator, in the employ of such owner, were held to be persons "employed in the same general business," and hence fellow servants.^{107a} This statute, it will be perceived, is simply an affirmation of the rule of the common law.¹⁰⁸ But it has received a construction which is contrary to the views of many American courts as to what the common law is. These courts, as we have seen,¹⁰⁹ hold that where the master delegates to an agent the entire control of his business, including the power to employ and discharge servants, such agent is not a fellow servant with those whom he employs, but is the representative of the master in such a sense that his negligence is the master's negligence. In construing this statute, the Supreme Court of California ignore this rule. Thus, a declaration alleged that the defendants were the owners of a certain mine, which they worked by their superintendent, who had full power to control the working of the mine, and to employ and to discharge hands at discretion; that all the hands in the mine, employed by the defendants, were employed by the superintendent; and that the engineer and the defendants and the superintendent knew this to be the case before the injury complained of. It then recited that the plaintiff's intestate was killed through the incompetency, or want of skill, of the engineer. It was held that the declaration was bad, the court saying: "The complaint counts on the negligence and want of skill of Westlake, the engineer, and that defendants did not use ordinary skill in selecting Westlake. But, as we have seen, Westlake was employed by, and was under the direction of, Clenden, the superintendent, and there is no averment that the defendants were negligent in employing and selecting Clenden."¹¹⁰ The doctrine of this case was reiterated in a subsequent case in the same court,—namely, that, in order to make the master liable, there must have been a want of ordinary care on his part in the selection of the culpable employé, and that it makes no difference whether this employé was of a grade superior to the injured employé or not.¹¹¹ Thus, the foreman of a mine, having authority to employ and discharge hands, fired a blast about three hundred yards from where the plaintiff, an employé,

^{107a} *Mann v. O'Sullivan*, 126 Cal. 61; s. c. 58 Pac. Rep. 375.

¹⁰⁸ *Ante*, § 4846.

¹⁰⁹ *Ante*, § 4946.

¹¹⁰ *Collier v. Stienhart*, 51 Cal. 116.

¹¹¹ *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255.

was working, without giving him notice that it was about to be discharged. For the injury thus caused it was held that the company was not liable, it having been found as a fact, by the court below which tried the case, that the company had not been negligent in selecting the foreman.¹¹² So, a railway section-foreman, although having undisputed control of the men under him, with authority to hire and discharge them, is a fellow servant with the men under him, and there can be no recovery for the death of one of them, occasioned by the foreman's negligently leaving a switch open, so that a passenger train runs upon the switch-track and collides with a hand-car.¹¹³ This places upon the statute a construction conforming to the English rule. A tendency is discovered in some of the later decisions, however, to hold the master responsible for the negligence of one to whom he has abdicated the entire charge and control of his business, or a separate and distinct department thereof, with the authority to employ and discharge servants.¹¹⁵ A distinction is made, too, between those duties owing personally by the master, and those the performance of which he can delegate. Under the former description come the duty of furnishing reasonably safe machinery,¹¹⁶ and reasonably safe and suitable appliances,¹¹⁷ and the duty to warn and instruct employes who are inexperienced in the work they are required to perform;¹¹⁸ and the master cannot escape liability for the negligent performance or non-performance of such duties by the servant to whom he has entrusted their performance.

§ 5292. **Under the Florida Code.**—The third section of the Florida statute defining the liabilities of *railway companies* in certain cases, allows a recovery to any employé who is injured by the negligence of any other employé in running the locomotives or cars, or other machinery, of such company, the injured servant being himself free from fault.¹²⁰ It is held that the second section of the statute, al-

¹¹² McLean v. Blue Point Gravel Min. Co., 51 Cal. 255.

¹¹³ Daves v. Southern Pac. Co., 98 Cal. 19; s. c. 32 Pac. Rep. 708.

¹¹⁵ McKune v. California Southern R. Co., 66 Cal. 302 (train-despatcher and material-man, having authority to employ and discharge men, and to direct the movements of trains, is not a fellow servant with an ordinary track laborer under his control); Brown v. Sennett, 68 Cal. 225.

¹¹⁶ Beeson v. Green Mountain Gold Min. Co., 57 Cal. 20.

¹¹⁷ Tedford v. Los Angeles Electric Co., 134 Cal. 76 (failure of superior servant to furnish *rubber gloves* to an electrical lineman).

¹¹⁸ Tedford v. Los Angeles Electric Co., 134 Cal. 76 (superior servant required inexperienced employé to scrape an electric wire without warning or instructing him as to the danger); Ingberman v. Moore, 90 Cal. 410.

¹²⁰ Fla. Rev. Stat. 1892, Appendix, p. 1009; Laws 1891, ch. 4071, § 3.

lowing a recovery to "any person" under the same circumstances, and providing that the damages shall be apportioned where both parties are at fault, has no application to the case of an *employé* who is injured, but he must be free from contributory negligence in order to a recovery.¹²¹

§ 5293. **Under the Georgia Code.**—The Code of Georgia contains the following provisions: "*Railroad companies* are common carriers, and liable as such. As such companies necessarily have many employés who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employés, as to passengers, for injuries arising from the want of such care and diligence."¹²² In a subsequent article there is this provision: "The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business. The exception in the case of railroads has been previously stated."¹²³ In a subsequent title the following provisions occur: "A railroad company shall be liable for any damages done to persons, stock, or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."¹²⁴ "If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."¹²⁵ The import of these very emphatic provisions is perfectly obvious. "They declare in unmistakable terms," say the Supreme Court of Georgia, "that any employé who is free from fault can recover for the negligence of any other employé, without respect to whether the two were engaged about the same business or not. This is the invariable rule that holds between railroad companies and their employés under our Code."¹²⁶ Thus, it is held that employés of

¹²¹ Duval v. Hunt, 34 Fla. 85; s. c. 15 South. Rep. 876; Florida &c. R. Co. v. Mooney, 40 Fla. 17; s. c. 24 South. Rep. 148; 12 Am. & Eng. R. Cas. (N. S.) 721.

¹²² Ga. Code 1895, § 2297; Code 1882, § 2083.

¹²³ Ga. Code 1895, § 3030; Code 1882, § 2202.

¹²⁴ Ga. Code 1895, § 2321; Code 1882, § 3033.

¹²⁵ Ga. Code 1895, § 2323; Code 1882, § 3036.

¹²⁶ Georgia R. &c. Co. v. Goldwire, 56 Ga. 196. To the same effect, see Marsh v. South Carolina R. Co., 56 Ga. 274; Georgia R. &c. Co. v. Rhodes, 56 Ga. 645; Georgia R. &c. Co. v. Brown, 86 Ga. 320; s. c. 12 S. E. Rep. 812; Georgia R. &c. Co. v. Cosby, 97 Ga. 299; s. c. 22 S. E. Rep. 912 (that negligence of co-

a railroad company may recover for injuries caused by the negligence or misconduct of their fellow servants, whether such injuries are connected with the running of trains or not;^{126a} or though the employes concerned are engaged in a business not immediately connected with the operation of the company's trains.^{126b}

§ 5294. **Under the Iowa Code.**—Formerly, in this State, the rule of the common law prevailed, that a master is not liable to his servant for an injury happening in consequence of the negligence of a fellow servant engaged in the same general employment.¹²⁷ This rule was not changed by the statute of 1853, which made every railroad corporation liable “for all damages sustained by any person in consequence of any neglect of the provisions of this act, or of any neglect of any of their agents, or by any mismanagement of their engineers, to the person sustaining such damages.”¹²⁸ But in 1862 the Legislature enacted that “every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employes, of the corporation, to any person sustaining such damage;”¹²⁹ and by another section of the Code the provisions of this section have been extended to all *lessees*

employé was sole cause of injury will not defeat action); Southern R. Co. v. Johnson, 114 Ga. 329; s. c. 40 S. E. Rep. 235 (injury because of defective work of coemployes). As to local jurisdiction, see Thomas v. Georgia R. & C. Co., 38 Ga. 222. As to jurisdiction over the Western & Atlantic Railroad, see Walker v. Spullock, 23 Ga. 436. It has been held that a Georgia company chartered to carry on a general *lumbering business* is not a railway company, and is not liable as such to an employé injured in the transportation of lumber by a locomotive used for that purpose by the company, although its charter also authorizes it to use and operate locomotives on tramroads and railroads in connection with its general business,—its liability in such case being under the general law relating to masters and servants: Ellington v. Beaver Dam Lumber Co., 93 Ga. 53; s. c. 19 S. E. Rep. 21. In order to a recovery under these statutes it is said that the injured employé must have been free from negligence immediately,

remotely, directly, or indirectly contributing to the injury: Walker v. Atlanta & C. R. Co., 103 Ga. 820; s. c. 4 Am. Neg. Rep. 26; 11 Am. & Eng. R. Cas. (N. S.) 498; 30 S. E. Rep. 503.

^{126a} Georgia R. & C. Co. v. Ivey, 73 Ga. 499.

^{126b} Georgia R. & C. Co. v. Hicks, 95 Ga. 301; s. c. 22 S. E. Rep. 613. Evidence on which it was error to grant a nonsuit, in an action against a railway company for personal injuries alleged to have been caused by the negligence of a person designated in the petition as a fellow servant of the plaintiff,—such an action being authorized by statute: Chandler v. Southern R. Co., 113 Ga. 130; s. c. 38 S. E. Rep. 305.

¹²⁷ Sullivan v. Mississippi & C. R. Co., 11 Iowa 421.

¹²⁸ Sullivan v. Mississippi & C. R. Co., *supra*.

¹²⁹ Laws Iowa, 9th Gen. Assem., ch. 169, § 7; carried into the Code of 1873, at § 1307, and into the Code of 1897, at § 2071, with some modifications and additions.

or *other persons* owning or operating railways.¹³⁰ This statute, in so far as it embraced persons engaged in the hazardous business of operating railroads, was held to be a valid exercise of legislative power; and when thus limited, it was not open to the objection that it was class legislation.¹³¹ But if it were to be construed as embracing persons engaged in labor not connected with railway service, it would be obnoxious to a constitutional prohibition of class legislation, because it would make a railway company liable for injuries to servants in situations where other employers would not be liable.¹³² Conforming to the limitation thus put upon it by the Supreme Court, the statute was carried into the Code of 1873, and subsequently into the Code of 1897, in the following language: "Every *corporation operating a railway* shall be liable for all damages sustained by any person, including employ  s of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employ  s thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or

¹³⁰ Iowa Code 1897, § 2039.

¹³¹ "If there is an employer and employ  , but no business of a railroad company to be engaged in, then the case is not within the act. But the same liability is extended by the act, upon the same terms, to all in the same situation": *McAunich v. Mississippi &c. R. Co.*, 20 Iowa 338. In another case, it was held that the term *employ  * "applies to conductors, agents, superintendents, and others engaged in operating the road, and the like, and not to contractors, or persons building or constructing the road-bed, or laying down the ties and rails": *Ney v. Des Moines &c. R. Co.*, 20 Iowa 347 [but compare *McKnight v. Iowa &c. Const. Co.*, 43 Iowa 406 (construction company running special trains)]. And it was the statute, as thus limited, that was held constitutional: *Deppe v. Chicago &c. R. Co.*, 36 Iowa 52, 55; *Schroeder v. Chicago &c. R. Co.*, 41 Iowa 344; *s. c.* 47 Iowa 375, 383; *Potter v. Chicago &c. R. Co.*, 46 Iowa 399.

¹³² *Deppe v. Chicago &c. R. Co.*, 36 Iowa 52, 55. "If," said Cole, J., "the statute should be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and

would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut the timber on its right of way, where it is about to extend its road, and the land-owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employ  s shall be injured by the negligence of a coemploy  , and the employ   of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the Constitution just as much as a law that should prescribe, under the same circumstances, different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was, to give its benefits to employ  s engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional": *Deppe v. Chicago &c. R. Co.*, *supra*.

other employés, *when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed*; and no contract which restricts such liability shall be legal or binding.”¹³³ The statute as thus amended has been held to be constitutional by a Federal court.¹³⁴ The benefits of this statute are held to extend to all employés who are engaged in the business of operating railroads, or who are by the nature of their employment *exposed to the hazards* incident to moving trains.¹³⁵ Under this rule a *private detective* in the employ of a railway company, who, while walking along the track in the course of his duty, was overcome by the heat and fell on the track, and was run over through the negligence of the engineer of a passing freight-train, was entitled to a recovery;¹³⁶ and so in the case of a *person employed to remove snow and ice* from the track, who was injured through the negligence of employés of the road, though the train upon which the negligent servants were employed was not in motion at the time, and the plaintiff was not then engaged in the duties required of him;¹³⁷ and so in the case of an *employé in a car-shop*, injured by the negligence of those in charge of a train standing at a station, while he is engaged in removing screens from the cars;¹³⁸ and so in the case of an employé who stepped upon the track to avoid a runaway team, and was struck and injured by a hand-car in consequence of the negligence of those running it.¹³⁹ The following employés of railway companies were held to have been engaged in the “use or operation” of the road, so as to be entitled to damages for injuries inflicted on them through the negligence of coemployés:—An employé engaged in the work of repairing the track;¹⁴⁰ a person engaged in the work of taking down and removing a bridge, who was compelled by orders of his superior to go upon one of the company’s trains, and who while so riding was injured;¹⁴¹ a section-hand, injured by reason of the negligence of the foreman under whom he was employed, in allowing a collision

¹³³ Iowa Code 1897, § 2071; Code 1873, § 1307.

¹³⁴ O’Brien v. Chicago &c. R. Co., 116 Fed. Rep. 502.

¹³⁵ Smith v. Humeston &c. R. Co., 78 Iowa 583; s. c. 43 N. W. Rep. 545; 41 Am. & Eng. R. Cas. 278; Jensen v. Omaha &c. R. Co., 115 Iowa 404; s. c. 88 N. W. Rep. 952 (hostler failed to notice switch was open, and ran engine into a standing car on a side-track, injuring a *car-cleaner* at work therein—recovery).

¹³⁶ Pyne v. Chicago &c. R. Co., 54

Iowa 223; s. c. 37 Am. St. Rep. 198.

¹³⁷ Smith v. Humeston &c. R. Co., 78 Iowa 583; s. c. 43 N. W. Rep. 545; 41 Am. & Eng. R. Cas. 278.

¹³⁸ Pierce v. Central R. Co., 73 Iowa 140; s. c. 34 N. W. Rep. 783.

¹³⁹ Moore v. Iowa Cent. R. Co., 47 Iowa 688.

¹⁴⁰ Frandsen v. Chicago &c. R. Co., 36 Iowa 372; Haden v. Sioux City &c. R. Co., 92 Iowa 226; s. c. 60 N. W. Rep. 537 (section-foreman).

¹⁴¹ Schroeder v. Chicago &c. R. Co., 47 Iowa 375; s. c. 41 Iowa 344.

between a hand-car and a flat-car used in the work of repairing the road;¹⁴² men engaged in coupling locomotive-tanks, which formed a necessary part of a train, so that they could be moved to their proper place for train service;¹⁴³ one of two railroad employes whose duties required them to fill tenders with coal from cars on an adjoining track, in pushing into a coal-car, so as to injure the other employe, a plank extending from the coal-car to the tender and used in filling the tender, after the work had been completed and the engine was about to start;¹⁴⁴ an employe whose duty it was to assist in loading and unloading gravel-cars, and to perform any other service required of him in or about such work, and to ride back and forth on such cars;¹⁴⁵ an employe engaged in *transferring rails* from one car to another by means of a locomotive which moved along the track and drew the rails by means of an attached rope;^{145a} one employed to *carry water* to a gang of men engaged in building a stone retaining-wall near the approach of a bridge, and injured through the negligent running of a train over the bridge at a dangerous speed, the bridge being insecure through the negligence of the "iron gang," who were at work on the bridge.^{145b} A running of special trains over a railway by a *construction company*, while engaged in building it, is "operating a railway" within the meaning of the statute; and a person engaged in shovelling gravel from the cars of such a train is within the constitutional scope of the statute.¹⁴⁶ So, the working of a *ditching-machine* on a railroad, which is operated by the movement along the track of the train of which it forms a part, is an employment "connected with the use and operation" of the railroad.¹⁴⁷

¹⁴² *Larson v. Illinois Cent. R. Co.*, 91 Iowa 81; s. c. 58 N. W. Rep. 1076; *Smith v. Chicago & C. R. Co. (Iowa)*, 80 N. W. Rep. 658 (no off. rep.) (section-hand injured in collision between two hand-cars) [following *Larson v. Illinois Cent. R. Co.*, *supra*]; *Lombard v. Chicago & C. R. Co.*, 47 Iowa 494 (employe injured in collision of two hand-cars, one of which ran upon the other from behind at a high rate of speed,—the negligence of the coemploye for which damages were given consisting in not *calling* to the brakeman on the hind car to apply the brakes, when he observed that such brakeman did not see his signal).

¹⁴³ *Butler v. Chicago & C. R. Co.*, 87 Iowa 206; s. c. 54 N. W. Rep. 208.

¹⁴⁴ *Akeson v. Chicago & C. R. Co.*, 106 Iowa 54; s. c. 4 Am. Neg. Rep. 384; 11 Am. & Eng. R. Cas. (N. S.) 430; 75 N. W. Rep. 676.

¹⁴⁵ *Handelun v. Burlington & C. R. Co.*, 72 Iowa 709; s. c. 32 N. W. Rep. 4.

^{145a} *Stebbins v. Crooked Creek R. & C. Co.*, 116 Iowa 513; s. c. 90 N. W. Rep. 355.

^{145b} *Keatley v. Illinois & C. R. Co.*, 94 Iowa 685; s. c. 63 N. W. Rep. 560 (train left track and struck derrick near which plaintiff was working).

¹⁴⁶ *McKnight v. Iowa & C. Const. Co.*, 43 Iowa 406.

¹⁴⁷ *Nelson v. Chicago & C. R. Co.*, 73 Iowa 576; s. c. 35 N. W. Rep. 611.

§ 5295. **Further Decisions under the Iowa Code.**—It has been held that the following railway employes were not engaged in the “use or operation” of the road, and hence were not entitled to recover damages under the statute:—An employé at work in a railway repair-shop,—his remedy, if any, being under the principles of the common law;¹⁴⁸ a car-repairer who had nothing to do with the cars while in motion, except to ride on them to and from the place where his services were required;¹⁴⁹ a section-hand while engaged in *loading a car*;¹⁵⁰ one whose sole duty it was to *elevate coal to a platform* convenient for delivery to engines;¹⁵¹ one employed in a railroad coal-house to *load coal on cars*;¹⁵² an *engine-wiper* in a roundhouse, employed to clean engines, and to open and close the roundhouse doors,—with the conclusion that he could not recover for the negligence of a fellow servant engaged in similar work;¹⁵³ a *sweeper* in a roundhouse, who was injured by falling into a hole alleged to have been negligently left uncovered by other employes.¹⁵⁴ The following acts have been held not to be “connected with the use and operation” of a railroad:—The act of a section-hand, riding on a hand-car, in willfully striking, while engaged in an argument, another employé, who, in attempting to avoid the blow, pushed the plaintiff off the car,—such act not being *willful*, as to the plaintiff; nor was it within the scope of the wrong-doer’s duty, or, in other words, “connected with the operation of the road”;¹⁵⁵ the act of one member of a construction-gang in negligently throwing a stone on a fellow servant’s hand;¹⁵⁶ the handling of a derrick in coaling an engine;¹⁵⁷ wiping locomotive-engines, opening and closing the roundhouse doors, and removing snow from a turntable and tracks, though the act of *turning* the turntable is so connected.¹⁵⁸ Whether the nature of the service in which the injured servant was engaged brought him within the statute, has been held a *question of fact for the jury*, and not of law for the court;¹⁵⁹ but the writer, speaking with deference, cannot see any

¹⁴⁸ Potter v. Chicago &c. R. Co., 46 Iowa 399.

¹⁴⁹ Foley v. Chicago &c. R. Co., 64 Iowa 644.

¹⁵⁰ Smith v. Burlington &c. R. Co., 59 Iowa 73.

¹⁵¹ Stroble v. Chicago &c. R. Co., 70 Iowa 555.

¹⁵² Luce v. Chicago &c. R. Co., 67 Iowa 75.

¹⁵³ Malone v. Burlington &c. R. Co., 61 Iowa 326; s. c. 47 Am. Rep. 813.

¹⁵⁴ Manning v. Burlington &c. R. Co., 64 Iowa 240.

¹⁵⁵ Kincade v. Chicago &c. R. Co., 107 Iowa 682; s. c. 6 Am. Neg. Rep. 64; 78 N. W. Rep. 698.

¹⁵⁶ Matson v. Chicago &c. R. Co., 68 Iowa 22.

¹⁵⁷ Reddington v. Chicago &c. R. Co., 108 Iowa 96; s. c. 6 Am. Neg. Rep. 60; 78 N. W. Rep. 800; rev’g on rehearing s. c. 75 N. W. Rep. 679; 11 Am. & Eng. R. Cas. (N. S.) 440; 4 Am. Neg. Rep. 384, note.

¹⁵⁸ Malone v. Burlington &c. R. Co., 65 Iowa 417; s. c. 54 Am. Rep. 11.

¹⁵⁹ Schroeder v. Chicago &c. R. Co., 41 Iowa 344.

grounds on which such a construction can be maintained. This statute did not make such a corporation liable for the negligence of one servant, whereby another servant was injured, to the same extent as it is liable as a carrier of passengers. As is well known, the courts impose on carriers of passengers the obligation of exercising extraordinary care, both personally and by their agents; while, as we have already seen, the obligation of a master to his servant is measured by the exercise of ordinary care. And this rule corresponds to the construction put upon this statute. Under it, an employé of a railway company can recover damages from the company for an injury received by him from a failure of a fellow servant to exercise ordinary care, but not where the injury arose from a failure on the part of a fellow servant to use extraordinary care. A servant of a railway company is not on an equal footing with a passenger in this respect.¹⁶⁰ This statute also operated to destroy the English doctrine of *identity in negligence*, or *imputed negligence*, in its application to coemployés, one of whom was under the immediate command of the other, and was in some sense a bailee of his person. Thus, where a hand-car, conveying some employés of a railway company home from their labor, was run into by a train, by reason of which one of the laborers on the hand-car was injured, the fact that the "boss" in charge of the hand-car was guilty of negligence contributing to the accident did not operate to prevent a recovery of damages.¹⁶¹

§ 5296. Under the Kansas Code.—The Kansas statute is as follows: "Every *railroad company* organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining such damage."¹⁶² It has been held that this statute is valid only in so far as it applies to the risks incident to the "use and op-

¹⁶⁰ Hunt v. Chicago &c. R. Co., 26 Iowa 363. Wright, J., however, was of opinion that the intention of the Legislature was, to put employés on the same footing with passengers, and to entitle them to the exercise of extraordinary care on the part of coemployés.

¹⁶¹ Hoben v. Burlington &c. R. Co., 20 Iowa 562. Under the English rule which obtains in such cases, a carrier and his passenger, or a child and his custodian, are so far identified with each other that the negli-

gence of the one is imputed to the other: Vol. III, § 3607, *et seq.*

¹⁶² Kan. Gen. Stat. 1901, § 5858; Laws 1874, ch. 93, § 1. This statute does not apply to a *firm or partnership of private persons*, although it has a subcontract to construct a part of a railroad for a corporation, and is operating cars and trains on the road in the prosecution of its work, having servants at work upon the road and in charge of its trains: Beeson v. Busenbark, 44 Kan. 669; s. c. 10 L. R. A. 839; 44 Am. & Eng. R. Cas. 584; 25 Pac. Rep. 48.

eration" of railroads.¹⁶³ The following employes have been held to be entitled to the benefit of the statute as thus limited:—An employé whose general employment was as a bridge-carpenter, but who was injured by the negligence of a fellow servant while engaged in *loading timbers on a car* for transportation over the road;¹⁶⁴ an employé in a roundhouse, engaged in *putting an engine into condition* for immediate use;¹⁶⁵ a section-hand engaged in *unloading ties from a car* for the purpose of repairing the track, who was injured by the negligence of an employé assisting him to handle the ties, in turning a tie before the former had secured a good hold, and pulling it so as to strike him;¹⁶⁶ a section-hand engaged in *repairing the road-bed*, and taking up and laying down rails, who was injured by the negligence of a coemployé in letting a rail fall on him;¹⁶⁷ and employes injured under the circumstances stated in the foot-note.¹⁶⁸ But a stone mason employed by a railroad company in *setting curbing around a depot and office-building*, who was injured by the fall of a curb-stone left standing in an insecure position by a coemployé, was not within the protection of the statute, since his injury was not received in connection with the "use and operation" of the road.¹⁶⁹ The employer is, of course, not liable under the statute, where it is not shown that the injury resulted from *negligence* on the part of the coemployé.¹⁷⁰

¹⁶³ Chicago &c. R. Co. v. Pontius, 52 Kan. 264; s. c. 34 Pac. Rep. 739.

¹⁶⁴ Chicago &c. R. Co. v. Pontius, 52 Kan. 264; s. c. 34 Pac. Rep. 739; s. c. aff'd, 157 U. S. 209; 15 Sup. Ct. Rep. 585; 39 L. ed. 675.

¹⁶⁵ Chicago &c. R. Co. v. Stahley, 62 Fed. Rep. 363; s. c. 11 C. C. A. 88.

¹⁶⁶ Atchison &c. R. Co. v. Brassfield, 51 Kan. 167; s. c. 32 Pac. Rep. 814.

¹⁶⁷ Union Pac. R. Co. v. Harris, 33 Kan. 416; Atchison &c. R. Co. v. Vincent, 56 Kan. 344; s. c. 43 Pac. Rep. 251 (section-hand engaged in *carrying a rail* to be substituted for a defective one).

¹⁶⁸ One employed by a railroad company on the track and in the yard to assist in *loading rails on cars*, whose particular duty is to assist in placing the rails on the cars after they have been lowered from the pile by another set of employes, who is injured or killed by the negligence of the latter employes in lowering a rail before the plaintiff has had sufficient time to get out of

the way after being duly warned: Atchison &c. R. Co. v. Koehler, 37 Kan. 463; s. c. 15 Pac. Rep. 567. A fireman on a switching-engine which was backing eastward in the yard, and who was stooping over shovelling coal into the engine with his back to the east, when another switching-engine approaching in the opposite direction collided and injured him, where the engineer on this last engine saw the plaintiff's engine 1,000 feet before he reached it, but came on at the rate of six miles an hour, and gave no signals and made no effort to stop until a few seconds before the collision: Missouri &c. R. Co. v. Mackey, 33 Kan. 298.

¹⁶⁹ Missouri &c. R. Co. v. Medaris, 60 Kan. 151; s. c. 55 Pac. Rep. 875; 5 Am. Neg. Rep. 339; 12 Am. & Eng. R. Cas. (N. S.) 698.

¹⁷⁰ As where an employé had his wrist sprained by the act of a coemployé, who, while they were jointly lifting out of its place the grate of a locomotive-firebox, suddenly and without warning dropped

§ 5297. **Under the Kentucky Constitution.**—The Kentucky Constitution of 1891 gives a right of action for death resulting from an injury inflicted by negligence or wrongful act.¹⁷¹ This will be considered in a future volume when discussing the subject of damages for negligent injuries resulting in death.

§ 5298. **Under the Mexican Law.**—Under a statute of Mexico declaring that “*railway companies* are liable for faults or accidents which occur through the tardiness, negligence, imprudence, or want of capacity of their employés,” it has been held by a Federal court that such a company is liable for an injury to an *employé* resulting either solely from its own negligence, or from its own negligence concurring with that of fellow servants;¹⁷⁵ or whether resulting solely from the negligence of a fellow servant.¹⁷⁶

§ 5299. **Under the Minnesota Statute.**—This statute makes *rail-road corporations* liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, excepting such damages as may be sustained while engaged in the construction of a new road, or any part thereof, not open to public travel or use.¹⁷⁷ It has been held that the statute must, to avoid the imputation of being class legislation, be construed to apply only to the peculiar hazards incident to the “use and operation” of railroads, and injuries resulting from such dangers.¹⁷⁸ The following risks have been held to be included in the hazards peculiar to the use and operation of a railroad, within the meaning of the statute as thus limited:—The risk of injury while using a *hand-car*, as well as those caused by the running of trains;¹⁷⁹ the danger incident to *great and extraordinary haste* in which the work of *replacing ties* is performed, in order to make the track safe for trains; so that a section-hand injured under such circumstances by the negligent act of a fellow servant in dropping a rail, is entitled to dam-

his end of the grate, by reason of the intense pain caused by some ashes falling into his eye,—the court holding that, as matter of law, his act was not negligent: *Union Pac. R. Co. v. Mahaffy*, 4 Kan. App. 88; s. c. 46 Pac. Rep. 187.

¹⁷² Ky. Const. 1891, § 241.

¹⁷⁵ *Mexican Cent. R. Co. v. Glover*, 107 Fed. Rep. 356; s. c. 46 C. C. A. 334.

¹⁷⁶ *Mexican Cent. R. Co. v. Knox*, 114 Fed. Rep. 73; s. c. 52 C. C. A.

21; *Mexican Cent. R. Co. v. Sprague*, 114 Fed. Rep. 544; s. c. 52 C. C. A. 318.

¹⁷⁷ Minn. Stat. 1894, § 2701; Laws 1887, ch. 13.

¹⁷⁸ *Lavallee v. St. Paul & C. R. Co.*, 40 Minn. 249; s. c. 41 N. W. Rep. 974; *Johnson v. St. Paul & C. R. Co.*, 43 Minn. 222; s. c. 45 N. W. Rep. 156; 8 L. R. A. 419.

¹⁷⁹ *Steffenson v. Chicago & C. R. Co.*, 45 Minn. 355; s. c. 11 L. R. A. 271; 47 N. W. Rep. 1068.

ages;¹⁸⁰ the risk of injury to a *section-hand* at work on the road, from the negligence of a locomotive-engineer in operating his engine;¹⁸¹ the risk of injury to an *engine-wiper* in a roundhouse, while assisting in coaling an engine, from the negligence of a coemployé in moving the engine;¹⁸² the risk of the injury to an *engine-wiper* in a roundhouse, from the negligence of his coemployés while the latter are engaged in straightening a wire cable which is used, in the work of repairing the road, to pull a plow in unloading gravel from flat-cars;¹⁸³ and the risk of injury under the circumstances stated in the foot-note.¹⁸⁴ But injuries to one of a crew of men engaged in *repairing a bridge*, caused by the negligence of a fellow servant in leaving the draw unfastened, were held not to be the result of dangers peculiar to the use and operation of the road, and did not give the injured employé a right of action against the company.¹⁸⁵ So, an injury to an employé of a railroad company by a bolt being driven through the bottom of a car under which he was at work making repairs on the car, was not within the meaning of the statute.^{185a} A railroad

¹⁸⁰ *Blomquist v. Great Northern R. Co.*, 65 Minn. 69; s. c. 67 N. W. Rep. 804; 4 Am. & Eng. R. Cas. (N. S.) 439. But an injury to one of a crew of section-hands, while engaged in *loading railroad-iron on a flat-car*, due to the negligence of his coemployés in allowing a rail to drop on his arm, was held not to be the result of a hazard peculiar to the use and operation of a railroad, and the plaintiff was denied a recovery: *Pearson v. Chicago & C. R. Co.*, 47 Minn. 9; s. c. 10 Rail. & Corp. L. J. 249; 49 N. W. Rep. 302.

¹⁸¹ *Smith v. St. Paul & C. R. Co.*, 44 Minn. 17; s. c. 46 N. W. Rep. 149.

¹⁸² *Mikkelsen v. Truesdale*, 63 Minn. 137; s. c. 65 N. W. Rep. 260.

¹⁸³ *Nichols v. Chicago & C. R. Co.*, 60 Minn. 319; s. c. 62 N. W. Rep. 386.

¹⁸⁴ A railroad employé whose duty it was to step from a high platform on to stock-cars as they drew up opposite the platform and pull bundles of hay from the platform on to the top of the cars, was thrown to the ground and injured by stepping from the platform to the top of a car which was moving, without his knowledge, at an unsafe rate of speed, in obedience to the order of the conductor. It was held that he was injured by reason of exposure to hazards peculiar to the operation of railroads, and his employer was

held liable to him in damages: *Leier v. Minnesota Belt-Line R. & C. Co.*, 63 Minn. 203; s. c. 65 N. W. Rep. 269. A complaint in an action by a section-hand to recover for personal injuries, which alleges that he was injured by the carelessness and negligence of fellow servants engaged with him in *moving a hand-car from the track*, has been held to state a cause of action under this statute,—such section-hand being exposed to and injured by the dangers peculiar to the use and operation of a railroad, while so engaged: *Lindgren v. Minneapolis & C. R. Co.*, 86 Minn. 152; s. c. 90 N. W. Rep. 381. By reason of this statute, an action cannot be defended in a Federal court in Minnesota on the ground that the negligence causing injury to an employé was that of a fellow servant: *Northern Pac. R. Co. v. Behling*, 57 Fed. Rep. 1037; s. c. 6 C. C. A. 681.

¹⁸⁵ *Johnson v. St. Paul & C. R. Co.*, 43 Minn. 222; s. c. 45 N. W. Rep. 156; 8 L. R. A. 419.

^{185a} *Holtz v. Great Northern R. Co.*, 69 Minn. 524; s. c. 72 N. W. Rep. 805. In another case the plaintiff, a section-hand on the defendant's railway, while at work with a number of others clearing away a wrecked train, entered a car and was handing out the contents to others on top of the car, when,

company operating a line composed of the *tracks of several companies* has been held to be subject to the provisions of the statute.¹⁸⁶ In another case it was held that an employé of a railway company which was operating a train through the yards of a depot company, under a contract for the use of the depot jointly with other companies, was not a fellow servant with the employés of the depot company, through whose alleged negligence in turning a switch he was killed, nor were the negligent employés the servants of the railway company, within the meaning of the statute.¹⁸⁷ The proviso exempting a railroad company from liability to an employé for injuries sustained in the construction of a new road, or any part thereof, not open for public traffic or use, has been held not to apply to a company which has operated its line for about six months.¹⁸⁸ Nor is work done by a railroad company in constructing a *yard*, to be used in connection with a line already open to the public, "construction of a new road" within the meaning of the proviso.¹⁸⁹

§ 5300. **Under the Mississippi Constitution and Code.**—The Mississippi Constitution of 1890 contains a section,¹⁹⁰ subsequently carried into the Code of 1892,¹⁹¹ which modifies¹⁹² the common-law rule as to the liability of *railroad corporations* for the negligence of fellow servants. Subsequently, by virtue of authority granted in the Constitutional provision to extend its provisions to any other class of employés, the Legislature amended the Code so as to provide that *any corporation* shall be liable for injuries to its employés result-

owing either to the number of men on top of the car or to the removal of the contents from within, the roof sagged down on the plaintiff and injured him, the plaintiff alleging that it happened on account of the negligence of the roadmaster in ordering too many men on to the roof, and the negligence of the men themselves in so crowding on the roof. The roadmaster had given no directions as to the manner of executing his orders, but had repeatedly told the men to hurry the work. It was held that it was a question for the jury whether the work was being executed under such conditions and such circumstances as to expose the plaintiff to the peculiar hazards of railroad service, within the meaning of the statute; and that, if he was exposed to such hazards, he could recover if the accident was due to the negligence of the foreman or men in

overweighting the roof, but not if it was due to the removal of the contents of the car, by which the support of the roof was removed: *Kreuzer v. Great Northern R. Co.*, 83 Minn. 385; s. c. 86 N. W. Rep. 413.

¹⁸⁶ *Moran v. Eastern R. Co.*, 48 Minn. 46; s. c. 50 N. W. Rep. 930.

¹⁸⁷ *Brady v. Chicago & C. R. Co.*, 114 Fed. Rep. 100; s. c. 52 C. C. A. 48; 57 L. R. A. 712.

¹⁸⁸ *Schneider v. Chicago & C. R. Co.*, 42 Minn. 68; s. c. 43 N. W. Rep. 783.

¹⁸⁹ *Moran v. Eastern R. Co.*, 48 Minn. 46; s. c. 50 N. W. Rep. 930.

¹⁹⁰ § 193.

¹⁹¹ § 3559.

¹⁹² These sections do not *abrogate* the common-law rule, but merely *modify* it in certain particulars: *Fenwick v. Illinois Cent. R. Co.*, 100 Fed. Rep. 247; s. c. 40 C. C. A. 369.

ing from "the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work."¹⁹³ It has been held that a railroad engineer is not a superior agent, officer or person having the right to control or direct the services of a brakeman on the train; but they are fellow servants when engaged in the execution of their ordinary functions, and the brakeman cannot recover for injuries inflicted on him through the negligence of the engineer.¹⁹⁴ A fireman and a telegraph-operator were held to be engaged "about a different piece of work," and hence not fellow servants; so that the fireman could recover damages from the company for an injury inflicted on him through the negligence of the telegraph-operator.¹⁹⁵

§ 5301. **Under the Missouri Statute.**—The Missouri statute makes every *railroad company* liable for all damages sustained by an employé "while engaged in the work of operating such railroad," by reason of the negligence of any other employé. It also defines what shall constitute employés of railroad companies vice-principals, and what fellow servants or not fellow servants.¹⁹⁶ It has been held that the words "engaged in the work of operating such railroad" cover the work of *substituting new rails in a track* for old ones, so that a servant who is injured, while engaged in such work, by the negligence of a fellow servant likewise engaged, can recover damages from the master.¹⁹⁷ But a railroad company cannot be held liable,

¹⁹³ Miss. Acts Spec. Sess. 1898, ch. 66; amending Acts 1896, ch. 87. See *Brooks v. Mississippi Cotton-Oil Co.*, 76 Miss. 874; s. c. 25 South. Rep. 479.

¹⁹⁴ *Evans v. Louisville & C. R. Co.*, 70 Miss. 527; s. c. 12 South. Rep. 581. In another case it appeared that the plaintiff, who was one of a switching-crew of the defendant railroad company, whose business it was to distribute cars on the various tracks in the yard, in order to make up the trains, was injured by the negligence of a member of the crew whom the yardmaster had appointed foreman for the night of the accident, and to whom he gave the switch-list. It appeared that such foreman merely called out the track on which a car was to be switched, as fixed by us-

age or by the switch-list, and had no authority to command the switchmen to pursue any particular line of action, and that he was of the same rank in the service as the others of the crew, and neither employed nor had power to discharge them. It was held that such foreman was not a "superior agent or officer," or "a person having the right to control or direct" the plaintiff, so as to render the defendant liable for the plaintiff's injuries: *Fenwick v. Illinois Cent. R. Co.*, 100 Fed. Rep. 247; s. c. 40 C. C. A. 369.

¹⁹⁵ *Illinois & C. R. Co. v. Hunter*, 70 Miss. 471.

¹⁹⁶ Mo. Rev. Stat. 1899, §§ 2873-2876; Acts 1897, p. 96.

¹⁹⁷ *Stubbs v. Omaha & C. R. Co.*, 85 Mo. App. 192.

under this statute, for an injury to an employé caused by another employé acting without authority wholly *outside the scope of his employment*.¹⁹⁸ It is said that this statute does not change the doctrine that the liability of the master is confined to the acts done within the real or apparent scope of authority confided to his agents; so that, where a section-foreman gave no order to the plaintiff to stop a hand-car, it was held that the plaintiff could not recover for an injury sustained while so doing on the direction of some one working under the foreman.¹⁹⁹

§ 5302. **Under the Montana Civil Code.**—The Montana statute applies only to *railway companies*, and is as follows: "In every case the liability of the corporation to a servant or employé acting under the orders of his superior, shall be the same in cases of injury sustained by default or wrongful act of his superior, *or to an employé not appointed or controlled by him*, as if such servant or employé were a passenger."²⁰⁰ It has been held that a conductor or party charged with the control of a train is a superior as compared with a fireman on another train, within the meaning of the statute, and, hence, that such fireman may recover damages for the negligence or wrongful act of such conductor or other party, resulting in injury to him.²⁰¹

§ 5303. **Under the North Carolina Statute.**—In this State the fellow-servant rule is abolished, so far as *railway companies* are concerned, by statute.²⁰² It was held that this statute is not invalid as being repugnant to a constitutional prohibition of class legislation.²⁰³

¹⁹⁸ Bequette v. St. Louis & C. R. Co., 86 Mo. App. 601.

¹⁹⁹ Hamlett v. Chicago & C. R. Co., 89 Mo. App. 354.

²⁰⁰ Mont. Civ. Code 1895, § 905; Comp. Stat. 1888, § 697.

²⁰¹ Ragsdale v. Northern Pac. R. Co., 42 Fed. Rep. 383. See also, Criswell v. Montana Cent. R. Co., 17 Mont 189; s. c. 42 Pac. Rep. 767; Northern Pac. R. Co. v. Mase, 63 Fed. Rep. 114; s. c. 11 C. C. A. 63; 27 U. S. App. 238.

²⁰² N. Car. Priv. Laws 1897, ch. 56; Kinney v. North Carolina R. Co., 122 N. Car. 961; s. c. 30 S. E. Rep. 313. This act does not apply in the case of an injury to an employé which happened before its

passage: Rittenhouse v. Wilmington St. R. Co., 120 N. Car. 544; s. c. 26 S. E. Rep. 922.

²⁰³ Hancock v. Norfolk & C. R. Co., 124 N. Car. 222; s. c. 32 S. E. Rep. 679. For other cases construing this act, see generally: Williams v. Southern R. Co., 128 N. Car. 286; s. c. 38 S. E. Rep. 893; Coley v. North Carolina R. Co., 128 N. Car. 534; s. c. 39 S. E. Rep. 43; s. c. on petition for rehearing, 129 N. C. 407; 40 S. E. Rep. 195; Thomas v. Raleigh & C. R. Co., 129 N. Car. 392; s. c. 40 S. E. Rep. 201; Cogdell v. Southern R. Co., 129 N. Car. 398; s. c. 40 S. E. Rep. 202; Mott v. Southern R. Co., 131 N. Car. 234; s. c. 42 S. E. Rep. 601.

§ 5304. **Under the Ohio Statute.**—It is provided by statute in Ohio that every servant of a *railway company*, actually having power or authority to direct or control any other servant, is the *superior* of such other servant; and that any servant who is such a superior as to the servants in any separate branch or department, is also the superior of servants in *any other* branch or department who *have no power to direct or control* in the department in which they are engaged.²⁰⁴ Under this statute it is held that the negligence of a superior servant of a railway company, causing injury to an employé under his control, renders the company liable, although the negligence was in respect to the performance of work of the kind done by the injured employé, and not in the performance of any duty imposed by law on the company.²⁰⁵ It is held in another case that an *engineer* and a *brakeman* on the same train, engaged in the promotion of a single object—the moving of the train, and associated together in such a way that they will naturally be careful of the train and of each other, are *fellow servants* in the same department; and neither can recover damages for injuries inflicted on him through the negligence of the other.²⁰⁶ But a locomotive-engineer having authority to direct or control a fireman on such locomotive is held to be a superior servant of a *brakeman on another train*.²⁰⁷

§ 5305. **Under the Pennsylvania Statute Making Employés of Third Persons Engaged about the Premises of a Railroad Company Fellow Servants with the Employés of the Railroad Company.**—A peculiar rule exists in Pennsylvania. In 1868, the Legislature of that State passed an act providing that, in case an injury is sustained by any person “while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé” of such railroad company.²⁰⁸ Under this statute the following persons have been held to be fellow servants of the employés of the railroad company, and not entitled to recover for injuries sustained

²⁰⁴ Bates' Ann. Ohio Stat. (2d ed.), § 3365-22; 87 Ohio Laws, p. 150.

²⁰⁵ Peirce v. Van Dusen, 78 Fed. Rep. 693; s. c. 47 U. S. App. 339; 24 C. C. A. 280.

²⁰⁶ Hill v. Lake Shore &c. R. Co., 22 Ohio C. C. 291; s. c. 12 Ohio C. D. 241.

²⁰⁷ Railroad Co. v. Margrat, 51

Ohio St. 130; s. c. 37 N. E. Rep. 11; 31 Ohio L. J. 247; 1 Toledo Leg. N. 48. For other cases construing this statute, see Railway Co. v. Erick, 51 Ohio St. 146; s. c. 37 N. E. Rep. 128; Snyder v. Railway Co., 60 Ohio St. 487; s. c. 54 N. E. Rep. 475.

²⁰⁸ 2 Pepper & L. Pa. Dig., col. 3957, § 137; Pa. Laws 1868, p. 58.

through their negligence, under the circumstances noted:—Where a teamster was hauling iron to a car in railroad-yards and was injured through the negligence of the flagman in signalling him to cross the tracks, or through the negligence of the engine crew in not sounding any warning-signals;²⁰⁹ where a boy employed by a coal-dealer was engaged in unloading cars standing upon a siding constructed by the dealer on his own land, and was injured by reason of the neglect of the railroad employes to change the switch leading to the siding from the main track, allowing several cars to enter from the main track upon the siding and collide with the car on which the boy was employed;²¹⁰ where the plaintiff was engaged in unloading his own goods from the cars of the company, permission to do which had been granted by the agent of the company, and employes of the company negligently shunted some cars on to the siding and against the car in which the plaintiff was working;²¹¹ where an employe of the owners of a furnace, in charge of cars owned by the latter and used in carrying coal over a railroad under a traffic arrangement by which his employers were to furnish their own cars, with a man to take charge of them, was injured by reason of the excessive speed of the train around a curve;²¹² where a person in the employ of contractors who were building a railroad-culvert, while engaged in wheeling brick, was struck and killed by a train going at a rapid rate of speed which gave no signal of its approach;²¹³ where a servant in the employ of a coal company, while engaged in unloading cars of coal which stood on a track in the company's yard, laid and maintained by the defendant railroad company, which owned the cars and moved them to such points as the coal company directed, was injured through the negligence of the employes of the railroad company in violently shunting other cars against the car on which he was engaged;²¹⁴ where there were two railroad-tracks on the grounds of a rolling-mill company, one alongside the rolling-mill and the other parallel therewith and seven feet distant, the cars on the grounds belonging to the railway company and being operated by its employes to such points in the yard as the rolling-mill company directed; and a servant in the employ

²⁰⁹ *Baltimore &c. R. Co. v. Colvin*, 118 Pa. St. 230; s. c. 12 Atl. Rep. 337; 10 Cent. Rep. 583; 20 W. N. C. (Pa.) 531.

²¹⁰ *Cumings v. Pittsburgh &c. R. Co.*, 92 Pa. St. 82.

²¹¹ *Ricard v. North Pennsylvania R. Co.*, 89 Pa. St. 193; *Woodward and Trunkey, JJ.*, dissenting.

²¹² *Miller v. Cornwall R. Co.*, 154 Pa. St. 473; s. c. 26 Atl. Rep. 779.

²¹³ *Fleming v. Pennsylvania R. Co.*, 134 Pa. St. 477; s. c. 19 Atl. Rep. 740; 26 W. N. C. (Pa.) 180.

²¹⁴ *Peplinski v. Pennsylvania R. Co.*, 203 Pa. St. 52; s. c. 52 Atl. Rep. 32.

of the rolling-mill company, who was loading iron into a car on the outer track, started from the car to go to the mill for more iron, and was struck and injured by a car which the railroad company's employes had negligently shunted on to the other track.²¹⁵ But it has been held that an employé of an iron company, engaged in unloading cars, was not a fellow servant with the employes of the railroad company engaged in shifting the cars into the iron company's stock-house, through whose negligence he was injured, although both were under the direction of the foreman of the iron company; since they were not employed on or about the premises of the railroad company, or "in or about any train or car *therein or thereon*," within the meaning of the statute;²¹⁶ that a car-inspector in a railroad-yard was not a fellow servant with an employé of another company delivering a car in such yard for transportation by the company by which the car-inspector was employed, where the delivery of such car had been *completed* by putting it upon a siding and the trainhands of the other company had started back, but, upon discovering that it was not fully upon the siding, returned with their engine and negligently moved the car, injuring the plaintiff;²¹⁷ and that a brakeman on an engine used by a steel company in shifting cars upon sidings running from a railroad-track upon its land, was not the fellow servant of an employé of a railroad company through whose negligence he was injured, where a car had been delivered by the railroad company and been unloaded, and the plaintiff, at the direction of the yard-boss of the steel company, was engaged in moving the car from the receiving-track to the scales,—such work not being connected with the work of the railroad within the meaning of the statute.²¹⁸ Where street-railway tracks of the defendant were used also by another company by which the plaintiff was employed as a conductor, it was held that the road was the road of the company using it, and that an employé

²¹⁵ *Weaver v. Philadelphia & C. R. Co.*, 202 Pa. St. 620; s. c. 52 Atl. Rep. 30.

²¹⁶ *Noll v. Philadelphia & C. R. Co.*, 163 Pa. St. 504; s. c. 30 Atl. Rep. 157.

²¹⁷ *Vannatta v. Central R. Co.*, 154 Pa. St. 262; s. c. 32 W. N. C. (Pa.) 288; 24 Pitts. L. J. (N. S.) 22; 26 Atl. Rep. 384. This case also holds that train-hands engaged in delivering a car to the yard of another road for transportation over the latter, are not, in the work beyond the actual point of connection between the two roads, engaged in the performance of a duty of the latter

so as to make them its employes and make an injury caused by them to an employé of the latter company the negligence of a coemployé for which there can be no recovery, where, in the customary course of business between the two roads, cars delivered by the former to the latter road are to be placed upon the siding in the yard of the latter to constitute a delivery: *Vannatta v. Central R. Co.*, *supra*.

²¹⁸ *Spisak v. Baltimore & C. R. Co.*, 152 Pa. St. 281; s. c. 31 W. N. C. (Pa.) 297; 23 Pitts. L. J. (N. S.) 319; 25 Atl. Rep. 497.

of the lessee company, lawfully engaged in its service, could not be said to be employed about the road of the other company; hence, where the plaintiff was injured through the negligence of a motorman in the employ of the lessor company in failing to turn a switch, he was not a fellow servant with such motorman, and was entitled to recover damages from the lessor company.²¹⁹

§ 5306. Under the South Carolina Constitution and Civil Code.—The Constitution of South Carolina of 1895 makes every *railroad company* liable for injuries to employés resulting from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the injured employé, and also for injuries resulting from the negligence of a fellow servant engaged in a different department of labor, or on another train, or about a different piece of work; and provides that the General Assembly may extend its provisions to any other class of employés.²²⁰ In pursuance of the power thus granted the General Assembly subsequently extended the provisions of the above section to *street-railway companies*.²²¹ A railroad company was held liable in an action under the above section of the Constitution where it appeared that the plaintiff, with sixteen others, was loading rails on a car, under the directions of a *foreman*, who was charged with the duty of giving orders to the men when to take hold of the rails, when to raise them, and when to throw them on the car, and the plaintiff was injured by the negligent failure of such foreman to countermand an order to throw a rail on a car; since the foreman had a right to direct the manner of the plaintiff's services; and the fact that the foreman and the plaintiff were fellow servants, engaged in the same department of labor, was no defense.²²²

§ 5307. Under the Texas Statute.—The Texas Fellow-Servant Act of 1891 was superseded by the Act of 1893, and the latter was superseded, presumably, by the Act of 1897, which makes every *person, receiver, or corporation operating a railway or street-railway* liable for injuries sustained by any employé *while engaged in oper-*

²¹⁹ Kelly v. Union Traction Co., 199 Pa. St. 322; s. c. 49 Atl. Rep. 70; aff'g s. c. 9 Pa. Dist. Rep. 69.

²²⁰ S. Car. Const. 1895, art. 9, § 15.

²²¹ S. Car. Civ. Code 1902, § 2848; 23 Laws, p. 716.

²²² Rutherford v. Southern R. Co., 56 S. Car. 446; s. c. 35 S. E. Rep. 136. An *instruction* which states, in effect, that the South Carolina

Constitution of 1895 renders a railroad company liable for injuries to an employé, caused by the negligence of a superior employé in the course of his employment, is proper: Bussey v. Charleston & C. R. Co., 52 S. Car. 438; s. c. 11 Am. & Eng. R. Cas. (N. S.) 474; 30 S. E. Rep. 477.

ating the cars, locomotives or trains, by reason of the negligence of any other employé; and, apart from the operation of trains, etc., defines vice-principals to be employés entrusted with the authority of superintendence, control or command of other employés, or with the authority to direct any other employé in the performance of any duty of such employé; and further declares that all persons who are engaged in the common service, and who while so employed are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants.²²³

²²³ Sayles' Tex. Civ. Stat. 1897, arts. 4560f-4560i; Acts Spec. Sess. 1897, p. 14. *Under the Act of 1891* it was held:—That an engineer in charge of an engine doing switch work was not a fellow servant with a fireman on another engine also doing switch work in the same yard, where the crews of the two engines were not working together: *Masterson v. Galveston &c. R. Co.* (Tex. Civ. App.), 42 S. W. Rep. 1001 (no off. rep.); writ of error denied, 91 Tex. 383; s. c. 43 S. W. Rep. 875. That a brakeman and an engineer on the same train were not fellow servants, not being of the same grade,—especially where the engineer exercised such authority as would make him a vice-principal: *San Antonio &c. R. Co. v. Bowles* (Tex. Civ. App.), 30 S. W. Rep. 89, 727 (no off. rep.). But in a later case under the same Act it was held that rules of a railroad company entrusting an engineer with discretion to give a signal notifying a brakeman to apply brakes, did not give the former "authority to direct" the latter in the performance of his duties, nor prevent their being in the same grade of the employment, and hence fellow servants: *Texas Cent. R. Co. v. Frazier*, 90 Tex. 33; s. c. 36 S. W. Rep. 432; 4 Am. & Eng. R. Cas. (N. S.) 664; rev'g s. c. (Tex. Civ. App.), 34 S. W. Rep. 664; 3 Am. & Eng. R. Cas. (N. S.) 381. In another case it appeared that the plaintiff, while engaged in the construction of a bridge, was injured by the slipping of a plank, which had been negligently laid without fastening it. The plaintiff had been engaged in other work at the time it was laid, but was working with the employés who

laid it when he was injured. It was held that, although the plaintiff was not a fellow servant with such employés at the time the plank was laid, he became their fellow servant on joining them, and that, as the negligence consisted also in allowing the plank to remain unfastened, it was continuing, and was that of the plaintiff's fellow servants, for which the company was not liable: *Allen v. Galveston &c. R. Co.*, 14 Tex. Civ. App. 344; s. c. 37 S. W. Rep. 171. *Under the Act of 1893* it was held:—That a brakeman on a train which had been made up and was about ready to leave the yard and start on its regular trip, was not a fellow servant with employés in charge of a switch-engine which was not at the time engaged in any service or performing any act in reference to such train, they not being "engaged in the common service": *Patterson v. Houston &c. R. Co.* (Tex. Civ. App.), 40 S. W. Rep. 442 (no off. rep.). That a night crew engaged in loading ties from a stack on to cars on one track were not fellow servants with another crew engaged during the daytime in unloading ties from cars on another track on the opposite side of the stack, and placing them on the stack, not being "working together, at the same time and place, and to a common purpose": *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677; s. c. 41 S. W. Rep. 488. But that an engineer and switchman in the same crew, engaged in switching cars under a common foreman, were fellow servants, though employed and discharged by different superiors: *Gulf &c. R. Co. v. Warner*, 89 Tex. 475; s. c. 35 S. W. Rep. 364.

Under this statute a *switchman* employed in *coupling cars* while a train is being made up in the yard is held to be "operating" such cars or train, and entitled to recover for an injury suffered while so engaged;²²⁴ but the contrary conclusion was reached in the case of a *section-hand* engaged in *unloading a car*, and injured by the negligence of a fellow servant.²²⁵ A *foreman of a gang of track-repairers* is held to be within the protection of that section of the act relating to the operation of cars, locomotives, and trains, notwithstanding he is a vice-principal under the provisions of another section; and he may recover for injuries resulting from the negligence of the men under his control while engaged in repairing the track.^{225a} A *section-hand* returning from work to the tool-house on foot to place his tools therein, was not a fellow servant with other section-hands carrying tools to the tool-house on a hand-car, since they were not doing the same character of work,—the *means of doing the work* being held to differentiate its character; nor was he a fellow servant with them on the theory that they were working at the same piece of work, since he was carrying his tools without their aid.²²⁶ A foreman in charge and control of a bridge-gang is held to be a vice-principal as toward a member of such gang, engaged under his orders in a separate piece of work; and the company is liable to such workman for injuries sustained through the negligence of such foreman in the performance of his duty.²²⁷ Since this statute makes a railroad company liable for injuries sustained by *any* employé thereof, while engaged in operating its cars, by reason of the negligence of *any other* employé, whether a fellow servant or not, it was error to instruct that the plaintiff could not recover for the death of an employé, who was thrown from a hand-car by reason of its being suddenly stopped by a fellow servant, if the jury believed that the brake was not applied under the order, direction, or signal of the foreman.²²⁸

²²⁴ *Missouri &c. R. Co. v. Baker* (Tex. Civ. App.), 58 S. W. Rep. 964 (no off. rep.). On the trial of this action the court sustained a demurrer to defendant's special plea that plaintiff was injured through the negligence of a servant for whose negligence defendant was not responsible, instead of receiving proof and determining whether the evidence brought plaintiff within the statute. The error, if any, was held to be immaterial; since, under plaintiff's pleadings, he could not recover without proving such facts: *Missouri &c. R. Co. v. Baker*, *supra*.

²²⁵ *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293; s. c. 61 S. W. Rep. 342.

^{225a} *Texas &c. R. Co. v. Smith*, 114 Fed. Rep. 728; s. c. 52 C. C. A. 360.

²²⁶ *Long v. Chicago &c. R. Co.*, 94 Tex. 53; s. c. 57 S. W. Rep. 802.

²²⁷ *Texas &c. R. Co. v. Carlin*, 111 Fed. Rep. 777; s. c. 49 C. C. A. 605 (foreman failed to see and remove a heavy iron maul from the bridge, in consequence of which a train struck the maul and threw it against plaintiff, who was standing twenty feet away).

²²⁸ *Perez v. San Antonio &c. R. Co.*,

§ 5308. **Under the Utah Statute.**—The Utah Fellow-Servant Act declares that all persons in the employ of any *person, firm, or corporation*, who are entrusted with the authority of superintendence, control, or command of other employés, or with the authority to direct any other employé in the performance of any duties of such employé, are *vice-principals*.²²⁹ Under this act it is held that the master is liable for the negligent act of such a vice-principal, resulting in injury to any employé, whether it is committed in the discharge of the positive duties of the master or not, and whether it is committed while he is exercising his authority to command or superintend others, or not.²³⁰ The statute also declares that all persons who are in the same grade of service, and are working together at the same time and place and to a common purpose, neither of such persons being entrusted by their common master with any superintendence or control over his fellow employés, are fellow servants with each other. Accordingly, it was held that a miner was not a fellow servant with one whose duty it was to manage and operate a cage by which the miners were conveyed in and out of the mine.²³¹

§ 5309. **Under the Wisconsin Statute.**—The Wisconsin statute makes every *railroad company* liable for injury to any employé while engaged in operating, running, riding upon or switching trains, engines or cars, and while engaged in the performance of his duty as such employé, where the injury is caused by the negligence of any other employé, officer or agent of the company in the discharge of, or for failure to discharge, his duties as such employé, officer or agent.²³² This statute has been held to apply so as to make the

28 Tex. Civ. App. 255; s. c. 67 S. W. Rep. 137.

²²⁹ Utah Rev. Stat. 1898, §§ 1342, 1343; Laws 1896, p. 99. This Act was held to be constitutional in *Dryburg v. Mercur Gold Min. & Co.*, 18 Utah 410; s. c. 5 Am. Neg. Rep. 253; 55 Pac. Rep. 367.

²³⁰ *Southern Pac. Co. v. Schoer*, 114 Fed. Rep. 466; s. c. 52 C. C. A. 268; 57 L. R. A. 707.

²³¹ *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; s. c. 68 Pac. Rep. 845. An *instruction* which states to the jury who are fellow servants as defined by the statute, and that the plaintiff cannot recover if the jury find that he was injured through the negligence of a fellow servant, —is a sufficient instruction as to the doctrine of the negligence of fellow servants, as the question

whether servants are fellow servants is *for the jury*: *Braegger v. Oregon & C. R. Co.*, 24 Utah 321; s. c. 68 Pac. Rep. 140.

²³² Wis. Stat. 1898, § 1816; Laws 1893, ch. 220. *The statute of 1875, ch. 173*, which made *railroad companies* liable for the negligence of any employé in respect to his duty, causing injury to any other employé while in the line of his duty, was held to be valid, though it did not impose a similar liability upon other corporations, nor limit such liability to injuries connected with the operation of the road; so that a section-hand who was injured while at work in a yard driving a spike into a tie, through the negligence of those in charge of a switch-engine in backing cars upon him without warning, was entitled to

company liable where an employé who was assisting to separate by hand a freight-car from other freight-cars, was killed by the negligence of other employés in running a train against such freight-cars;²³³ and where an employé engaged in propelling a hand-car was injured through the negligence of coemployés in running another hand-car into it,—the phrase “or other cars” being held to include hand-cars.²³⁴ Where the defendants, a railroad *construction company*, were engaged in grading a line of railroad-track which was to be straightened, and the railroad company furnished them with work-trains, and with employés to operate the same, who were paid and controlled by the defendants for the time being, it was held that the defendants, while engaged in such work, were within the scope and purpose of the statute; so that a *brakeman on a work-train*, who was injured by reason of the negligence of the engineer, could recover against the construction company.²³⁵ But it was held that a railroad company was not liable where a car-repairer, while engaged in repairing a car, was injured by the negligence of a switchman in causing a car to be kicked against the car in which the car-repairer was at work;

damages: *Ditberner v. Chicago &c. R. Co.*, 47 Wis. 138. This statute was repealed by Laws 1880, ch. 232. *Under the statute of 1889, ch. 438*, making *railroad companies* liable for “the negligence of any train-despatcher, telegraph-operator, superintendent, yardmaster, conductor or engineer, or any other employé, who has charge or control of any stationary signal, target point, block or switch,” it was held that such a company was liable for an injury to a *brakeman* while he was making a coupling, caused by the engineer’s negligently increasing the speed of the train, when the brakeman had given no signal to do so and was in a position of extreme danger, but free from fault: *Kruse v. Chicago &c. R. Co.*, 82 Wis. 568; s. c. 52 N. W. Rep. 755. So, the company was liable for an injury to a *yard workman* who was struck by a passenger-car kicked rapidly into the yard in the dark, due to the negligence of a brakeman who accompanied the car in riding on the rear instead of the front of the car, and not warning the plaintiff: *Promer v. Milwaukee &c. R. Co.*, 90 Wis. 215; s. c. 63 N. W. Rep. 90. The foreman of a railway repair-shop was held not to be a “superintendent” within the meaning

of the statute: *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374; s. c. 64 N. W. Rep. 1033. A yardmaster whose duty it was to open and close switches and follow the switch-engine from yard to yard, taking cars in and out of a quarry, and who had a key for the purpose of opening and closing switches, was in “charge or control of a switch” within the meaning of the statute, though he was not to be so regarded while engaged in the *work of switching* the cars in and out of a track leading to the quarry: *Albrecht v. Milwaukee &c. R. Co.*, 94 Wis. 397; s. c. 69 N. W. Rep. 63. This statute was repealed by the statute of 1893, ch. 220—the statute now in force.

²³³ *Ean v. Chicago &c. R. Co.*, 95 Wis. 69; s. c. 69 N. W. Rep. 997 (recovery being had under Wis. Rev. Stat., § 4255, making one who negligently causes the *death* of another liable for damages if the person killed could have recovered if death had not ensued).

²³⁴ *Benson v. Chicago &c. R. Co.*, 75 Minn. 163; s. c. 5 Am. Neg. Rep. 182; 12 Am. & Eng. R. Cas. (N. S.) 797.

²³⁵ *Roe v. Winston*, 86 Minn. 77; s. c. 90 N. W. Rep. 122 (under the Wisconsin statute).

since he was not injured while "engaged in operating, running, riding upon or switching" trains, engines, or cars, "and while engaged in the performance of his duties as such employé,"—the latter clause, in the theory of the court, referring to the preceding one;²³⁶ nor, for the same reason, where a *railroad conductor*, while standing by a car for the purpose of watching a switch and closing a car-door when the car was unloaded, was struck and injured by a bundle negligently thrown from the car by coemployés;²³⁷ nor, for the same reason, where a *warehouseman* employed by a railroad company was injured by reason of the negligence of coemployés while he was standing between an engine-tender and car for the purpose of sealing the end door of the car;²³⁸ nor under the circumstances stated in the foot-note.²³⁹

§ 5310. **Extra-Territorial Effect of such Statutes.**—It is held that a statute of one State making employers liable for injuries to servants resulting from the negligence of fellow servants can have no application to cases where the injury is received outside of such State, unless the statute clearly provides that it shall apply in such cases.²⁴⁰

²³⁶ *Smith v. Chicago &c. R. Co.*, 91 Wis. 503; s. c. 65 N. W. Rep. 183.

²³⁷ *Medberry v. Chicago &c. R. Co.*, 106 Wis. 191; s. c. 81 N. W. Rep. 659.

²³⁸ *Hibbard v. Chicago &c. R. Co.*, 96 Wis. 443; s. c. 71 N. W. Rep. 807.

²³⁹ The defendant was engaged in repairing its track at a point in the State of Wisconsin, and employed a large number of men in and about such work, including the plaintiff. Boarding-cars were kept and maintained at or near the work, at which such employés were boarded and lodged. As the work progressed the men became further removed from the boarding-cars; and at their request and for their convenience, defendant furnished them hand-cars on which to transport themselves to and from their work. The defendant did not manage the boarding-cars, nor operate or have control of the hand-cars. Such hand-cars were operated exclusively by the men, and they had full charge and control thereof. A collision occurred between two of such hand-cars while the men were transporting themselves thereon to the boarding-cars

for their dinner, and the plaintiff was injured. The collision was caused by the negligence of the employés in charge of one of such cars, and plaintiff was free from fault. It was held that the coemployés were not at the time of the collision and injury "engaged in the discharge of their duties as such" within the meaning of the statute, so as to make the defendant liable: *Benson v. Chicago &c. R. Co.*, 78 Minn. 303; s. c. 80 N. W. Rep. 1050.

²⁴⁰ *Kahl v. Memphis &c. R. Co.*, 95 Ala. 337; s. c. 10 South. Rep. 661; *Alabama &c. R. Co. v. Carroll*, 97 Ala. 126; s. c. 11 South. Rep. 803 (although the negligence causing the injury happened in the enacting State); *Davis v. New York &c. R. Co.*, 143 Mass. 301; s. c. 9 N. E. Rep. 815. It was held in *Indiana* that the section of the *Employers' Liability Act* of that State giving a right of action in such cases was unconstitutional: *Baltimore &c. R. Co. v. Reed*, 158 Ind. 25; s. c. *sub nom.* *Baltimore &c. R. Co. v. Read*, 62 N. E. Rep. 488; *Baltimore &c. R. Co. v. Jones*, 158 Ind. 87; s. c. 62 N. E. Rep. 994.

§ 5311. **Constitutionality of Statutes Applying Only to Railroad Companies.**—Such statutes have been assailed on the ground that they violate a constitutional prohibition of class legislation. It has been held that, when they abolish the fellow-servant rule only in regard to injuries sustained in connection with the *use and operation* of railroads, they are valid;²⁴¹ but where they are not limited by their terms to injuries sustained only under such circumstances, the courts will generally hold them invalid in so far as they attempt to impose a special liability on railroad companies for injuries not so sustained;²⁴² though in a few jurisdictions it is not considered necessary to their validity that they should be so limited.²⁴³

§ 5312. **Whether Statutes Imposing a Special Liability on Railway Companies Apply to Street-Railway Companies.**—In several of the States it is expressly provided by statute that *street-railway companies* shall be under the same liability for injuries to their employes sustained through the negligence of fellow servants, as is imposed by statute on railroad companies.²⁴⁴ In the absence of a statute to this effect, it is held that the common-law rule governs in actions against street-railway companies.²⁴⁵

§ 5313. **Whether such Statutes Apply to Logging-Railways.**—In an action under the Minnesota statute, the Supreme Court of that State held that the protection of the statute extended to the employes on a logging-railroad conducted by a lumber company for its own private use and benefit, though such company was not incorporated as a railroad company;²⁴⁶ though a Federal court, in another

²⁴¹ O'Brien v. Chicago &c. R. Co., 116 Fed. Rep. 502 (Iowa statute); Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494; s. c. 60 N. E. Rep. 943.

²⁴² Deppe v. Chicago &c. R. Co., 36 Iowa 52; Schroeder v. Chicago &c. R. Co., 41 Iowa 344; s. c. 47 Iowa 375; Potter v. Chicago &c. R. Co., 46 Iowa 399; Chicago &c. R. Co. v. Pontius, 52 Kan. 264; s. c. 34 Pac. Rep. 739; Lavalley v. St. Paul &c. R. Co., 40 Minn. 249; s. c. 41 N. W. Rep. 974; Johnson v. St. Paul &c. R. Co., 43 Minn. 222; s. c. 45 N. W. Rep. 156; 8 L. R. A. 419.

²⁴³ Hancock v. Norfolk &c. R. Co., 124 N. Car. 222; s. c. 32 S. E. Rep. 679; Ditherner v. Chicago &c. R. Co., 47 Wis. 138 (under the original statute of that State).

²⁴⁴ S. Car. Civ. Code 1902, § 2848;

23 Laws, p. 716; Sayles' Tex. Civ. Stat. 1897, arts. 4560f-4560i; Acts Spec. Sess. 1897, p. 14.

²⁴⁵ Manhattan Trust Co. v. Sioux City Cable R. Co., 68 Fed. Rep. 82 (under Iowa statute); Fallon v. West End St. R. Co., 171 Mass. 249; s. c. 50 N. E. Rep. 536; Funk v. St. Paul City R. Co., 61 Minn. 435; s. c. 29 L. R. A. 208; 63 N. W. Rep. 1099 (although operated by a cable); Lundquist v. Duluth St. R. Co., 65 Minn. 387; s. c. 67 N. W. Rep. 1006; 4 Am. & Eng. R. Cas. (N. S.) 506. It was so held in Texas, prior to the enactment of the Act of 1897: Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247; s. c. 35 S. W. Rep. 826.

²⁴⁶ Schus v. Powers-Simpson Co., 85 Minn. 447; s. c. 89 N. W. Rep. 68.

action under the same statute, had previously held that it was limited in its application to *quasi*-public corporations having franchises from the State, and operating railroads open to *public travel and use*, and that it did not apply to a logging-railroad built and operated only for private purposes, and not as a common carrier.²⁴⁷ So, a lumber company was not liable as a railway company, under the Georgia statute, for injuries to an employé engaged in the transportation of lumber by means of a locomotive used for that purpose by the company,—and this although its charter authorized it to use and operate locomotives on tramroads and railroads in connection with its general business.²⁴⁸

§ 5314. Whether such Statutes Apply to the Cases of Railroads in the Hands of Receivers.—In the absence of statutes changing the rule, the so-called “fellow-servant doctrine” applies so as to exonerate a receiver—or, more strictly speaking, the fund in his hands—from liability for injuries sustained by one servant through the negligence of a fellow servant.²⁴⁹ Statutes making railroad companies liable in certain cases for the negligence of fellow servants have been held to apply to receivers in charge of the property of railroad companies;²⁵⁰ and the contrary has been held.²⁵¹

§ 5315. Contracts Waiving Benefit of such Statutes.—Many of these statutes contain a clause declaring that any contract entered into by the employé, on entering the employment, to waive the benefit of the statute, shall be void. It is held that such statutes are not unconstitutional as interfering with the freedom of contract.²⁵²

²⁴⁷ *Williams v. Northern Lumber Co.*, 113 Fed. Rep. 382.

²⁴⁸ *Ellington v. Beaver Dam Lumber Co.*, 93 Ga. 53; s. c. 19 S. E. Rep. 21.

²⁴⁹ *Brown v. Comer*, 97 Ga. 801; s. c. 25 S. E. Rep. 176 (although the company petitioned for the appointment of a receiver); *Youngblood v. Comer*, 97 Ga. 152; s. c. 23 S. E. Rep. 509; 25 S. E. Rep. 838; *Barry v. McGhee*, 100 Ga. 759; s. c. 28 S. E. Rep. 455 (recovery cannot be had for an injury sustained by such employé before the passage of Ga. Act of Dec. 16, 1895); *San Antonio & C. R. Co. v. Reynolds* (Tex. Civ. App.), 30 S. W. Rep. 846 (no off. rep.).

²⁵⁰ *Mikkelsen v. Truesdale*, 63 Minn. 137; s. c. 65 N. W. Rep. 260; *Powell v. Sherwood*, 162 Mo. 605;

s. c. 63 S. W. Rep. 485; *Hornsby v. Eddy*, 5 C. C. A. 560; s. c. 56 Fed. Rep. 461 (such a statute entitles an employé injured by the carelessness of a fellow servant while at work in the line of his duty, to an allowance against the property of the company in the hands of the receiver for the injuries sustained); *Peirce v. Van Dusen*, 78 Fed. Rep. 693; s. c. 47 U. S. App. 339; 24 C. C. A. 280.

²⁵¹ *Campbell v. Cook*, 86 Tex. 630; s. c. 40 Am. St. Rep. 878; 26 S. W. Rep. 486; rev'g s. c. 24 S. W. Rep. 977; *Texas & C. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88; s. c. 20 S. W. Rep. 1135; *Henderson v. Walker*, 55 Ga. 481. See also, note to *Turner v. Cross*, 15 L. R. A. 262.

²⁵² *Powell v. Sherwood*, 162 Mo. 605; s. c. 63 S. W. Rep. 485; *Coley*

Even though the statute contains no such prohibition, such a contract is void as being opposed to public policy;²⁵³ and this is so though the contract of employment contains a stipulation that the regular compensation shall cover all the risks of the negligence of fellow servants.²⁵⁴

§ 5316. **Contributory Negligence as a Defense under these Statutes.**—Under these statutes, as at common law, the servant who is injured through the negligence of his fellow servants must himself be free from negligence contributing to the accident, in order to recover damages from the master.²⁵⁵

§ 5317. **Statutes Giving a Right of Action for Injury or Death of "Any Person."**—These statutes are held, with but few exceptions, not

v. North Carolina R. Co., 128 N. Car. 534; s. c. 39 S. E. Rep. 43; rehearing denied, 129 N. Car. 407; s. c. 40 S. E. Rep. 195.

²⁵³ Kansas &c. R. Co. v. Peavey, 29 Kan. 169; s. c. 44 Am. Rep. 630.
²⁵⁴ Hissong v. Richmond &c. R. Co., 91 Ala. 514; s. c. 8 South Rep. 776.

²⁵⁵ Corning Steel Co. v. Pohlplatz, 29 Ind. App. 250; s. c. 64 N. E. Rep. 476 (boy standing on edge of vat of molten metal while driving cog-wheel on shaft with sledgehammer—missed a blow and fell into vat); Hancock v. Norfolk &c. R. Co., 124 N. Car. 222; s. c. 32 S. E. Rep. 679; McAunich v. Mississippi &c. R. Co., 20 Iowa 338; Hoben v. Burlington &c. R. Co., 20 Iowa 562; Hamilton v. Des Moines &c. R. Co., 36 Iowa 31; Carlin v. Chicago &c. R. Co., 37 Iowa 316; Lang v. Holiday Creek R. Co., 42 Iowa 677; Steel v. Iowa Cent. R. Co., 43 Iowa 109; Lombard v. Chicago &c. R. Co., 47 Iowa 494; Kansas Pac. R. Co. v. Peavey, 34 Kan. 472. An instruction that where there has been mutual negligence, etc., the plaintiff cannot recover, was held good. It simply expressed the idea of reciprocal or contributory negligence: Hamilton v. Des Moines &c. R. Co., 36 Iowa 31. The degree of care exacted of the injured servant is the same as that exacted of the master,—ordinary care. The following instruction was therefore held bad, for it required of the plaintiff the

exercise of more than ordinary care and foresight: "If it was the usual and common custom of the defendant's railroad to carry projecting timbers on cars, the same as when plaintiff was hurt, then it was plaintiff's duty to watch and look for such projecting timbers and avoid them; and if he did not, when he could or should have done so, he is not entitled to recover": Hamilton v. Des Moines &c. R. Co., *supra*. But the bare fact that an employé did not refuse to obey the order of his superior, when ordered into a position of danger in which he was injured, was held, in one case, not to be contributory negligence; since there are many cases in which such an act is necessary in order to save the lives of others: Frandsen v. Chicago &c. R. Co., 36 Iowa 372. See Vol. V, subtitle CONTRIBUTORY NEGLIGENCE OF THE SERVANT. An instruction that the plaintiff was entitled to recover if he did not by his own carelessness contribute to the accident, was held correct: Steel v. Iowa Cent. R. Co., 43 Iowa 109. The repeal of a penalty for running trains through towns or cities faster than six miles an hour did not operate to make a railroad company liable to an employé who was injured by reason of running at a negligent rate of speed through a railroad-yard: Farquhar v. Alabama &c. R. Co., 78 Miss. 193; s. c. 28 South. Rep. 850.

to change the rule of the common law that the master is not liable in damages to a servant who is injured by reason of the negligence of his fellow servants, the master himself being free from negligence contributing to the injury.²⁵⁶

§ 5318. Under the English Coal-Mines Regulation Act, 1872.—By this statute, “every mine to which this act applies shall be under the control and daily supervision of a manager, and the owner or agent of every such mine shall nominate himself or some other person (not being a contractor for getting the mineral in such mine, or a person in the employ of such contractor) to be the manager of such mine, and shall send written notice to the inspector of the district of the name and address of such manager. A person shall not be qualified to be a manager of a mine to which this act applies, unless he is, for the time being, registered as the holder of the certificate under this act.”²⁵⁷ A manager appointed under this act was a fellow servant with a miner at work in the mine; and if the latter was killed by the negligence of the former, damages could not be recovered of the owner of the mine.²⁵⁸

²⁵⁶ *Sullivan v. Mississippi &c. R. Co.*, 11 Iowa 421; *Atchison &c. R. Co. v. Farrow*, 6 Colo. 498; *Carle v. Bangor &c. R. Co.*, 43 Me. 269; *Proctor v. Hannibal &c. R. Co.*, 64 Mo. 112 [overruling *Schultz v. Pacific R. Co.*, 36 Mo. 13]. Nor is the State liable under such a statute where an individual employer would not be liable: *Loughlin v. State*, 105 N. Y. 159; s. c. 7 Cent. Rep. 70. Where such a statute made railroad companies responsible for deaths caused by their negligence, or by the unfitness or gross negligence of their employés, it was held, in an action for the death of an employé, caused by the unfitness of a coemployé, with notice of which the company was chargeable, that the negligence of such coemployé need not have been “gross” in order

to make the company liable, since the statute had no application to such an action: *Galveston &c. R. Co. v. Davis*, 4 Tex. Civ. App. 468; s. c. 45 S. W. Rep. 956; 48 S. W. Rep. 570; 12 Am. & Eng. R. Cas. (N. S.) 832. But under a statute requiring railroad companies to fence their tracks, and making them liable to “persons thereon” injured by reason of their failure to do so, it was held that a railroad company was liable for the death of a conductor who was killed by a derailment of his train, caused by a steer which had strayed on the track by reason of the want of a fence: *Quackenbush v. Wisconsin &c. R. Co.*, 62 Wis. 411.

²⁵⁷ 35 & 36 Vict., ch. 76, § 26.

²⁵⁸ *Howells v. Landore &c. Co.*, L. R. 10 Q. B. 62.

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